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TABLE OF CONTENTS

ARTICLES

	PAGE
ALIENABILITY OF CHSES IN ACTION, THE. <i>Walter Wheeler Cook</i>	816
COMPENSATION PLAN FOR RAILWAY ACCIDENT CLAIMS, A. <i>Arthur A. Ballantine</i>	705
CONSTITUTIONAL OPINIONS OF JUSTICE HOLMES, THE. <i>Felix Frankfurter</i>	683
COSMOPOLITAN CUSTOM AND INTERNATIONAL LAW. <i>Frederick Pollock</i>	565
DRASTIC PLEDGE AGREEMENTS. <i>Murray Seasongood</i>	277
EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY. <i>Roscoe Pound</i>	640
EZRA RIPLEY THAYER. <i>William H. Dunbar. Roscoe Pound</i>	1
FEDERAL EQUITY RULES, WORKING UNDER. <i>Wallace R. Lane</i>	55
HOURS OF LABOR AND REALISM IN CONSTITUTIONAL LAW. <i>Felix Frankfurter</i>	353
JUSTICE HOLMES AND THE LAW OF TORTS. <i>John H. Wigmore</i>	601
LABOR, CAPITAL, AND BUSINESS AT COMMON LAW. <i>Edward A. Adler</i>	241
LEGISLATIVE INDICTMENT OF THE COURTS, A. <i>J. B. Winslow</i>	395
LIABILITY WITHOUT FAULT. <i>Ezra Ripley Thayer</i>	801
MINGLING OF WATERS. <i>Samuel C. Wiel</i>	137
MONTESQUIEU AND SOCIOLOGICAL JURISPRUDENCE. <i>Eugen Ehrlich</i>	582
NEGLIGENCE. <i>Henry T. Terry</i>	40
NEW PROVINCE FOR LAW AND ORDER, A. <i>Henry Bournes Higgins</i>	13
PARENTAL RIGHT TO CONTROL THE RELIGIOUS EDUCATION OF A CHILD, THE. <i>Lee M. Friedman</i>	485
PENALTIES AND FORFEITURES. <i>William H. Loyd</i>	117
PERSONALITY OF ASSOCIATIONS, THE. <i>Harold J. Laski</i>	404
PLACE OF LOGIC IN THE LAW, THE. <i>Morris R. Cohen</i>	622
PROPERTY IN CHATTELS. <i>Percy Bordwell</i>	374, 501, 731
SPEECH OF JUSTICE, THE. <i>Learned Hand</i>	617
UNIFORM PARTNERSHIP ACT—A REPLY TO MR. CRANE'S CRITICISM, THE. <i>William Draper Lewis</i>	158, 291
UNIFORM PARTNERSHIP ACT AND LEGAL PERSONS, THE. <i>Judson A. Crane</i>	838
UNITED STATES v. Hvoslef: A CONSTITUTIONAL SOURCE OF NATIONAL REVENUE IMPAIRED. <i>Clarence Norton Goodwin</i>	469
WAIVER OR ELECTION. <i>John S. Ewart</i>	724

INDEX-DIGEST

References in heavy-faced type are to **Notes**; in plain type to **Recent Cases**; and in italicized type to **Articles**.

A

ABATEMENT AND REVIVAL.

See also *Executors and Administrators*.

Survival of action: Death of plaintiff pending suit for arrears of alimony. 100

Effect of death of next of kin given right of action for death by wrongful act. 781

ABUTTING OWNERS.

See under *Eminent Domain; Municipal Corporations; Taxation; Waters and Watercourses*.

ACCOMMODATION PAPER.

See under *Bills and Notes*.

ACQUIESCENCE FOR DETECTION.

See under *Criminal Law*.

ACTIONS.

See *History of Law; Title, Ownership and Possession*.

Particular forms of action, see *Delinque; Replevin; Trespass de Bonis; Trover and Conversion*.

ADJOINING LANDOWNERS.

See under *Restrictions and Restrictive Agreements as to Use of Property*.

ADMINISTRATION.

Of estates, see *Descent and Distribution; Executors and Administrators; Legacies and Devises; Wills*.

ADMINISTRATIVE LAW.

See also *Constitutional Law; Courts*.

Admissibility of hearsay before administrative tribunal. 208, 226

Australian Court of Conciliation and Arbitration: its purpose and effect. 13-39

Increase in number of administrative tribunals due to dissatisfaction with courts. 395-397

ADMIRALTY.

See also *Constitutional Law; General Average*.

Jurisdiction: Extent of admiralty jurisdiction of federal courts: whether it can be limited by treaty. 219

Vessel requisitioned by foreign government released on owner's bond. 871

Torts: Application of general average to liability for tort committed in saving ship. 546

Practice: Right to withdraw suit after defendant has petitioned for limitation of liability. 448

ADMISSIONS.

See also under *Evidence; Husband and Wife*.

By parties and privies: Statement of transferor of stock as admissible against corporation in action for wrongful registry of stock. 775
Wife's declarations admissible against husband as co-conspirator. 332

ADVERSE POSSESSION.

See also *Evidence; Title, Ownership and Possession*.

Subject matter and extent of adverse possession: Chattels: adverse possessor as disseisor under early law. 378-386.

Continuity of adverse possession: Tacking: necessity of privity. 790

Against whom title may be gained: State. 88, 106

AGENCY.

See also *Master and Servant*.

Particular classes of agents, see *Banks and Banking; Carriers; Municipal Corporations*.

Nature and incidents of the relation: Husband as wife's agent to care for child. 99

Scope of agent's authority: Check drawn to fictitious payee by agent with no authority to draw to bearer. 216

Emergencies: enlargement of authority: railroad's liability to physician employed by agent to attend injured trespasser. 547

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- Principal's liability for acts of independent contractor:** Liability for acts of independent contractor as narrowing doctrine of *Rylands v. Fletcher*. 808-813
- Agent's liability to third persons:** Liability of agent of municipal corporation for misfeasance. 323, 337
- Ratification of unauthorized contracts:** Principal retaining benefits of agent's unauthorized act. 216
- ALIENATION.**
Restraints on, see under *Trusts (Restraints on alienation of cestui's interest)*.
- ALIENS.**
See also under *Constitutional Law*.
Exclusion of aliens: Judicial power of review: construction of statute. 215
- ALIMONY.**
See under *Divorce*.
- ANIMALS.**
See under *Torts*.
- APPEAL AND ERROR.**
See also under *Criminal Law; New Trial*.
Review: Verdict on instructions requested by appellant not justified by evidence. 448
- APPORTIONMENT.**
Of income, see *Life Estates; Trusts*.
Of dividends, see *Corporations*.
- ARBITRATION AND AWARD.**
In industrial disputes: Australian methods. 13-22, 34-37
- ASSAULT AND BATTERY.**
See also *Criminal Law*.
Criminal responsibility: Forcible prevention of wrongful levy on defendant's property. 330
- ASSESSMENT.**
Constitutionality of assessment, see *Constitutional Law*.
- ASSIGNMENTS.**
Of administrator's rights, see *Executors and Administrators*.
Of choses in action, see *Choses in Action*.
Of lease, see *Landlord and Tenant*.
- ASSIGNMENTS FOR CREDITORS.**
Validity: Assent of creditors. 449
- ASSOCIATIONS.**
See *Voluntary Associations*.
- ATTACHMENT.**
See also *Conflict of Laws*.
Exemptions, see *Exemptions; Homestead*.
What property may be attached:
Bailee's interest as a bar to attachment. 775
Rolling stock of non-resident carrier. 775
Effect of attachment: Appearance: filing of forthcoming or replevy bond. 547
- ATTORNEYS.**
See also *Champerly and maintenance; Constitutional Law; Trusts (Rights and liabilities of third parties)*.
Relation between attorney and client: See also under *Witnesses*.
Privileged communications: whether attorney can refuse to disclose client's identity. 109
- AUTHORITY.**
Scope of agent's authority, see under *Agency*.
- AUTOMOBILES.**
Regulation of, see *Constitutional Law; Municipal Corporations*.
See also *Master and Servant; Proximate Cause*.

B

- BAILMENTS.**
See also *Title, Ownership and Possession*.
Nature of bailments: Bailor's rights: history of, as showing property is in bailor. 501-520
Bailor and bailee: Rights and liabilities of bailee. 731-751
Bailor and third persons: Action of trespass by bailor. 513-520, 731-751
- Early law as to actions allowed against converter from bailee. 503-513, 731-751
- BANKRUPTCY.**
See also under *Corporations; Fraudulent Conveyances; Partnership*.
State bankruptcy and insolvency laws: State law superseded as to farmers. 776
Bankruptcy Act of 1898 and amendments: § 2 (1). 871

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- § 17 a (3). 97
 § 63 a (4). 873
- Preferences:** Enforcement of transfer as effecting a preference. 872
 Previous transfer recorded within four months of bankruptcy. 766, 776
 Sale of future goods: possession by vendee within four months of bankruptcy. 229
- Property passing to trustee:** Right to recover unpaid balance of stock issued at discount. 854, 877
- Provable claims:** Claims under executory contracts. 873
- Discharge:** Debts not affected: debts omitted from schedule: knowledge of proceedings in bankruptcy. 97
- Exemptions:** Validity of homestead exemption acquired after adjudication. 548
- Jurisdiction of federal courts:** Whether deposit in local bank is property within the jurisdiction. 871
- BANKS AND BANKING.**
 See also under *Corporations; Suretyship.*
 Forged instruments, see under *Bills and Notes.*
Officers and agents: Liability of bank for fraudulent sale of pledged stock by president. 339
Deposits: Deposit of penal sums: whether bank bound to return. 454
National banks: Collateral attack on *ultra vires* act: authority to purchase stock in building corporation as incidental to securing banking quarters. 320, 330
 Constitutionality of Federal Reserve Act. 587
- BELLIGERENCY.**
 See *War.*
- BILLS AND NOTES.**
 See also *Parol Evidence Rule.*
Negotiable Instruments Law:
 § 62. 548
 § 63. 549
 § 87. 204, 217
- Formal requisites:** Fictitious payee: check to fictitious payee drawn by agent with no authority to draw to bearer. 216
- Delivery:** Effect of negotiating a check delivered to the payee in trust for special indorsee. 777
- Indorsement:** Forged indorsement: whether drawee may recover payment negligently made to holder. 450
 Indorsement by joint payees to one of them. 778
- Purchasers for value without notice:** Effect of indorsement by a payee holding in trust for special indorsee. 777
- Payment and discharge:** Bill payable in German marks: whether recovery of value at time of payment or at time of trial. 873
 Whether presentment at bank where payment is to take place is payment when maker has funds on deposit sufficient to meet note. 204, 217
- Defenses:** Accommodation maker: failure of holder to set-off claim against accommodated party. 231
 Negligence of the drawer of a check as a defense to the drawee bank: signing in blank. 874
 Negligence of maker: signing in blank. 449
- Doctrine of Price v. Neal:** Certification of check by mistake against drawer's orders. 548
 Negligent payment under forged indorsement. 450
- Presentment and notice of dishonor:** Waiver: assent by indorser to extension of time. 450
 Whether liability of maker of domiciled note is primary or secondary. 204, 217
 Whether necessary to charge indorser shown by parol to be joint maker or surety. 549
- Checks:** Certified checks: retraction of certification made under mistake. 548
 Effect of indorsement of payee holding check in trust for special indorsee. 777
- BILLS OF LADING.**
 See under *Constitutional Law (Powers of legislature: taxation).*
- BIOGRAPHY.**
 See *Legal Biography.*
- BONDS.**
 See *Conflict of Laws; Suretyship; Taxation.*
- BOYCOTTS.**
 See *Torts; Trade Unions; Unfair Competition.*
- BURDEN OF PROOF.**
 See also *Descent and Distribution; Federal Courts.*
 Nature and scope of subject:

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Whether matter of procedure or of substantive law. 95, 98
Duty of going forward with evidence in particular cases:
 Doctrine of *res ipsa loquitur* as

doing away with need of Rylands v. Fletcher doctrine. 806-807
 Proof of negligence: *res ipsa loquitur* 105

C

CAPTURE.

See *War*.

CARRIERS.

See also *Attachment; Illegal Contracts; Interstate Commerce; Statutes*.

Connecting lines: Liability of initial carrier under Carmack Amendment for excess charges. 217, 550

Discrimination and overcharge: Discrimination against ship brokers: exclusive storage facilities on carrier's wharf. 883

Effect of a single railroad maintaining a higher rate than that of competing roads reaching same market. 760

Limitation of liability: Is a common carrier subject to an exceptional duty of care? 805-806

Passengers: who are passengers: Pullman employees 435, 458

Loss or injury to goods: Origin of absolute liability for carriers. 746-747

What constitutes "loss, damage or injury" under Carmack Amendment. 217, 550

CERTIFICATION.

Of checks, see under *Bills and Notes*.

CHAMPERTY AND MAINTENANCE.

Quasi-contractual recovery for services under contract void for champerty. 874

CHARACTER.

Evidence of, see under *Evidence*.

CHARITIES AND TRUSTS FOR CHARITABLE USES.

See *Rule against Perpetuities*.

CHARTER-PARTY.

Taxation of, see under *Constitutional Law; Taxation*.

CHECKS.

See under *Bills and Notes*.

CHOSIN IN ACTION.

Situs of, see under *Conflict of Laws; Taxation*.

See also *Title, Ownership and Possession*.

What may be assigned: Alienability of choses in action in general. 816-837

Rights and liabilities of assignee: assignee treated as owner at law. 828-837

Manner and effect of assignment: assignability a matter of positive law. 816-818

Assignment not merely power of attorney. 822-830

Development of assignments at common law. 822-837

Effect of failure of assignee of written contract to take the writing from assignor. 879

Legal effect of assignment. 830-837

CITIES.

See *Municipal Corporations; Taxation; Waters and Watercourses*.

COLLATERAL ATTACK.

On act of corporation, see *Banks and Banking; Corporations*.

COLLATERAL SECURITY.

See *Pledges*.

COLLISION.

See *Admiralty (Torts)*.

COMBINATIONS.

See *Restraint of Trade; Torts; Unfair Competition*.

COMMERCE.

See *Carriers; Constitutional Law; Interstate Commerce*.

COMMON LAW.

Regulation of labor, capital and business as a field for the common law. 272-276

Relation of labor, capital and business to the common law. 241-243

Labor, capital and business under the early common law 243-265

COMPENSATION.

See also under *Eminent Domain; Railroads*.

Plan for providing compensation in railway accident claims. 705-723

COMPETITION.

See *Unfair Competition*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES: and in italicized type to ARTICLES.

CONDITIONAL SALES.

See under *Sales*.

CONDITIONS PRECEDENT.

Excuse for non-performance: acceptance of defective performance as excuse. 229

CONFESSIONS.

See under *Evidence*.

CONFLICT OF LAWS.

See also *Constitutional Law; Executors and Administrators; Federal Courts; Taxation*.

Extent of governmental power:

Law governing the interpretation of the by-laws of a foreign corporation. 98

Restraining and enforcing extra-territorial acts: foreclosure of mortgage on property partly in foreign jurisdiction. 456

Rights in property: Sale by conditional vendee, and re-sale in state where vendor's rights are divested. 217

Testamentary succession: See also *Taxation*.

Inheritance tax on proceeds of foreign realty equitably converted. 343

Succession tax on registered bonds of the taxing state kept by non-resident at his domicile. 107

Suits against foreign executors. 442

Obligations ex delicto: creation and enforcement: Whether statute conferring jurisdiction over torts to foreign realty is retroactive. 875

Jurisdiction of courts: personal jurisdiction: Enforcement by neutral courts of contracts between citizens of belligerent countries. 108

Service: service on agent of foreign corporation in cause of action arising outside state. 880

Jurisdiction of courts: jurisdiction quasi in rem: Whether filing of replevy bond will give jurisdiction in attachment suit. 547

Remedies: right of action: Enforcement by neutral courts of contracts between citizens of belligerent countries. 108

Limitation in federal Employers' Liability Act as extinguishing the right of action. 451

Rights and obligations of foreign corporations: Effect of dissolution of a corporation when statute

provides a state officer shall be successor 778

CONSIDERATION.

See also under *Contracts*.

Illegal consideration, see under *Illegal Contracts*.

What constitutes consideration:

Consideration moving to promisor from third person. 99

Failure of consideration: Effect of divorce on antenuptial agreement. 881

CONSPIRACY.

Criminal liability: Participation of public officials: whether a defense. 100

CONSTITUTIONAL LAW.

See also *Aliens; Carriers; Conflict of Laws; Criminal Law; Customs Duties; Elections; Foreign Corporations; Indictment and Information; Judges; Legal Biography; Master and Servant; Municipal Corporations; Police Power; Presumptions; Taxation; Witnesses*.

Nature and development of constitutional government: Attitude of Justice Holmes towards constitutional questions: in general. 685-688

Growing importance of constitutional issues and decisions. 683-685

Nature and theory of the Constitution. 469-471

Relations between states and nation: Justice Holmes' interpretations of the commerce clause. 688-690

Making and changing constitutions: Constitutional convention: restriction by legislature. 528, 550

Construction, operation, and enforcement of constitutions: Constitution as an unchanging document. 469-471

Difference between limitations on taxing power of Congress and that of states. 472-477

Revenue bill: prohibitory tax attached by House to Senate bill. 220

The Sixteenth Amendment as a declaration that an income tax is "indirect." 536, 558

Separation of powers: Criticism of the doctrine as set forth by Montesquieu. 592-595

Legislature's power to prevent referendum by declaring act within

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

emergency exception: whether subject to judicial review.	91	Right to confer with expert witnesses.	218
Powers of the judiciary: Admiralty jurisdiction: validity of treaties.	219	Right to hearing on tax assessment.	550
Exclusion of aliens: judicial review when construction of statute involved.	215	Statute allowing suits against foreign executors.	442
Power to review action of school board passing rule to exclude members of teachers' union from schools.	230	Statute limiting attorney's fees in claim against United States.	328, 331
Powers of legislature: taxation: Federal income tax: indirect tax under the Sixteenth Amendment.	536, 558	Workmen's Compensation Acts: their constitutionality.	199
Mortgage registry tax: whether uniform.	231	Personal rights: civil, political and religious: "Liberty" as interpreted by Justice Holmes.	693-694
Opinions of Justice Holmes concerning taxing power.	696-699	Liberty to contract: decisions as to statutes regulating labor of women and children.	354-357
Stamp tax on charter parties: whether an export tax	471-484	Liberty to contract: decisions as to statutes regulating labor in dangerous employments.	357-359
Stamp tax on foreign bills of lading: whether an export tax	478-483	Liberty to contract: decisions as to statutes regulating hours of labor in general.	359-362
Whether prohibitory tax attached by House to Senate bill is a revenue bill originating in the Senate.	220	Liberty to contract: statute restricting employment of aliens.	219, 452
Powers of legislature: delegation of powers: statute making it a crime to operate a poolroom in any district voting to prohibit.	780	Notice to produce incriminating documents as violation of privilege against self-incrimination.	211, 223, 879
Powers of legislature: money: Constitutionality of Federal Reserve Act of 1913.	768	Right to indictment by grand jury: statute dispensing with grand jury on plea of guilty.	326, 333
Ex post facto and retroactive laws: Whether overruling decision given retroactive effect so as to make acts done in reliance on overruled decision criminal, is analogous.	80, 103	Right to vote: constitutionality of statutes providing for preferential voting.	213, 221
Impairment of the obligation of contracts: Whether statute limiting attorney's fees in claim against United States is impairment of obligation of contracts.	328, 331	Witnesses' privilege against self-incrimination.	876
Validity of statute reserving power to alter contractual rights through repeal of legislation.	874	Privileges, immunities and class legislation: Regulation of trades: "jitney bus" regulation.	437
Trial by jury: Change of judges during trial: waiver of usual procedure.	83, 99	CONSTRUCTION.	
Due process of law: Assessment by frontage method for paving street of varying width.	228	Of constitutional provisions, see <i>Constitutional Law</i> .	
Compensation statute for injuries by railroads.	716-718	Of contracts, see <i>Contracts; Insurance</i> .	
Constitutionality of statute placing prohibitive tax on trading stamps.	779	Of statutes, see <i>Statutes</i> .	
		Of wills, see <i>Wills</i> .	
		CONSTRUCTIVE TRUSTS.	
		See <i>Quasi-Contracts</i> .	
		CONTINGENT REMAINDERS.	
		See <i>Vested, Contingent and Future Interests</i> .	
		CONTRACTS.	
		See also <i>Bankruptcy; Banks and Banking; Bills and Notes; Conditions Precedent; Conflict of Laws; Consideration; Constitutional Law; Damages; Equity; History of Law; Husband and Wife; Insurance;</i>	

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Negligence; Parent and Child; Pledges; Quasi-Contracts; Rescission; Restraint of Trade; Restrictions and Restrictive Agreements as to Use of Property; Roman Law; Sales; Specific Performance; Suretyship; United States; Vendor and Purchaser; War.

Capacity of parties, see *Corporations; Husband and Wife; Infants.*

Collateral oral agreements, see *Parol Evidence Rule.*

Contracts implied in law, see *Quasi-Contracts.*

Illegality as a defense, see *Illegal Contracts.*

Requisites, see *Consideration; Offer and Acceptance.*

What law governs, see under *Conflict of Laws.*

Construction of contracts: Particular words construed: "arrest and conviction." 220

Defenses: in general: Statutory informality as defense against suit by government. 453

Defenses: infancy. Ratification without knowledge contract is voidable. 452

Suits by third persons not parties to the contract: Consideration moving from third person: rights of promisee. 99

Divisible contracts: Repudiation after part performance: whether the party who would rely on the repudiation need act at once. 551

Rewards: Performance without knowledge of the offer: meaning of "arrest and conviction." 220

CONTRIBUTION.

See *Joint Wrongdoers.*

CONTRIBUTORY NEGLIGENCE.

See also *Master and Servant; Negligence; Torts.*

In general: Relation between contributory and tortious negligence. 40, 47

Imputed negligence: Negligence of husband in charge of child imputed to wife in recovery under death statute. 99

CONVERSION.

See *Trover and Conversion.*

Equitable Conversion, see *Equitable Conversion.*

CONVEYANCES AND TRANSFERS OF PROPERTY.

See *Assignments for Creditors; Bank-*

ruptcy; Deeds; Fraudulent Conveyances; Husband and Wife; Mortgages; Rent Charges; Sales.

CORPORATIONS.

See also *Agency; Banks and Banking; Conflict of Laws; Municipal Corporations; Statutes; Taxation.*

Nature of corporation: Personality of corporation: whether real or creature of the state. 405-407, 408-416, 423-426

Personality of corporation: evidences that it is real and not an artificial creation of the state. 408-416

Capital, stock and dividends: Apportionment of stock dividends between life tenant and remainderman 551

Ultra vires: basis of doctrine: Failure of *ultra vires* doctrine to fit the facts of corporate personality. 410-413

Ultra vires: what acts are ultra vires: Purchase by national bank of stock in building corporation. 320, 330

Ultra vires: effects of: Collateral attack on purchase by national bank of stock in building corporation. 320, 330

Stockholders: rights incident to membership: Right to vote: voting trusts. 433, 453

Stockholder's bill under Federal Equity rules of 1913. 66

Stockholders: individual liability to corporation and creditors:

Full payment of shares: liability to trustee in bankruptcy for unpaid balance of stock issued at discount. 855, 877

Gift of stock to corporation. 877

Torts and crimes: Criminal liability of corporation: whether it can have a criminal mind. 415-416

Tort liability of corporation: tendency to treat it as individual. 413-414

Insolvency of corporation: Effect of dissolution of corporation under statute providing a state officer shall take assets and become the successor of the corporation. 778

Right of trustee in bankruptcy to recover unpaid balance of stock issued at discount. 855, 877

Dissolution: Devolution of property on dissolution. 780

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

CORROBORATION.

Necessity for, of confessions, see *Evidence*.

CO-TENANCY.

See *Tenancy in Common*.

COURTS.

See also *Admiralty*; *Aliens*; *Conflict of Laws*; *Constitutional Law*; *Federal Courts*; *International Law*; *Law and Fact*; *Trial*.

Australian Court of Conciliation and Arbitration: cost of proceedings.

26-27

Australian Court of Conciliation and Arbitration: its creation.

13-14

Australian Court of Conciliation and Arbitration: its methods.

13-22

Australian Court of Conciliation and Arbitration: its powers.

13-15, 26-30

Australian Court of Conciliation and Arbitration: results it has brought about.

37-39

Criticism of the decision of the Massachusetts Supreme Court regarding statute limiting hours of labor.

353-354, 368-371

Dissatisfaction with courts shown by legislatures.

395-397

Effect of allowing patentee recovery in the Court of Claims.

339

Proper attitude of courts in the administration of justice.

617-619

Reasons for dissatisfaction with courts.

397-403

COVENANTS OF TITLE.

See also under *Estoppel*.

Covenants in leases, see *Landlord and Tenant*.

Covenant against encumbrances:

Implied in decree passing with the land.

770, 782

COVENANTS RUNNING WITH THE LAND.

See *Landlord and Tenant*; *Restrictions and Restrictive Agreements as to Use of Property*.

COVERTURE.

See *Husband and Wife*.

CREDITORS.

Assignments for, see *Assignments for Creditors*.

CRIMINAL LAW.

See also *Constitutional Law*; *Evidence*; *History of Law*; *Indictment and Information*; *Injunctions*; *Insane Persons*; *Intoxicating Liquors*; *Judges*; *New Trial*; *Post-Office*; *Self-Defense*; *Witnesses*.

Particular crimes, see *Assault and Battery*; *Conspiracy*.

Liability for lawful act: Lawful sale of liquor knowing it is to be re-sold illegally.

453

Defenses: Self-defense: illegal place of business as "castle."

544

Whether resisting wrongful attachment is excuse for assault and battery.

330

Insanity: Act under insane belief of command of God: whether within the "right and wrong" test.

538

Acquiescence for detection: Encouragement of crime by public officials.

100

Trial:

See also *Evidence*; *Judges*.

Disqualification of judge because of prejudice.

430, 459

Necessity for direct proof of *corpus delicti*.

222

Waiver of usual procedure: validity.

83, 99

Appeal: Appeal from conviction in accordance with instructions requested by appellant not warranted by evidence.

448

CUSTOMS DUTIES.

Federal Constitution as affecting right of states to tax importers.

472-477

Tax on charter parties as within constitutional prohibition against tax on exports.

471-484

D**DAMAGES.**

In admiralty, see *Admiralty*.

See also *Carriers*; *Eminent Domain (Compensation)*; *Evidence*; *General Average*; *Interstate Commerce*; *Libel and Slander*; *Master and Servant*; *Municipal Corporations*; *Proximate Cause*; *Sales*; *Torts*; *Trover and Conversion*.

Measure of Damages: contracts:

Effect of depreciation of German marks for which bill of exchange is drawn.

873

Recovery for breach of warranty after resale of seed.

221

Measure of damages: tort: Verdict apportioning damages among joint tort-feasors.

344, 793

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Liquidated damages: Effect of posting penal sums to secure performance of contract. 454

Growth of the distinction between penalty and liquidated damages. 127-129

DANGEROUS PREMISES.

See also *Landlord and Tenant*.

Liability to licensees: General rules. 53-54

Liability of landlord to licensee of tenant. 226

DEATH.

See *Descent and Distribution; Wills*.

DEATH BY WRONGFUL ACT.

Statutory liability in general:

Death of next of kin given right of action by statute does not defeat. 781

Defenses to statutory liability: Negligence of husband in charge of child imputed to wife. 99

DEBT.

Discharge of, see *Bankruptcy*.

See also *Conflict of Laws; Taxation*.

DEDICATION.

Nature and scope: Doctrine as applied to water rights. 142-144

DEEDS.

Estoppel by deed, see *Estoppel*.

See also *Mortgages; Recording and Registry Laws*.

Construction and operation in general: Conveyance by grantor to himself and wife as tenants by the entirety. 201

Estoppel of grantor conveying before acquiring title, see under *Estoppel*.

Rights of grantee of deed to growing timber. 781

Conditions: Impossibility of performing condition subsequent. 878

DEFAMATION.

See *Libel and Slander; Privacy, Right of*.

DEPOSITS.

See under *Banks and Banking*.

DESCENT AND DISTRIBUTION.

See also *Conflict of Laws; Executors and Administrators; Jurisprudence; Legacies and Devises; Taxation; Wills*.

Death in common disaster: disposition of property under reciprocal wills. 461

Nature of escheat: whether subject to inheritance tax. 455

Power of legislature to regulate descent. 521

DETINUE.

See *Bailments; History of Law*.

DIRECTORS.

See *Corporations*.

DISCHARGE.

Of bills and notes, see under *Bills and Notes*.

Of debts by bankruptcy proceedings, see under *Bankruptcy*.

DISSEISIN.

See also *Adverse Possession; History of Law; Title, Ownership and Possession*.

General nature and effects of disseisin: Difference between the old disseisin and the modern adverse possession. 377-378

Disseisin of chattels: Disseisin by election in case of chattels. 385-386

Trespass as disseisin under the early law. 378-386

DISSOLUTION.

Of partnership, see under *Partnership*.

See also *Suretyship*.

DISTRIBUTION.

See *Descent and Distribution*.

DIVIDENDS.

See *Corporations*.

DIVORCE.

See also *Husband and Wife; Marriage*.

Grounds: Desertion: deed of separation: whether defense to divorce on ground of desertion. 331

Desertion: refusal to live with husband's parents. 331

Defenses: Voidability of the marriage. 455

Alimony: Right of personal representative of deceased wife to recover for arrears. 100

DOCUMENTS.

As evidence, see under *Evidence; Parol Evidence Rule*.

DOGS.

See under *Torts*.

DOMICILE.

See *Conflict of Laws*.

DUE PROCESS OF LAW.

See under *Constitutional Law*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

E

EASEMENTS.

See also *Eminent Domain*.

Nature and classes of easements:

Light and air: when it may be corporeal hereditament. 525

EIGHT HOUR LAW.

See *Constitutional Law*; *Police Power*.

ELECTION.

Disseisin by: in case of chattels. 385-386

ELECTIONS.

See also *Constitutional Law*.

Constitutionality of statutes providing for preferential elections. 213, 221

EMINENT DOMAIN.

Compensation: Proper considerations to take into account in computing market value. 427

Value of fee under highway. 332

EMPLOYERS' LIABILITY ACTS.

See under *Master and Servant*.

EQUITABLE CONVERSION.

See also *Conflict of Laws*; *Taxation*.

Inheritance tax on foreign realty equitably converted. 342

EQUITABLE EASEMENTS.

See *Restrictions and Restrictive Agreements as to the Use of Property*.

EQUITY.

See also *Conflict of Laws*; *Federal Courts*; *History of Law*; *Infants*; *Injunctions*; *Jurisprudence*; *Landlord and Tenant*; *Libel and Slander*; *Life Estates*; *Mortgages*; *Penalties*; *Pleading*; *Privacy*; *Right of*; *Quasi-Contracts*; *Quieting Title*; *Rescission*; *Restrictions and Restrictive Agreements as to Use of Property*; *Specific Performance*; *Trade Unions*; *Trusts*; *Vendor and Purchaser*; *Waste*.

Jurisdiction: Decree operating as warranty deed. 770, 782

Enjoining libel: whether contrary to policy of jury trial. 655-657

Enjoining libel: whether infringement of freedom of press. 648-655

Enjoining libel: whether precluded by authority. 657-668

Enjoining use of motion picture obtained by ordinary breach of negative covenant. 784

Foreclosure of mortgage on property partly in another jurisdiction: indirect order. 456

Injunction against waste by holder of *interesse termini*. 101

Interest of personality created by statute: whether equity will protect. 93, 102

Protection of business reputation as a property right. 646-648

Protection of interests in personality. 640-646, 668-677

Protection of social and political relations. 677-682

Relief against forfeiture: growth of the doctrine. 129-135

Relief against penalties: development of the jurisdiction. 123-129

Restraint of criminal prosecution to safeguard property rights. 219

To enforce specifically contract to operate a depot. 552

Writ of *ne exeat* where no pecuniary claim involved. 206, 222

Procedure: Federal Equity Rules: interrogatories under. 72-73

Effect of Federal Equity Rules of 1913 on disposition of cases. 74-75

Effect of taking evidence in open court under Federal Equity Rules. 56-60

Federal Equity Rules: variance as to requirements of bill of complaint. 64-66

Federal Equity Rules: demurrers and motions to dismiss. 66-68

Federal Equity Rules: answers under. 68-69

Pleading under Federal Equity Rules. 62-74

ESCHEAT.

See *Descent and Distribution*.

ESTATES FOR LIFE.

See *Life Estates*.

ESTATES IN FEE SIMPLE.

See also *Trusts*.

Compensation for fee covered by water taken by eminent domain. 332

ESTATES TAIL.

Estate tail in rent charge: effect of disentailing assurance. 555

Unusual form of estate tail special. 878

ESTOPPEL.

Estoppel in pais: What acts will estop: failure of assignee of written contract to take the writing from assignor. 879

Estoppel by deed: Land mortgaged before acquired: priority of mortgage to judgment lien. 457

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

EVIDENCE.

See also *Admissions; Appeal and Error; Attorneys; Burden of Proof; Criminal Law; Parol Evidence Rule; Physicians and Surgeons; Presumptions; Witnesses.*

Testimony given at former trial: Admissibility after marriage of witness with defendant. 102

Hearsay: in general: Applicability of rule in proceedings before administrative tribunal. 208, 226

Declarations of wife admissible against husband as co-conspirator. 332

Confessions: Admissibility of plea of guilty withdrawn by leave of court. 782

Corroboration: whether sufficient to support conviction without further proof of *corpus delicti*. 222

Declarations concerning matters of public or general interest: Traditional proof of ancient boundaries. 783

Declarations in course of duty: Entries based on reports of unavailable clerks allowed to supplement testimony of book-keeper. 863, 880

Shop books and account books: Entries from data of another party: whether testimony by latter necessary to make available. 863, 880

Declarations concerning intention, feelings, or bodily condition: Whether statements characterizing adverse possession are hearsay. 224

Res gestae: Whether statements characterizing adverse possession are hearsay. 224

Character of parties: Slander: evidence of good character of plaintiff in aggravation of damages. 460

Documents.

See under *Parol Evidence Rule.*

Admissibility of parol evidence to contradict legislative record. 101
Negligent loss of originals: whether secondary evidence admissible. 223

Secondary evidence: notice to accused to produce privileged documents. 211, 223, 879

Proof of foreign law: Application of *lex fori* in absence of proof of law of jurisdiction governing the case. 106

EX POST FACTO LAWS.

See under *Constitutional Law.*

EXECUTION.

See also *Exemptions.*

Of one of two "equal judgment liens." 755, 785

EXECUTORS AND ADMINISTRATORS.

See also *Abatement and Revival; Conflict of Laws; Descent and Distribution; Divorce; Suretyship.*

Rights, powers and duties: Right of executor of deceased wife to recover arrears of alimony. 100

Proceedings by or against: Suits against foreign executors. 442

Administration bonds: Surety's liability to assignee of administrator. 333

EXECUTORY DEVICES.

See *Vested, Contingent and Future Interests.*

EXEMPTIONS.

See also under *Bankruptcy; Homestead.*

Effect of exemption on judgment lien. 225

Validity of exemption obtained after debtor became bankrupt. 548

EXONERATION.

Right of, see *Trusts.*

EXPECTANT ESTATE.

See *Vested, Contingent and Future Interests.*

EXPERT TESTIMONY.

See *Constitutional Law (Due process of law).*

F

FAMOUS CASES.

See *v. Pritchard.* 642-644

Peachy v. The Duke of Somerset. 117, 132-134

FAMOUS JUDGES.

See *Legal Biography.*

FEDERAL COURTS.

See also *Admiralty; Bankruptcy; Constitutional Law; Courts; Equity; Procedure.*

Jurisdiction and powers in general: Application of Federal Equity

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- Rules of 1913: in general. 55-56
 Burden on courts working under Federal Equity Rules. 55-59
Relations of state and federal courts: Whether federal or state rule as to burden of proof should apply in action brought in federal court under federal statute. 95,98
FEE SIMPLE.
 See *Estates in Fee Simple*.
FICTITIOUS PAYEE.
 See under *Bills and Notes*.
FIDUCIARY RELATIONS.
 See *Agency; Attorneys; Partnership; Physicians and Surgeons; Tenancy in Common; Trusts; Witnesses (Privileged Communications)*.
FINDING LOST GOODS.
 See *Title, Ownership and Possession*.
FORECLOSURE SALE.
 See *Conflict of Laws; Mortgages*.
FOREIGN COMMERCE.
 See *Constitutional Law; States; Taxation*.

FOREIGN CORPORATIONS.

- Service of process: jurisdiction over cause of action arising outside state. 880

FORFEITURE.

- Relief against, see *Equity*.
 See *Landlord and Tenant (Conditions and covenants in leases)*.

FORGERY.

- Of negotiable instruments, legal effect, see *Bills and Notes*.

FRAUD.

- As ground for rescinding contract, see *Rescission; Vendor and Purchaser*.
 See also *Banks and Banking; Fraudulent Conveyances; Insurance; Post-Office; Trover and Conversion*.

FRAUDULENT CONVEYANCES.

- Rights of creditors: Conveyance by partnership: when fraudulent. 296-298

G

GENERAL AVERAGE.

- Nature, cause and manner of sacrifice: Liability for tort incurred in saving ship. 546

GOOD WILL.

- Good will as property: tenancy in common in right to use firm name. 457

GOVERNOR.

- See *Parol Evidence Rule*.

GRAND JURY.

- See *Constitutional Law; Indictment and Information*.

H

HEALTH

- See *Constitutional Law; Police Power*.

HEARSAY EVIDENCE.

- See under *Evidence*.

HIGHWAYS.

- See also *Eminent Domain; Estates in Fee Simple; Municipal Corporations; Taxation; Waters and Watercourses*.

- Injuries from obstructions, etc.:** Liability of highway contractor to passers-by. 323, 337

HISTORY OF LAW.

- Contracts:** Origin and history of penal obligations. 117-123

- Property:** Development of law of assignment of choses in action. 821-830

- Land under the early common law: village communities. 251-258

- Development of law as to bailor's rights. 501-520

- Equity:** Development of jurisdiction to relieve against penalties. 123-129

- Origin and development of assignment of choses in action in equity. 821-822

- Common-law actions:** actions of replevin and trespass in the early law. 387-394

- Early writs of trespass: whether based on possession. 513-520

- Replevin in the early law for chattels taken by thief or trespasser. 378-394

- Whether appeals of larceny and

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

robbery allowed to bailor against third persons converting from bailee. 503-513

HOMESTEAD.

Exemption: property becoming homestead after debtor adjudicated bankrupt. 548

Whether judgment lien revives on sale of homestead. 225

HOMICIDE.

Justification for, see *Self-Defense*.

See also *Criminal Law*; *Evidence*; *Insane Persons*.

HUSBAND AND WIFE.

See also *Agency*; *Contributory Negligence*; *Death by Wrongful Act*; *Divorce*; *Evidence*; *Parent and Child*; *Witnesses*.

Rights of wife against husband and in his property: Effect of antenuptial agreement after divorce. 881

Rights and liabilities of wife as to third parties: Liability of wife on contract to convey her realty: statute making such conveyance invalid. 553

Contracts between husband and wife: Separation agreements: whether bar to divorce on ground of desertion. 331

Privileges and disabilities of coverture: Admissions of wife as evidence against husband. 332

Wife's separate estate: Estate by entirety: inheritance tax on husband's death. 201, 558

I

ILLEGAL CONTRACTS.

Restraint of trade, see *Restraint of Trade*.

Ultra vires contracts, see under *Corporations*.

See also *Quasi-Contracts*.

Contracts against public policy: Agreement to sue in certain courts only. 881

Exemption of railroads from liability for negligent injuries to Pullman employees. 435, 458

IMPLIED CONTRACTS.

See under *Quasi-Contracts*.

IMPUTED NEGLIGENCE.

See under *Contributory Negligence*.

INDEMNITY.

Re-insurance as indemnity, see *Insurance*.

INDICTMENT AND INFORMATION.

Finding and filing indictment: Constitutionality of statute dispensing with grand jury on plea of guilty. 326, 333

Joinder of counts and offenses: Joint indictment for practising medicine without a license. 334

INFANTS.

See also *Contributory Negligence*; *Parent and Child*.

Custody property and maintenance: Parent's liability on breach of agreement as to custody of child. 338

Control of religious education of child in the United States. 497-500

Control of religious education of child under English law. 488-497

Contracts and conveyances: Ratification by infant without knowledge that contract is voidable. 452

INFRINGEMENT.

Of patents, see *Patents*.

INHERITANCE.

See *Descent and Distribution*.

INHERITANCE TAX.

See *Conflict of Laws*; *Taxation*.

INJUNCTIONS.

See also *Equity*; *Privacy*, *Right of*; *Receivers*; *Restraint of Trade*; *Trade Marks and Trade Names*.

Nature and scope of remedy: Balancing of plaintiff's and defendant's rights. 218

Enjoining libel: whether contrary to policy of jury trial. 655-657

Enjoining libel: whether infringement of freedom of press. 648-655

Enjoining libel: whether precluded by authority. 657-658

Injunction against libel on business reputation. 646-648

Threatened injury to personality as ground for injunction. 640-646, 668-677

Acts restrained: Criminal proceedings. 219

Enforcement of rule of school board

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

excluding members of teachers' union from schools. 230	Marine insurance: Valued policy: extent of insurer's right of subrogation. 553
Injunction against exhibiting motion picture obtained through breach of negative covenant. 784	Employer's liability insurance: Liability of insurer before payment by employer. 882
Interest of personality created by statute: exclusiveness of statutory remedy. 93, 102	INTENT. See <i>Torts</i> .
Right of holder of <i>interesse termini</i> to enjoin for waste. 101	INTERNATIONAL LAW. See also <i>Admiralty; Conflict of Laws; War</i> .
INSANE PERSONS.	In general: Defects in the methods of enforcing international law. 566-568
Tests of insanity: "Knowledge of right and wrong" test: whether legal or moral wrong. 538	Necessity of modelling international law after municipal law as a means to preserve peace. 568-571, 577-581
INSOLVENCY. See <i>Bankruptcy</i> .	Plan to enforce international law to preserve peace. 577-581
INSURANCE.	Nature and extent of sovereignty: Right of English court under the Declaration of Paris to condemn German non-contraband goods shipped on British vessel before war. 851
Defenses of insurer: Defense of fraud in procuring policy incontestable after date. 784	Change of sovereignty: Validity of change of registry of belligerent merchant ship during war. 317
Policy issued after loss varying preliminary agreement. 554	INTERSTATE COMMERCE. See also <i>Carriers; Constitutional Law; Statutes</i> .
Election and waiver of conditions: Effect of failure of insurer to return premiums on breach of condition. 458, 724-730	Control by Congress: Federal employers' liability acts: whether state compensation statutes are superseded by Act of 1908. 439, 459
Election, not waiver, is the doctrine really involved in the cases. 724-730	"Loss, damage or injury" under the Carmack Amendment. 217
Construction of particular words and phrases in standard forms: Standard mortgage clause as protection against owner's acts. 334	Recovery of holder of free pass, prohibited by law, when injured by railroad. 785
Rights of beneficiary: Right of life beneficiary to lien on insurance policy for premiums voluntarily paid. 228	INTOXICATING LIQUORS. Sales: Lawful sale of liquor with knowledge that it is to be re-sold illegally. 453
Whether reserved right to change beneficiaries gives insured right to surrender policy without consent of beneficiary. 225	
Rights of insurer: Subrogation: extent of right on "valued" policy. 553	
Reinsurance: Liability of reinsurer when insurer compromises. 102	

J

JOINT STOCK COMPANIES.

See under *Partnership*.

JOINT WRONGDOERS.

See also *Damages*.

Contribution: in admiralty. 546

JUDGES.

See also *Courts; Federal Courts*.

Disqualification because of prejudice against defendant. 430, 459

Disqualification because of pecuniary interest: subordination of the rule to necessity. 103

Illness of judge during criminal trial: whether substitute conducting remainder of trial is denial of trial by jury. 83, 99

Increasing burdens of federal judges. 55-59

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

JUDGMENTS.

See also *Conflict of Laws*; *Res Judicata*.

Liens: Whether lien will revive on sale of exempt homestead. 225

Should execution of one of two "equal judgment liens" give it a preference over the other? 755, 785

JUDICIAL NOTICE.

No judicial notice of territorial jurisdictions of justices of peace. 786

JURISDICTION.

In admiralty, see *Admiralty*; *Federal Courts*.

In bankruptcy, see *Bankruptcy*.

Personal, *quasi in rem*, see *Conflict of Laws*.

In equity, see *Equity*.

Of federal courts, see *Federal Courts*.

For taxation, see *Taxation*.

See also *Constitutional Law*; *Courts*.

JURISPRUDENCE.

See also *Common Law*; *Constitutional Law*; *Courts*; *History of Law*; *Law*; *Legal Biography*; *Roman Law*.

Equitable protection of interests in personality. 640-646, 668-677

Equitable protection of social and political relations. 677-682

Interests: interest of the public in business, labor and capital. 241-276

Classification of rights and remedies: Classification of rights and wrongs in law too arbitrary. 635-636

Schools of jurisprudence: Sociological jurisprudence: shortcomings of Montesquieu as a sociological jurist. 596-600

Sociological jurisprudence: tendencies of Montesquieu towards. 582-596

Law: Abuse of fundamental principles of law. 630-633

Comparison between law and natural science. 623-630

Deduction from principles part of the life of law. 623-629

Natural law as a limitation on legislative authority. 521

Whether acts done in reliance on decision subsequently overruled are lawful. 80, 103

JURY.

Right to trial by jury, see *Constitutional Law (Trial by jury)*; *Criminal Law (Trial)*.

Grand jury, see *Grand Jury*.

See also *Law and Fact*; *New Trial*; *Trial*.

Misconduct of jury in "chance" verdict. 885

L

LABOR UNIONS.

See *Trade Unions*.

LAKES AND RIVERS.

See *Waters and Watercourses*.

LANDLORD AND TENANT.

See also *Tenancy in Common*.

Conditions and covenants in leases:

Equitable relief from forfeiture incurred by breach. 129-135

Implied covenant by landlord not to interfere with tenant's use of the premises. 555

Repair and use of premises: Landlord's liability to customer or guest of tenant for negligent repairs. 226

Assignment and subletting: Assignee's liability for rent. 459

Rent: Distress: whether tenant's receiver may enjoin distress for advance rent. 335

Liability of assignee of lease for rent. 459

LAW.

History of, see *History of Law*.

See also *Common Law*; *Conflicts of Law*; *Constitutional Law*; *Courts*; *International Law*; *Jurisprudence*.

Abuse of the use of principles in law. 630-636

Comparison of law with natural science. 623-629

Growth of the law: function of the legal profession. 619-621

Inadequacies of Aristotelian logic in the law. 636-639

The law as over-emphasizing logic. 622-623

Value of principles in law. 623-627

LAW AND FACT.

See also *Trial*.

Provinces of court and jury: Negligence: why it is a question for the jury. 46-50

Negligence: when it is a question of law. 50

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

LAW SCHOOL.

- Changes in curriculum and new appointments for the academic year 1915-16. 76
 Ezra Ripley Thayer. 1-12, 76
 Registration. 193
 The Harvard Legal Aid Bureau. 195

LEASES.

See *Landlord and Tenant*.

LEGACIES AND DEVICES.

See also *Conflict of Laws; Descent and Distribution; Equitable Conversion; Executors and Administrators; Husband and Wife; Life Estates; Presumptions; Rule against Perpetuities; Taxation; Trusts; Vested, Contingent and Future Interests; Wills*.

Lapsed bequests and devises: Effect when same person is special and residuary legatee. 109

LEGAL BIOGRAPHY.

- Holmes, Justice Oliver W., his analysis of the law of torts. 607-616
 Holmes, Justice Oliver W., constitutional opinions of. 685-702
 Holmes, Justice Oliver W., knowledge of the history of the law. 604-607
 Holmes, Justice Oliver W., note on his seventy-fifth birthday. 705
 Holmes, Justice Oliver W., philosophy of life as shown in his writings and opinions. 602-604
 Holmes, Justice Oliver W., style of his opinions. 601-602
 Thayer, Ezra Ripley. 1-12
 Thayer, Ezra Ripley, note on death of. 78

LEGISLATION.

See also *Constitutional Law; Statutes*.
 Uniform State Laws: canons of construction. 541, 561

LEGISLATIVE RECORDS.

Variation of, see under *Evidence; Parol Evidence Rule*.

LEGISLATURE.

Power of, see *Constitutional Law*.

LIBEL AND SLANDER.

See also *Privacy, Right of*.

Acts and words actionable: Charging acts not in fact criminal, but alleging them to be such: whether libelous *per se*. 857

Unintentional defamation: suggestion of rule of due care. 533

Privileged communications: Distinction between a mutual commercial association and one conducted for profit. 786

Words spoken in the course of church discipline. 560

Damages: Aggravation of damages by plea of justification. 335

Evidence: whether plaintiff may give evidence of good character in aggravation of damages. 460

Pleading and proof: Plea of truth as aggravation of damages. 335

Injunction against publication: Enjoining publications affecting personality. 641-646

State of authorities. 657-658

Whether infringement of freedom of press. 648-655

Whether precluded by policy of trial by jury. 655-657

LIBERTY.

Under the Constitution, see *Constitutional Law*.

LIENS.

See also *Execution; Mortgages*.

Judgment liens: revival on sale of exempt homestead. 225

Lien by life beneficiary on insurance policy for premiums voluntarily paid. 228

LIFE ESTATES.

Apportionment of stock dividends between life tenant and remainderman. 551

Right of equitable life tenant on acquisition of remainder. 345

Right of life beneficiary as against remainderman to lien on insurance policy for premiums voluntarily paid. 228

LIGHT AND AIR.

See *Easements; Title, Ownership and Possession*.

LIMITATION OF ACTION.

See also *Adverse Possession; Prescription*.

Nature and construction of statute: Inability to discover breach of warranty preventing running of statute. 336

Accrual of action: Breach of warranty: at time of sale. 336

Effect of delay on pledgor's right to reclaim. 222

Operation and effect of bar of statute: State limitation and federal Employer's Liability Act. 451

Ignorance, mistake, fraud, etc.: Discovery of fraud: presumption of knowledge of document from reading. 226

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Failure to discover breach of warranty as preventing running of statute. 336

LIQUIDATED DAMAGES.

See under *Damages*.

LORD'S DAY.

See *Sunday Laws*.

M

MAIL.

See under *Post-Office*.

MAINTENANCE.

See *Champerly and Maintenance*.

MALICE.

See under *Libel and Slander*.

MANDAMUS.

Acts subject to mandamus: Mandamus to compel school board to give diploma. 342

MANDATORY INJUNCTION.

See *Injunctions*.

MARINE INSURANCE.

See under *Insurance*.

MARITIME LAW.

See *Admiralty*.

MARRIAGE.

See also *Divorce; Evidence; Husband and Wife*.

Nullification: Right to nullify as a defense to action for divorce. 455

MARRIED WOMEN.

See *Husband and Wife*.

MASTER AND SERVANT.

Liability of master to third persons, see under *Agency*.

State regulation of the relation, see *Constitutional Law*.

See also *Administrative Law; Common Law; Courts; Illegal Contracts; Torts; Trade Unions; Wages*.

Assumption of risk: Effect of statute abrogating assumption of risk but leaving contributory negligence untouched. 787

Employers' liability acts: Effect of limitation in federal Employers' Liability Act on action brought in state court. 451

Proposed plan for compensation to parties injured through carelessness of servants of railroad. 705-723

Whether state statutes are superseded by federal act of 1908 439, 450

Workmen's compensation acts:

Admissibility of hearsay before administrative tribunal. 208, 226

Amount of compensation awarded where the workman had been formerly injured. 104

"Arising out of the employment": injury due in part to peculiar characteristic of disease of workman. 762

Character of payments: duty of receiver to pay past claims. 104

Common law alternative clause: effect of abrogation of assumption of risk. 336

Conscious violation of a statute as "wilful misconduct." 883

Constitutionality: discussion of attitude of courts. 199

Construction of clause excluding other remedies. 227

Measure of compensation after general fall in wages. 787

Provision for death benefits: at what time does right of action accrue. 463

MONOPOLIES.

See *Restraint of Trade*.

MORTGAGES.

See also *Conflict of Laws; Constitutional Law; Taxation*.

Priorities: Priority of subsequent creditors over bondholders. 337

Foreclosure: Rights of mortgagor: foreclosure under power of sale pending bill for redemption. 105

Nature and effect of mortgages: Mortgage on land prior to acquisition by mortgagor: priority to judgment lien. 457

Whether subject of conversion. 107

Rights of mortgagee: Right to recover on insurance policy regardless of owner's acts. 334

MUNICIPAL CORPORATIONS.

Police power and regulations: Regulation of "jitney busses." 437

Officers and agents: Liability of highway contractor for misfeasance. 323, 337

Assessments for local improve-

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

ments: Validity of frontage assessment for paving street of varying width. 228

MURDER.

See *Homicide*.

N**NATIONAL BANKS.**

See *Banks and Banking*.

NECESSITY.

See *Sunday Laws*.

NEGLECTANCE.

In particular relationships, see *Agency; Bills and Notes; Carriers; Corporations; Dangerous Premises; Landlord and Tenant; Master and Servant; Municipal Corporations; Parent and Child; Trusts*.

See also *Admiralty; Burden of Proof; Contributory Negligence; Death by Wrongful Act; Law and Fact; Libel and Slander; Proximate Cause; Torts*.

Duty of care: As to dangerous premises. 804-806

Common law and statutory duties. 50-52

Definition of negligence: not a breach of duty of care. 40-42

Rule for finding negligence: balancing risks and objects. 42-46

Defenses: Contract exempting railroad from liability for negligent injuries to Pullman employees. 435, 438

Illegal conduct of the plaintiff. 337

NEGOTIABLE INSTRUMENTS.

See *Bills and Notes*.

NEW TRIAL.

See also *Criminal Law; Judges*.

Grounds for granting new trial:

Invited error: verdict on instructions requested by appellant not warranted by evidence. 448

NOTICE.

See under *Bills and Notes; Recording and Registry Laws; Trusts*.

NUISANCE.

See also *Police Power*.

What constitutes nuisance: "Jitney bus" as nuisance. 437

O**OFFER AND ACCEPTANCE.**

Unilateral contracts: Whether performance without knowledge of

offer is acceptance of offer of reward. 220

OWNERSHIP.

See *Title, Ownership and Possession*.

P**PARENT AND CHILD.**

See also *Contributory Negligence (Imputed Negligence); Infants*.

Agreements concerning custody: liability of parent. 338

Parent's rights: in religious education of child: in general. 485-500

Parent's rights: in religious education of child: early English law. 485-487

Parent's rights: in religious education of child: modern English law. 488-497

Parent's rights: in religious education of child: law in United States. 497-500

Parent's rights: recovery for death of

child: contributory negligence of other parent as a bar. 99

PAROL EVIDENCE RULE.

See also *Evidence*.

Substantive law expressed in terms of evidence: Bills and notes: extrinsic evidence to show indorser joint maker. 549

Insurance policy: right to show agreement prior to policy issued after loss. 554

Legislative records: admissibility of evidence to show bill signed before it was vetoed. 101

PART PERFORMANCE.

See *Contracts; Rescission*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES: and in italicized type to ARTICLES.

PARTNERSHIP.

See also *Good Will*.

Nature of partnership: Affirmative reasons for basing the Uniform Partnership Act on the entity theory. 839-845

Answer to objections to the entity theory as a basis for the Uniform Partnership Act. 845-850

In general. 158-192

Difficulties in treating partnership as legal person. 165-170

Difficulties of aggregate theory. 162-165

Nature of partner's interest: "tenancy in partnership." 170-173

Partnership an entity but not a legal personality. 158-162

Whether treated by courts and legislatures as legal person. 174-192

Partnership property: Condemning property owned by partnership partly composed of alien enemies. 795

Uniform Partnership Act: Argument for adopting the entity theory as a basis for the act. 838-850

Desirability of adoption. 312-313

Nature of partnership under the act. 158, 171-173

Theory of act: reasons in favor of. 162-173

Whether an adoption of the aggregate theory of partnership. 291-296

8 (3). 298-299

9 (1). 299-300

16. 300-302

18 (h). 302

35. 302-305, 311-312

38 (1). 305

40 (h). 306-307

40 (i). 307-309

43. 309-311

Partnership property: Difficulties in determining what constitutes a fraudulent conveyance. 296-298

Rights and remedies of creditors: Injustice to creditors under the "legal person" theory of partnership. 165-167

Rights of creditors of ostensible firm over assets under Uniform Partnership Act. 300-302

Right of partnership creditors in separate assets of partner. 306-307

Dissolution and winding-up: Effect on liability of surety. 460

Effect upon right to use firm name. 457

Partnership for illegal purpose: 457

when notice of dissolution necessary. 302-305

Joint stock companies: Whether taxable under corporation tax. 342

PASSENGERS.

See *Carriers*.

PATENTS.

Infringement: Use by government. 339

PENALTIES.

See also *Damages* (*Liquidated damages*). Development of the penal obligation. 117-123

Jurisdiction of equity to relieve against penalties: development. 123-129

PERPETUITIES, RULE AGAINST.

See *Rule against Perpetuities*.

PERSONAL PROPERTY.

See *Adverse Possession; Bailments; Disseisin; Election; History of Law; Replevin; Sales; Title, Ownership and Possession; Trover and Conversion*.

PERSONS.

See *Divorce; Husband and Wife; Infants; Parent and Child*.

PHYSICIANS AND SURGEONS.

See also *Agency*.

Whether patient can waive statutory privilege as to communications with physician. 462

PLEADING.

Pleading under Federal Equity Rules of 1913. 62-74

PLEDGES.

Agreements varying common law obligations of pledgee: validity of. 278-279

Common law safeguards restricting pledgee in dealing with pledged property. 277-278

Effect of delay on pledgor's right to reclaim. 222

Efficacy of agreements varying common law obligations of pledgee. 289-290

Strict construction of agreements as to time, place, method and notice of sale of pledges. 282-289

Tortious disposal by pledgee: effect of substitution of something of equal value. 107

Wrongful sale of stock by bank president: liability of bank. 339

POLICE.

See under *Criminal Law*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

POLICE POWER.

See also *Constitutional Law; Municipal Corporations.*

Interest of public health: Basis on which courts should decide whether statutes regulating hours of labor are within police power. 362-373

Regulation of labor in dangerous employments. 357-359

Regulation of labor of women and children. 354-357

Regulation of hours of labor in general. 359-371

Billboard and building regulations. 860, 884

Regulation of trade, professions and business: "Jitney bus" regulation. 437

POSSESSION.

See *Adverse Possession; Title, Ownership and Possession.*

POST-OFFICE.

Use of mails to defraud: what constitutes "scheme or artifice." 340

PREFERENCES.

Under bankruptcy laws, see *Bankruptcy.*

PRESCRIPTION.

Operation against state of presumption of lost grant. 88, 106

PRESUMPTIONS.

See also *Limitations of Action.*

Existence and effect of presumptions in particular cases: Constitution and statutes of sister state: presumption of similarity. 106

Death: presumption of survivorship when death occurs in common disaster. 461

Effect of further evidence by the plaintiff on the doctrine of *res ipsa loquitur.* 105

Operation against state of presumption of lost grant. 88, 106

PRIORITIES.

See under *Mortgages.*

PRINCIPAL AND AGENT.

See *Agency.*

PRINCIPAL AND SURETY.

See *Suretyship.*

PRIVACY, RIGHT OF.

Nature and extent of the right: Right of privacy protected on property grounds. 641-646

Social and political relations. 677-682

Unconscious recognition of right of privacy. 668-677

Remedies: Protection of right of privacy by injunction. 641-646, 668-677

PRIVILEGE.

Against self-incrimination, see *Witnesses.*

PRIVILEGED COMMUNICATIONS.

See under *Attorneys; Libel and Slander; Witnesses.*

See also *Physicians and Surgeons.*

PRIVITY.

See *Adverse Possession.*

PROCEDURE.

See *Appeal and Error; Burden of Proof; Criminal Law; Equity; Federal Courts; Indictment and Information; Judges; New Trial; Pleading; Trial.*

PROCESS.

See also *Attachment.*

Manner and effect of service: Service of misdirected process: whether amendment will validate. 884

Service on foreign corporation: cause of action arising outside of state. 880

PROMISSORY NOTES.

See *Bills and Notes.*

PROPERTY.

See *Bailments; Constitutional Law; Descent and Distribution; Easements; Eminent Domain; Equity; Estates in Fee Simple; Estates Tail; Exemptions; Good Will; History of Law; Husband and Wife; Jurisprudence; Legacies and Devises; Liens; Life Estates; Mortgages; Municipal Corporations; Partnership; Patents; Pledges; Rent Charges; Replevin; Restrictions and Restrictive Agreements as to Use of Property; Rule against Perpetuities; Sales; Taxation; Tenancy by the Entirety; Tenancy in Common; Title, Ownership and Possession; Transfer of Stock; Trover and Conversion; Trusts; Vendor and Purchaser; Vested, Contingent and Future Interests; Waters and Watercourses.*

PROXIMATE CAUSE.

See also *Contributory Negligence; Master and Servant; Negligence; Torts.*

Efficient cause of injury: Causation of injury in workmen's compensation acts. 752

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Concurrent causes: Plaintiff's illegal act as contributing cause. 883

Intervening causes: Effect of intervention of a natural force. 789

Intervention of wilful act of third person. 453

PUBLIC SERVICE COMPANIES.

See *Carriers; Interstate Commerce.*

PUBLIC USE.

See *Eminent Domain.*

PURCHASERS FOR VALUE WITHOUT NOTICE.

See under *Bills and Notes; Recording and Registry Laws; Trusts.*

Q

QUANTUM MERUIT.

See under *Quasi-Contracts.*

QUASI-CONTRACTS.

Nature and scope of obligation:
Illegal contracts: recovery for services under contract void for champerty. 874

Rights and obligations of parties in default under contract:
Parent's liability on breach of agreement as to custody of child. 338

Rescission of contract for sale of land by purchaser: whether vendor can recover for use and occupation. 340

Recovery for benefits conferred without contract: Right of life beneficiary to lien on insurance policy for premiums voluntarily paid. 228

QUIETING TITLE.

Change in character of locality as ground for bill to remove restrictions as cloud on title. 106

R

RAILROADS.

See also *Agency; Carriers; Illegal Contracts; Interstate Commerce.*

State regulation in general: Plan for compensation statute for personal injuries. 705-723

Liability to trespassers: Liability to person riding unlawfully. 785

RATIFICATION.

Of contracts by infant, see *Contracts; Infants.*

REAL PROPERTY.

See *Adverse Possession; Conflict of Laws; Deeds; Descent and Distribution; Disseisin; Easements; Eminent Domain; Equitable Conversion; Estates in Fee Simple; Estates Tail; Estoppel; History of Law; Husband and Wife; Landlord and Tenant; Life Estates; Mortgages; Prescription; Quieting Title; Recording and Registry Laws; Restrictions and Restrictive Agreements as to Use of Property; Rule against Perpetuities; Taxation; Tenancy by the Entirety; Tenancy in Common; Title, Ownership and Possession; Vendor and Purchaser; Vested Contingent and Future Interests; Waste; Waters and Watercourses.*

RECEIVERS.

Receiver's liability to pay claims under workmen's compensation acts arising before appointment. 104

Right of tenant's receiver to enjoin distress for advance rent. 335

RECORDING AND REGISTRY LAWS.

See also *Bankruptcy; Constitutional Law; Taxation.*

Effect of recording in general: Previous transfer recorded within four months of bankruptcy. 766, 776

Notice by record: Earlier deed of grantor: mortgage prior to acquisition of title. 457

Torrens land registration system: Rights of purchaser of an overlapping certificate. 772, 790

REINSURANCE.

See under *Insurance.*

RELIGION.

See *Infants; Parent and Child.*

RELIGIOUS SOCIETIES.

See under *Voluntary Associations.*

REMAINDERS.

See *Life Estates; Trusts; Vested, Contingent and Future Interests.*

RENT.

See under *Landlord and Tenant.*

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

RENT CHARGES.

Effect of disentailing assurance on rent charges in tail. 555

REPLEVIN.

See also *History of Law (Common-law actions)*.

Right of replevin in the early law for property taken by a thief or trespasser. 378-394

REPUDIATION.

Of contracts, see *Contracts; Rescission*.

RES GESTAE.

See under *Evidence*.

RES IPSA LOQUITUR.

See under *Burden of Proof*.

RES JUDICATA.

Persons concluded: Persons assisting in the defense. 556

RESCISSION.

Rescission for fraud or mistake: Fraud of vendor: effect of purchaser's statements as to expert knowledge. 560

Rescission upon other party's breach, repudiation or inability to perform: Repudiation after part performance: damages recoverable. 551

RESTRAINT OF TRADE.

See also *Torts; Unfair Competition*.

Combination by agreements as to product or prices: Compulsory sales and public policy. 446
Compulsory sales under the Clayton Act. 77, 341

RESTRAINTS ON ALIENATION.

See *Trusts*.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY.

Change in character of locality as ground for decree quieting title. 106

REVERSAL.

See *Appeal and Error*.

RIGHT OF PRIVACY.

See *Privacy, Right of*.

RIPARIAN RIGHTS.

See *Waters and Watercourses*.

ROMAN LAW.

Penal obligations in the Roman law. 117-119

RULE AGAINST PERPETUITIES.

As applied to charitable trust. 793
Interests subject to rule: limitation for life expectant upon estate void for remoteness. 341

S

SALES.

See also *Intoxicating Liquors; Limitation of Action; Pledges; Rescission; Restraint of Trade; Statute of Frauds; Vendor and Purchaser*.

Subject-matter of sale: After-acquired property: when title passes: possession of vendee. 229

Conditional sales: Effect of sale by conditional vendee. 217

Implied warranties: Waiver of breach by acceptance. 229

Warranties: remedies for breach: Measure of damages: for breach of warranty of seed after re-sale. 221

SCHOOLS AND SCHOOL DISTRICTS.

Mandamus for diploma for unqualified student allowed to take part in graduation exercises. 342

Right to enjoin school board enforcing rule to exclude members of teachers' union from schools. 230

SELF-DEFENSE.

Duty to retreat: Whether duty to retreat from illegal place of business. 544

SEPARATE ESTATE.

See under *Husband and Wife*.

SEPARATION AGREEMENTS.

See *Divorce; Husband and Wife (Contracts between husband and wife)*.

SERVICE.

See *Conflict of Laws; Foreign Corporations; Process*.

SHERIFFS AND CONSTABLES.

See also *Process*.

Resisting sheriff making wrongful attachment. 330

SHIPPING.

See *Admiralty; Carriers*.

SITUS.

See *Conflict of Laws*.

SLANDER.

See *Libel and Slander*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

SOVEREIGN.

See *Conflict of Laws; International Law.*

SPECIAL LEGISLATION.

See *Constitutional Law.*

SPECIFIC PERFORMANCE.

See also *Equity.*

General nature and scope of equitable relief: How far equity should relieve promisor against literal performance. 135-136

Plaintiff's delay where time is expressly of the essence. 791

Affirmative contracts: Agreement to operate railroad depot. 552

STARE DECISIS.

See also *Constitutional Law.*

Conflict between two co-ordinate courts of same state on constitutional question. 780

STATES.

See also *Bankruptcy; Conflict of Laws; Constitutional Law; Federal Courts.*

State statutes: whether superseded by Federal Employers' Liability Act of 1908. 439, 459

Tax on importers: whether beyond state's constitutional powers. 472-477

STATUTE OF FRAUDS.

Sales of goods, wares and merchandise: Goods in possession of vendee at time of sale. 791

STATUTE OF LIMITATIONS.

See *Limitation of Action.*

STATUTES.

See also *Conflict of Laws; Constitutional Law; Federal Courts.*

Interpretation: Construction of clause in Workmen's Compensation Act excluding other remedies. 227

Construction of uniform state laws. 541, 561

Contract to convey under statute making conveyance invalid. 553

Corporation tax: whether joint stock company taxable. 342

Federal Employers' Liability Act of 1908: whether it supersedes state statutes. 439, 459

"Loss, damage, or injury" under the Carmack Amendment. 217, 550

Statute creating new right: whether statutory remedy exclusive. 93, 102

Statute requiring contracts with government to be in certain written form. 453

What constitutes "scheme or artifice." 340

Whether statute changing procedure is retroactive. 875

STEAMSHIPS.

See *Admiralty; Carriers.*

STOCK.

See *Corporations.*

STOCKHOLDERS.

See *Corporations; Wills.*

STREET RAILWAYS.

See *Carriers; Railroads.*

STREETS.

See *Highways.*

STRIKES.

See *Trade Unions.*

SUBROGATION.

Rights of insurers, see under *Insurance.*

SUCCESSION.

See *Conflict of Laws; Corporations; Descent and Distribution; Legacies and Devises; Taxation.*

SUNDAY LAWS.

Sunday newspapers as a necessity. 557

SURETYSHIP.

See also *Bills and Notes.*

Surety on administration bond: recovery against by assignee of administrator. 333

Surety's defenses: on general principles of contract: Partnership as principal: effect of dissolution on continuing guaranty. 460

Surety's defenses: extension of time to principal: Whether affected by rise of suretyship as business undertaking. 314, 342

Surety's defenses: surrender or loss of securities: Whether affected by rise of suretyship as business undertaking. 314, 342

Bank's failure to set-off claim against principal debtor. 231

Surety's defenses: miscellaneous: Bank's failure to set-off claim against principal debtor. 231

SURVIVAL.

Of action, see under *Abatement and Revival; Death by Wrongful Act.*

SURVIVORSHIP.

Proof in case of death by common disaster. 461

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

T

TACKING.

Of adverse possession, see *Adverse Possession*.

TAXATION.

See also *Conflict of Laws; Constitutional Law*.

General limitations on the taxing power: Constitutional restrictions: taxation of importers by the states. 472-477

Constitutional restrictions: "uniformity": mortgage registry tax. 231

Constitutional restrictions: what is a tax on exports under the constitution. 471-484

Constitutional restrictions: whether tax on charter parties is tax on "articles exported." 471-472, 476-477, 483-484

Particular forms of taxation: Betterment taxes: validity of frontage assessment for paving street of varying width. 228

Federal corporation tax: whether joint stock companies are taxable under. 342

Federal income tax and the Sixteenth Amendment. 536, 558

Inheritance tax: application to property held in tenancy by the entirety. 558

Inheritance tax: on property passing by escheat. 455

Inheritance tax: taxation of real estate equitably converted. 343

Succession tax: registered bonds of the taxing state kept by non-resident at his domicile. 107

Transfer tax: when property already conveyed by testator to himself and wife as tenants by the entirety. 201

TEACHING OF LAW.

See *Law School*.

TENANCY BY THE ENTIRETY.

Effect of grantor conveying to himself and wife as tenants by the entirety. 201

TENANCY IN COMMON.

Right of tenant under oil lease from one tenant in common to compel a partition. 788

Tenancy in common in firm name and good will. 457

THEATRES.

Injunction against exclusion of critic. 93, 102

TITLE, OWNERSHIP AND POSSESSION.

See also *Adverse Possession; Choses in Action; Estates Tail; History of Law; Husband and Wife; International Law; Liens; Life Estates; Mortgages; Personal Property; Pledges; Property; Real Property; Sales; Trusts; Waters and Watercourses*.

Ownership: Nature of bailor's rights. 501-520

What constitutes ownership of chose in action. 816-821

Possession: Possession as necessary to action of trespass. 517-520

Rights and liabilities of a bailee as to bailor and strangers. 731-751

Things subject to ownership as property: Air space as corporeal realty. 525

Finding lost goods: Rights and liabilities of finder. 741-742

Chattels: Whether trespasser has property in chattels. 374-394

TORRENS ACT.

See under *Recording and Registry Laws*.

TORTS.

For particular torts, see *Dangerous Premises; Death by Wrongful Act; Libel and Slander; Negligence; Privacy, Right of; Trover and Conversion; Unfair Competition; Waste*.

For equity jurisdiction over, see *Equity; Injunctions*.

For torts in particular relations, see *Agency; Bailments; Bankruptcy; Banks and Banking; Carriers; Corporations; Landlord and Tenant; Master and Servant; Municipal Corporations; Pledges; Railroads; Receivers; Trade Unions; Trusts; Voluntary Associations*.

See also *Admiralty; Burden of Proof; Conflict of Laws; Contributory Negligence; Damages; Divorce; History of Law; Joint Wrongdoers; Jurisprudence; Legal Biography; Limitation of Action; Patents; Proximate Cause; Theatres; Trade Marks and Trade Names; Waters and Watercourses*.

Nature of tort liability in general: Culpable causation as essential element of tort principles. 611-612

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- Effect of bad motive in persuading tenants not to deal with plaintiff. 344
- Exceptions to rule of no liability without fault. 801-804
- Excuse as an element of tort principles. 612-616
- Liability for neglect of affirmative duty. 52-54
- Temporal damage as essential element of tort principles. 609-610
- Liability of maker or vendor of a chattel to third person injured by its use:** Liability for injury from defective automobile wheel. 866, 886
- Nature and grounds of liability: in general. 53
- Interference with business or occupation:** Effect of bad motive in persuading tenants not to deal with plaintiff. 344
- Liability of bishop ordering members of his faith to boycott plaintiff's newspaper. 886
- Refusal of manufacturer to sell to retailer. 77, 341
- Secondary boycott: whether *prima facie* tortious. 86
- Unusual cases of tort liability:** Knowingly and unlawfully causing the plaintiff to expend money to prevent liability under an indemnity contract. 559
- Limits of the doctrine of *Rylands v. Fletcher*. 804-815
- Defenses:** Defense by railroad that injured person was riding on a pass issued contrary to law. 785
- Justification in proper motive. 886
- Right to destroy property as reasonable protection against owner's wrong: killing dog who has bitten to ascertain rabies. 558
- TRADE MARKS AND TRADE NAMES.**
- Protection apart from statute: Accounting for profits due to infringement. 763, 792
- Injunction against infringement of design. 763, 792
- TRADE UNIONS.**
- See also *Constitutional Law; Schools and School Districts; Unfair Competition.*
- In general: Arbitration in Australia based on unionism. 23-25
- Attitude of courts towards disputes between labor and capital. 265-272
- Relief for wrongful expulsion from English trade unions. 868
- Strikes:** Prevention of strikes in Australia. 13-15, 28-34
- Boycotts:** Secondary boycott: legality of. 86
- TRANSFER OF STOCK.**
- See also *Corporations.*
- Transfer to trustees with power to vote. 433, 453
- TRESPASS DE BONIS.**
- See *History of Law (Common law actions).*
- TRIAL.**
- See also *Appeal and Error; Constitutional Law; Criminal Law; Evidence; Judicial Notice; Law and Fact; New Trial; Witnesses.*
- Modes of trial:** Present mode of jury trial unsatisfactory. 399-403
- Reception of evidence:** Present methods unsatisfactory. 399-400
- Province of court and jury:** Greater power advocated for the trial judge. 400-402
- Verdicts:** Affidavits of jurors received to show "chance" verdict. 885
- Joint tort-feasors: severance of damages. 344, 793
- TROVER AND CONVERSION.**
- See also *Mortgages; Pledges.*
- What constitutes conversion:** Exchange of securities by pledgee: whether impairment of pledgor's security need be shown. 107
- Liability for fraudulent sale of pledged stock at inadequate price after maturity of debt. 339
- Sale of chattel by conditional vendee. 217
- TRUSTS.**
- See also *Bankruptcy; Rule against Perpetuities; Vested, Contingent and Future Interests.*
- Creation and validity:** Validity of perpetual trust with preference to lineal descendants. 793
- Validity of voting trusts. 433, 453
- Cestui's interest in the res:** Life tenant's rights on acquisition of remainder. 345
- Life tenant's right to stock dividends. 551
- Life tenant's right to profits under sales properly made by trustee. 794
- Following trust property:** Confusion of trust funds with trustee's own property. 461

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- Rights and liabilities of third parties:** Constructive notice by deposit as "trustee." 232
 Recovery against trust estate for services rendered the trustee. 885
 Restraint on alienation of absolute interest: whether valid against assignee in bankruptcy. 557

- Restraints on alienation of cestui's interest:** Cestui having life estate: effect of acquisition of remainder. 345
 Spendthrift trust: whether an absolute equitable interest will pass to assignee in bankruptcy. 557

U

ULTRA VIRES.

See under *Corporations*.

UNFAIR COMPETITION.

See also *Restraint of Trade; Torts*.

By means unlawful as against third persons: Refusal to sell with purpose of illegally restraining trade. 77, 341

Secondary boycott: whether it should be illegal. 86

Interference with the making of contract: Secondary boycott: proposal to legalize. 86

Remedy by injunction: Particular instances. 763

UNINCORPORATED SOCIETIES.

See *Voluntary Associations*.

UNIONS.

See *Trade Unions*.

UNITED STATES.

See also *Constitutional Law*.

Whether government may sue on contract unenforceable against it because not in statutory form. 453

USE AND OCCUPATION.

See *Quasi-Contracts; Vendor and Purchaser*.

USES.

See *Rule against Perpetuities*.

V

VALUE.

Purchaser for, see *Bills and Notes*.

VENDOR AND PURCHASER.

See also *Quieting Title; Sales; Specific Performance*.

Rescission of contract: Rescission for fraud of vendor: effect of purchaser's statements as to expert knowledge. 560

Right of vendor to sue for use and occupation after rescission. 340

Rights and liabilities: Whether equity will permit a forfeiture of payments. 791

VERDICT.

See *Trial*.

VESTED, CONTINGENT AND FUTURE INTERESTS.

See also *Rule against Perpetuities; Trusts*.

Contingent remainders: after estate void for remoteness. 341

VOTING.

See *Constitutional Law; Corporations; Elections*.

VOLUNTARY ASSOCIATIONS.

Equitable protection of membership therein. 677-682

Religious societies: exclusion of member: interference by courts. 560

Trade unions: relief for wrongful expulsion from English trade unions. 868

Unincorporated associations: legal status in general. 407-408, 416-423

Unincorporated associations: personality of. 404-405, 416-423

W

WAGES.

The minimum wage in Australia. 15-22, 25-26, 34-37

WAIVER.

Of conditions in contract, legal effect, see *Insurance*.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Of defective performance by acceptance, see *Conditions Precedent*.

Of defenses to negotiable instruments, see *Bills and Notes*.

Of privilege by witness, see *Witnesses*.

WAR.

Alien enemies: expatriated citizens of belligerent countries as prisoners of war. 233

Contraband: application of doctrine of continuous voyage to conditional contraband shipped "to order." 195

Contracts between citizens of belligerent countries: jurisdiction of neutral courts. 108

Enemy property: condemnation of property owned by partnership partly composed of enemies. 795

Peace: failure of schemes to secure peace. 566-577

Peace: league to enforce peace. 577-581
Right of English court to condemn German non-contraband goods shipped on British vessel before war. 851

WAREHOUSEMEN.

Uniform Warehouse Receipts Act: construction of. 541, 561

Uniform Warehouse Receipts Act: wrongful pledge of warehouse receipts to innocent pledgee. 541, 561

WARRANTY.

In sales of personal property, see under *Sales*.

WASTE.

Right of holder of *interesse termini* to enjoin waste by tenant. 101

WATERS AND WATERCOURSES.

See also *Eminent Domain*.

Natural watercourses: riparian rights: Right against city for diversion. 108

Rights of riparian owners subject to rights of producer of artificial flow. 152-156

Natural water courses: obstruction, pollution and diversion: Diversion: authorized by municipality. 108

Diversion: rights of owner of artificial watercourse discharging into natural stream. 144-152

Appropriation and prescription: Right to retake water discharged into stream. 144-152

Water severed from stream: ownership of. 137-138

Artificial watercourses and dams:

Prescriptive right to compel continued maintenance of artificial flow. 142-144

Right to retake water discharged into natural stream if part of original project. 147-152

Right to stop artificial flow while in control of producer. 138-142

Rights of party bringing water from one river to another: summary of. 156-157

Public rights: Right of city to take water from navigable stream. 108

WIFE.

See *Husband and Wife; Marriage*.

WILLS.

Administration under, see *Executors and Administrators*.

See also *Conflict of Laws; Descent and Distribution; Legacies and Devises; Rule against Perpetuities; Trusts; Vested, Contingent and Future Interests; Witnesses*.

Execution: Stockholder in corporation made executor witnesses will. 795

Construction: Effect of making same person special and residuary legatee. 109

Gift over if legatee "dies before I do." 461

WITNESSES.

See also *Constitutional Law; Evidence; Wills*.

Competency in general: Stockholder in corporation named executor witnesses will. 795

Privilege against self-incrimination: whether notice to produce incriminating documents is violation of the privilege. 211, 223, 879

Privileged communications: Attorney and client: privilege of attorney not to disclose client's identity. 109

Physician: waiver in insurance policy. 462

Supplementing memory: Testimony of bookkeeper of large establishment who has no personal knowledge of facts recorded. 863, 880

WORK AND LABOR.

Regulation of, see *Constitutional Law; Police Power; Trade Unions*.

Workmen's compensation acts: see under *Master and Servant*.

BOOK REVIEWS

	PAGE
ABDUR RAHIM: The Principles of Muhammadan Jurisprudence	348
BALLANTINE: Problems in the Law of Contracts	563
BATES: Les Traités Fédéraux et la Législation des États aux États-Unis. . . .	799
BATY: Vicarious Liability	892
BLAKE: The Law of Architecture and Building	887
BOLLAND: Year Books of Edward II. Volume XI	893
BORCHARD: The Diplomatic Protection of Citizens Abroad	349
BOWERS: Clinical Studies in the Relationship of Insanity to Crime	798
BREWER: Rights and Duties of Neutrals	893
BROWN: The Prevention and Control of Monopolies	467
BURDICK: Cases on the Law of Public Service	891
CUSHING: Voting Trusts	237
DARUVALA: The Doctrine of Consideration	114
ELY: Property and Contract in their Relations to the Distribution of Wealth.	
Volumes I and II	110
FUEHR: The Neutrality of Belgium	796
GANAPATHI IYER: Hindu Law	348
GROTIUS SOCIETY, THE: Problems of the War. Volume I	894
HALL: Outline of International Law	240
HARLAN AND McCANDLESS: Federal Trade Commission, Its Nature and Powers	890
HARVEY AND BRADFORD: Federal Trade Commission Manual	890
HEALY: Pathological Lying, Accusation, and Swindling	346
JOHNSON AND JENKINSON: English Court Hand, A.D. 1066 to 1500	351
JOHNSON AND JENKINSON: Palæography, and the Practical Study of Court	
Hand. Parts I and II	115
JONES: Blackstone's Commentaries on the Laws of England	799
KIBLER: The Commodities Clause	797
KOCOUREK AND WIGMORE: Evolution of Law. Volumes I and II	236
MAITLAND AND MONTAGUE: A Sketch of English Legal History	351
NEWHALL: The Settlement of Estates in Massachusetts	894
OPPENHEIM: The Collected Papers of John Westlake on Public International	
Law	239
PALMER: Guide to the Law and Legal Literature of Spain	561
POUND: Report upon Uniformity of Laws Governing the Establishing and Regu-	
lation of Corporations and Joint Stock Companies in the American Republics	113

	PAGE
ROBSON: The Principles of Legal Liability for Trespasses and Injuries by Animals	466
SNELL: The Principles of Equity	888
STONE: Law and its Administration	465
THOMPSON: The Law of Sales of Stocks and Bonds	562
TYABJI: Principles of Muhammadan Law	348
WAXWEILER: Belgium Neutral and Loyal,	796
WHITEHOUSE: Equity Practice, State and Federal. Volumes I, II, and III . .	463
WILSON: The Hague Arbitration Cases	112
WOODBINE: Bracton de Legibus et Consuetudinibus Angliae. Volume I . . .	233
WRIGHTINGTON: The Law of Unincorporated Associations	563

TABLE OF CASES

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

	PAGE		PAGE
Albergen, The	219	Barth v. Pock	877
Alexander Seed Co., Caldwell v.	884	Bay State Street Ry. Co., Johnston v.	781
Alfred Nobel, The	195	Belden, Dickinson v.	109
Allen v. Camp	558	Berthoud, <i>In re</i>	871
Allen & Wheeler Co. v. Hanover Star Milling Co.	763	Bettman v. United States	340
Allen, S. S., Grocery Co. v. Bank of Buchanan County	874	Beyer, People's Land & Mfg. Co. v.	344
American Fire Insurance Co., Martyne v.	778	Bi-Metallic Investment Co. v. State Board of Equalization	550
American Sugar Refining Co., State v.	550	Bjornstern Bjornson, The	195
American Surety Co. v. Stebbins, Lawson & Spraggins Co.	547	Bliss v. Bliss	107
Anderson, Roberts v.	343	Board of Commissioners, Lavery v.	860 , 884
Arkansas State Fair Association v. Hodges	101	Boston & M. R. Co., Ashton v. . .	336
Armstead, Castle v.	340	Boston Safe Deposit & Trust Co. v. Collier	557
Ashton v. Boston & M. R. Co. . .	336	Bowles, Deitchman v.	460
Atlantic Coast Line R. Co. v. General Burnette	451	Brady, People v.	758
Austin Friars Steamship Co. v. Spillers & Baker	546	British & Chilean Steamship Co., Thames & Mersey Marine Ins. Co. v.	553
Ayers, Fitzgerald v.	461	British, etc. Ins. Co. v. Duder . .	102
Bagdon v. Philadelphia & Reading Coal Co.	880	Brown v. Smallwood	213 , 221
Bailey v. Baker Ice Machine Co.	766 , 776	Brown, W. P., Co., Droge Elevator Co. v.	106
Baker Ice Machine Co., Bailey v.	766 , 776	Brushaber v. Union Pacific R. R. Co. (36 Sup. C. 236)	536 , 558
Baldinger & Kupperman Mfg. Co. v. Manufacturers-Citizens Trust Co.	548	Bryan v. Vandalia R. Co.	547
Baldwin's Bank of Penn Yan v. Smith	204 , 217	Buckbee v. P. Hohenadel, Jr., Co. . .	221
Bank, Tatum v.	231	Buddendorff, Gulf, etc. R. Co. v. .	883
Bank of Buchanan County, Allen, S. S., Grocery Co. v. . .	874	Buick-Motor Co., McPherson v. . .	866 , 886
Barclay v. Barclay	457		
Barnes-Ames Co. v. S. S. Luigi . .	871	Cadwell v. Higgenbotham	229
Barron's Will, <i>In re</i>	794	Caldwell v. Alexander Seed Co. . .	884
		California Development Co., Title Insurance and Trust Co. v.	456
		Camden Iron Works, Wood v. . . .	104
		Camp, Allen v.	558
		Campbell, City of Rochester v. . .	874
		Canal-Louisiana Bank & Trust Co., Commercial National	

	PAGE		PAGE
Bank of New Orleans v. (36 Sup. C. 194)	541, 561	Fil v. United States Service Corporation	108
Carey v. Donohue (36 Sup. C. 386)	766, 776	Condon National Bank, Mad- den, v.	107
Carnell v. Harrison ([1916] 1 Ch. 328)	452	Cook v. Stockwell	453
Carrington v. Worcester Consol- idated St. Ry. Co.	337	Cooper v. Spring Valley Water Co.	775
Carroll v. Henderson	105	Couch, Scott v.	795
Carroll v. Knickerbocker Ice Co.	208, 227	Courtney v. Georger	854, 877
Carroll v. What Cheer Stables Co.	752	Cream of Wheat Co., The Great Atlantic & Pacific Tea Co. v.	77, 341, 446
Carta, State v.	782	Cross, Ellis & Co. v.	449
Carter v. Papineau (111 N. E. 358)	560	Cunard Steamship Co., Ma- loney v.	787
Caruth v. Gillespie	88, 106	Dacia, The	317
Castle v. Armstead	340	Daggett, State v.	227
Central Trust Co. v. Chicago Auditorium Association	873	Dail, Warren v.	553
Central Vermont Ry. Co. v. White	95, 98	Dale v. Guaranty Trust Co.	345
Chapman v. Dearman	781	Darbrinsky v. Pennsylvania Co.	99
Chesapeake & O. Ry. v. W. L. Ward Lumber Co.	217	Davies v. Maryland Casualty Co.	882
Chicago Auditorium Associa- tion, Central Trust Co. v.	873	Deal, Gray v.	225
Chicago, B. & Q. R. Co., Lind- say v.	435, 458	Dearman, Chapman v.	781
Chicago, etc. R. Co. v. United States, etc. Trust Co.	337	Deitchman v. Bowles	460
Churchill v. Rafferty	860, 884	Democratic Parish Committee, Foley v.	528, 550
City of Flint, Loranger v.	109	Detroit United Ry., Rathbone v.	344, 793
City of Louisville, Ewald's Ex- ecutor v.	780	Dickinson v. Belden	109
City of Macon, Kaplan v.	228	District Court, State <i>ex rel.</i> , Carlson v.	463
City of New York (Main Street), Matter of	332	Donk, Mercantile Trust Co. v.	314, 342
City of Rochester v. Campbell	874	Donohue, Carey v. (36 Sup. C. 386)	766, 776
City of Schenectady, Wands v.	793	Dooley v. Press Publishing Co.	857
Closser v. Strawn (227 Fed. 139)	776	Dotson v. Skraggs	778
Clyde Steamship Co., Walker v.	227	Doyle, Feeley v.	226
Colgate, Jacobus v.	875	Drinkle, Steedman v.	791
Collier, Boston Safe Deposit & Trust Co. v.	557	Droge Elevator Co. v. W. P. Brown Co.	106
Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Co. (36 Sup. C. 194)	541, 561	Duder, British, etc. Ins. Co. v.	102
Commonwealth, Pippin v.	224	Dunlop Pneumatic Tyre Co. v. Selfridge & Co.	99
Commonwealth, <i>ex rel.</i> Stanton v. Francies	326, 333	Du Pont De Nemours Powder Co., Masland v.	218
Commonwealth v. Tradesmen's Trust Co.	461	Durney, <i>In re</i>	787
Compagnie Universelle de Tele- graphie et de Telephonie Sans		Duvall v. National Ins. Co.	784
		Dye v. Denver & Rio Grande R. Co.	775
		Eastern Importing & Mfg. Co., Sheehy Co. v.	336
		Eicholz, Malzy v.	555

	PAGE		PAGE
El Dia Ins. Co. v. Sinclair	554	Gillespie, Caruth v.	88, 106
Elliot v. Elliot	878	Givens v. Pierson	863, 880
Ellis & Co. v. Cross	449	Golden, Paris v.	770, 782
Elzey v. State	786	Gordon v. Wyness	338
Empire Cotton Oil Co., Hancock v.	449	Gray v. Deal	225
Employers' Assurance Corporation v. Industrial Accident Commission	208	Great Atlantic & Pacific Tea Co., The, v. Cream of Wheat Co.	77, 341, 446
Emporium Forestry Co., Schwab v.	104	Green, Supreme Council of Royal Arcanum v.	98
Englebreton v. Industrial Accident Commission	208, 227	Greene, Sieg v.	229
Enterprise, The	789	Greenlands, London Association for the Protection of Trade v.	786
Eumaeus, The	795	Griggs v. State	448
Evans v. Prince's Bay Oyster Co.	101	Gross v. Mendel	873
Ewald's Executor v. City of Louisville	780	Guaranty Trust Co., Dale v.	345
Fahey, Moyers v.	328, 331	Gulf Refining Co. of La. v. Hayne	788
Feeley v. Doyle	226	Gulf, etc. R. Co. v. Buddendorff	883
Fidelity & Deposit Co. v. Industrial Accident Commission	883	Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.	763, 792
First National Bank of Coweta, National Bank of Commerce v.	450	Hammermill Paper Co., Nashua River Paper Co. v.	881
First National Bank of Henderson v. Johnson	450	Hancock v. Empire Cotton Oil Co.	449
Fish v. Vanderlip	556	Handlin, McCoy v.	103
Fisher, Sweitzer v.	342	Hanish v. United States (227 Fed. 584)	211, 223
Fitzgerald v. Ayers	461	Hanover Star Milling Co., Allen & Wheeler Co. v.	763
Foley v. Democratic Parish Committee	528, 550	Hanover Star Milling Co. v. Metcalf	763, 793
Fourth National Bank of Nashville v. Stahlman	320, 330	Harper v. Virginian Ry. Co.	552
Fox, Jesse L. Lasky, etc. Co. v.	784	Harrison, Carnell v. ([1916] 1 Ch. 328)	452
Francies, Commonwealth ex rel. Stanton v.	326, 333	Hayne, Gulf Refining Co. of La. v.	788
Frank's Estate, <i>In re</i>	555	Heaton's Estate, <i>In re</i>	551
Frederick v. Owens	230	Hegdale v. Wade	560
Freeman v. United States (227 Fed. 732)	83, 99	Heim v. McCall	452
Friedland, The	195	Henderson, Carroll v.	105
Fuller v. Webster	217	Hewett's Settlement, <i>Re</i>	341
Fursman, People ex rel.	230	Higginbotham, Cadwell v.	229
Gallagher v. Stern	457	Hill v. State	544
Gannon, Manning v.	452	Hillyer, People v.	430, 459
Garden v. Moore	885	Hodges, Arkansas State Fair Association v.	101
Gates, Thorburn v.	442	Hohenadel, P., Jr., Co., Buckbee v.	221
Gegiow v. Uhl	215	Hood Rubber Co., McArthur v.	106
General Burnette, Atlantic Coast Line R. Co. v.	451	Hotchkiss, Wilson v.	791
Georger, Courtney v.	854, 877	Hubbard v. Lowe	220
Gibson, People v.	879	Huffman v. Rickets	878
Gilchrist v. Mystic Workers of the World	462	Hulbert v. Hulbert	755, 785

	PAGE		PAGE
Illinois Central R. Co. v. Mes-		London Association for the Pro-	
sina	785	tection of Trade v. Green-	
Illinois Publishing & Printing		lands	786
Co., O'Malley v.	335	Longino, State v.	80, 103
Industrial Accident Commis-		Loranger v. City of Flint	109
sion, Employers' Assurance		Lottow, Rubenstein v.	872
Corporation v.	208	Lowe, Hubbard v.	220
Industrial Accident Commis-		Luthy v. Ream	433, 453
sion, Englebreton v.	208, 227		
Industrial Accident Commis-		McAfee v. Newberry	783
sion, Fidelity & Deposit Co. v.	883	McAnany v. Shipley	105
		McAninch, State v.	334
Jacobus v. Colgate	875	McArthur v. Hood Rubber Co.	106
Jensen v. Southern Pacific Co.	199	McCall, Heim v.	452
Jessup v. Smith	885	McCampbell v. McCampbell . .	331
Johnson, First National Bank		McCoy v. Handlin	103
of Henderson v.	450	McDonough, <i>Ex parte</i>	110
Johnston v. Bay State Street		MacDowell, Matter of	793
Ry. Co.	781	McNichols, Pulitzer Pub. Co. v.	557
Jones v. R. L. Polk & Co. . . .	533	McPherson v. Buick-Motor Co.	866, 886
Jones v. Woodward	226		
Jones' Settlement, <i>In re</i>	228	Madden, <i>In re</i>	752
		Madden v. Condon National	
Kaili, Oahu Ry. Co.	224	Bank	107
Kaplan v. City of Macon	228	Maloney v. Cunard Steamship	
Kellogg, People v.	343	Co. (111 N. E. 835)	787
Kelly v. National Society of		Malzy v. Eicholz	555
Operative Printers	868	Manning v. Gannon	452
Kim, The	195	Mansfield, Palmer v.	558
Klatzl, Matter of (216 N. Y. 83)		Manufacturers-Citizens Trust	
	201, 558	Co., Baldinger & Kupperman	
Knickerbocker Ice Co., Carroll		Mfg. Co. v.	548
v.	208, 227	Marconi Wireless Telegraph Co.	
Kuryer Pub. Co. v. Messmer . .	886	of America v. Simon (227 Fed.	
Kuter v. State Bank of Holton .	454	906)	339
		Marquardt's Estate, <i>In re</i> . . .	549
Lake Shore & Michigan South-		Martyne v. American Fire In-	
ern Ry. Co. v. Sterling	790	surance Co.	778
Lane, Thomas v.	226	Maryland Casualty Co., Davies	
Langham v. State	102	v.	882
Lasky, Jesse L., etc. Co. v. Fox	784	Masland v. Du Pont De Nemours	
Lavery v. Board of Commission-		Powder Co.	218
ers	860, 884	Matheson, Pearson v.	525
Legarda v. Saleeby	772, 790	Maxwell Motor Co., Weaver v.	104
Lehfeldt, <i>In re</i>	548	Mendel, Gross v.	873
Lem v. Wilson	339	Mercantile National Bank,	
Leslie, Matter of the Estate of		Wehrle v.	222
Mrs. Frank	521	Mercantile Trust Co. v. Donk	
Liebmann, Rex v.	233		314, 342
Lindsay v. Chicago, B. & Q. R.		Messina, Illinois Central R. Co.	
Co.	435, 458	v.	785
Linnan, Phelps v.	879	Messmer, Kuryer Pub. Co. v. .	886
Little, Tanner v. (36 Sup. C. 379)	779	Metcalf, Hanover Star Milling	
Liverpool & London & Globe		Co. v.	763, 793
Ins., Scott v.	458	Missouri, Oklahoma, etc. Co. v.	
Lombardo, United States v. . .	876	West	223

	PAGE		PAGE
Mode, <i>Ex parte</i>	780	Pearson v. Matheson	525
Moore, Garden v.	885	Peninsula Produce Exchange, New York, etc. R. Co. v. (36 Sup. C. 230)	550
Moss v. Smith	875	Pennsylvania Co., Darbrinsky v.	99
Moyers v. Fahey	328, 331	People v. Brady	758
Muller v. National Surety Co.	333	People <i>ex rel.</i> Fursman	230
Mullin, Seaboard Air Line Ry. v.	789	People v. Gibson	879
Mystic Workers of the World, Gilchrist v.	462	People v. Hillyer	430, 459
Nashua River Paper Co. v. Ham- mermill Paper Co.	881	People v. Kellogg	343
National Bank of Commerce v. First National Bank of Coweta	450	People v. Richardson	455
National Bank of Commerce v. United States	216	People v. Schmidt	538
National Ins. Co., Duvall v.	784	People v. Traves	314, 342
National Newspapers' Associa- tion, United Press Associa- tion v.	551	People's Land & Mfg. Co. v. Beyer	344
National Society of Operative Printers, Kelly v.	868	Phelps v. Linnan	879
National Surety Co., Muller v.	333	Philadelphia & Reading Coal Co., Bagdon v.	880
Newberry, McAfee v.	783	Philadelphia & Reading Ry. Co. v. United States	760
New Jersey Title Guaranty & Trust Co. v. Parker	881	Pierson, Givens v.	863, 880
New York v. Sage	427	Pillsbury, Western Indemnity Co. v.	199
New York Central & Hudson R. R. Co., Winfield v.	439, 459	Pinkerton v. Pratt	555
New York, etc. R. Co. v. Penin- sula Produce Exchange (36 Sup. C. 230)	550	Pippin v. Commonwealth	224
New York, etc. Steamship Co., United States v.	453	Piqueron, Sackheim v.	95, 98
Newton, Wheeler v.	97	Pitney v. State of Washington (36 Sup. C. 385)	779
Northwestern Nat'l Life Ins. Co., Roberts v.	225	Pock, Barth v.	877
Notaseme Hosiery Co., Straus v.	763, 792	Polk, R. L., & Co., Jones v.	533
Oahu Ry. Co. v. Kaili	224	Pratt, Pinkerton v.	555
Ockerman v. Woodward	323, 337	Press Publishing Co., Dooley v.	857
O'Malley v. Illinois Publishing & Printing Co.	335	Prince's Bay Oyster Co., Evans v.	101
Orpen v. Watson	213, 221	Pulitzer Pub. Co. v. McNichols	557
Ostro v. Ostro	455	Pursell Mfg. Co., 78th Street & Broadway Co. v.	459
Overland Auto Co. v. Winters	549	Rafferty, Churchill v.	860, 884
Owens, Frederick v.	230	Raich, Truax v. (36 Sup. C. 7)	219
Palmer v. Mansfield	558	Ransom, Van Ness v.	100
Palmer v. Palmer	206, 222	Rast v. Van Deman & Lewis Co. (36 Sup. C. 370)	779
Papineau, Carter v. (111 N. E. 358)	560	Rathbone v. Detroit United Ry.	344, 793
Paris v. Golden	770, 782	Ream, Luthy v.	433, 453
Parker, New Jersey Title Guar- anty & Trust Co. v.	881	Rex v. Liebmann	233
		Rex v. Tshingwayo	222
		Richards v. Steuben County	460
		Richardson, People v.	455
		Richter, Titcomb v.	232
		Rickets, Huffman v.	878
		Roberts v. Anderson	343
		Roberts v. Northwestern Nat'l Life Ins. Co.	225
		Roumanian, The	851

	PAGE		PAGE
Royal Exchange Assur. Co., Stamey v.	334	State, Griggs v.	448
Rubenstein v. Iottow	872	State, Hill v.	544
Sackheim v. Piqueron	95, 98	State, Langham v.	102
Sage, New York v.	427	State v. Longino	80, 103
Saleeby, Legarda v.	772, 790	State v. McAninch	334
Schmidt, People v.	538	State v. Selengut	330
Schwab v. Emporium Forestry Co.	104	State, Smith v.	220
Scott v. Couch	795	State, Thompson v.	332
Scott v. Liverpool & London & Globe Ins.	458	State Bank of Holton, Kuter v. .	454
Seaboard Air Line Ry. v. Mullin	789	State Board of Equalization, Bi- Metallic Investment Co. v. .	550
Security Bank of New York, Wolfen v.	777	State of Washington, Pitney v. (36 Sup. C. 385)	779
Selengut, State v.	330	Steamship Luigi, Barnes-Ames Co. v.	871
Selfridge & Co., Dunlop Pneu- matic Tyre Co. v.	99	Stebbins, Lawson & Spraggins Co., American Surety Co. v. .	547
78th Street & Broadway Co. v. Pursell Mfg. Co.	459	Steedman v. Drinkle	791
Sheehy Co. v. Eastern Import- ing & Mfg. Co.	336	Sterling, Lake Shore & Michigan Southern Ry. Co. v.	790
Shibley, McAnany v.	105	Stern, Gallagher v.	457
Shubert, Woolcott v.	93, 102	Steuben County, Richards v. .	460
Sieg v. Greene	229	Stockwell, Cook v.	453
Simon, Marconi Wireless Tele- graph Co. of America v. (227 Fed. 906)	339	Straus v. Notaseme Hosiery Co. 763, 792	776
Sinclair, El Dia Ins. Co. v. . .	554	Strawn, Closser v. (227 Fed. 139)	776
Skrags, Dotson v.	778	Supreme Council of Royal Arca- num v. Green	98
Smallwood, Brown v.	213, 221	Switzer v. Fisher	342
Smith, Baldwin's Bank of Penn Yan v.	204, 217	Tanner v. Little (36 Sup. C. 379)	779
Smith, Jessup v.	885	Tatum v. Bank	231
Smith, Moss v.	875	Thames & Mersey Marine Ins. Co. v. British & Chilean Steamship Co.	553
Smith v. Smith	331	Thomas v. Lane	226
Smith v. State	220	Thompson v. State	332
Southern Pacific Co., Jensen v. .	199	Thorburn v. Gates	442
Spillers & Baker, Austin Friars Steamship Co. v.	546	Thorpe, Venner's Electrical Cooking & Heating Appli- ances ([1915] 2 Ch. 404) . .	335
Spring Valley Water Co., Cooper v.	775	Titanic, The	448
Stahlman, Fourth National Bank of Nashville v.	320, 330	Titcomb v. Richter	232
Stamey v. Royal Exchange As- sur. Co.	334	Title Insurance & Trust Co. v. California Development Co. .	456
Stanton, Francies, Common- wealth <i>ex rel.</i> , v.	326, 333	Tradesmen's Trust Co., Com- monwealth v.	461
State v. American Sugar Refin- ing Co.	550	Traves, People v.	314, 342
State <i>ex rel.</i> Carlson v. District Court.	463	Truax v. Raich (36 Sup. C. 7) .	219
State v. Carta	782	Tshingwayo, Rex v.	222
State v. Daggett	227	Uhl, Gegiow v.	215
State, Elzey v.	786	Union Pacific R. R. Co., Brus- haber v. (36 Sup. C. 236) 536, 558	536, 558
		Unione Austriaca di Naviga-	

	PAGE		PAGE
zione, Watts, Watts & Co., Ltd. v.	108	Ward, W. T., Lumber Co., Chesa- peake & O. Ry. v.	217
United Press Association v. Na- tional Newspapers' Associa- tion	551	Warren v. Dail	553
United States, Bettman v.	340	Watson, Orpen v.	213, 221
United States, Freeman v. (227 Fed. 732)	83, 99	Watts, Watts & Co., Ltd. v. Unione Austriaca di Naviga- zione	108
United States, Hanish v. (227 Fed. 584)	211, 223	Weaver v. Maxwell Motor Co.	104
United States v. Lombardo	876	Weber, <i>Ex parte</i>	233
United States, National Bank of Commerce v.	216	Webster, Fuller v.	217
United States v. New York, etc. Steamship Co.	453	Wehrle v. Mercantile National Bank	222
United States, Philadelphia & Reading Ry. Co. v.	760	Weightman, Wheeler v.	231
United States, Woo Wai v.	100	West, Missouri, Oklahoma, etc. Co. v.	223
United States Service Corpora- tion, Compagnie Universelle de Telegraphie et de Tele- phonie sans Fil v.	108	Western Indemnity Co. v. Pills- bury	199
United States, etc. Trust Co., Chicago, etc. R. Co. v.	337	What Cheer Stables Co., Carroll v.	752
Vandalia R. Co., Bryan v.	547	Wheeler v. Newton	97
Van Deman & Lewis Co., Rast v. (36 Sup. C. 370)	779	Wheeler v. Weightman	231
Vanderlip, Fish v.	556	White, Central Vermont Ry. Co. v.	95, 98
Van Ness v. Ransom	100	Wilson v. Hotchkiss	791
Venner's Electrical Cooking & Heating Appliances v. Thorpe (1915] 2 Ch. 404)	335	Wilson, Lem v.	339
Virginian Ry. Co., Harper v.	552	Winfield v. New York Central & Hudson R. R. Co.	439, 459
Wade, Hegdale v.	560	Winters, Overland Auto Co. v.	549
Wakin v. Wakin	559	Wolf Brothers & Co., Hamilton- Brown Shoe Co. v.	763, 792
Walker v. Clyde Steamship Co.	227	Wolfin v. Security Bank of New York	777
Wands v. City of Schenectady	793	Wood v. Camden Iron Works	104
		Woodward, Jones v.	226
		Woodward, Ockerman v.	323, 337
		Woollcott v. Shubert	93, 102
		Woo Wai v. United States	100
		Worcester Consolidated St. Ry. Co., Carrington v.	337
		Wyness, Gordon v.	338



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Ezra Ripley Thayer

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EZRA RIPLEY THAYER

EZRA RIPLEY THAYER was born in Milton, Massachusetts, on February 21st, 1866. His father, James Bradley Thayer, was for nearly thirty years a professor in the Harvard Law School, a man of rare scholarship, and one of the most respected and best loved teachers the School has ever had. His mother, Sophia Bradford Ripley, granddaughter of the Reverend Ezra Ripley, of the Old Manse in Concord, Massachusetts, and descended from William Bradford, the early colonial governor, was a highly talented woman of the finest New England type. Their second son, Ezra, combined some of the best qualities of both parents. Educated in the public schools of Cambridge, and after a year with a private tutor at Athens, Greece, in Hopkinson's School for Boys, he entered Harvard College with the class of 1888. After graduation he studied in the Harvard Law School and took his degree as a bachelor of laws in 1891. The following year he served as secretary to Mr. Justice Gray of the United States Supreme Court, and then began the practice of law in Boston with the firm of Warren and Brandeis. In June, 1898, he married Ethel Randolph Clark, and after that made his home in Boston. His widow, a son, James Bradley, and two daughters, Eleanor Arnold and Ethel Randolph, are living. In 1896 Thayer became a member of the firm of Brandeis, Dunbar and Nutter, and in 1900 a partner in the firm of Storey, Thorndike, Palmer and Thayer. In 1910 he was appointed to succeed the late James Barr Ames as Dean of the Harvard Law

School, and giving up his practice devoted himself to teaching and the administration of the School. In 1913 he was offered an appointment to the Supreme Judicial Court of Massachusetts, but declined the offer. On September 14th, 1915, at the age of forty-nine, in the fullness of his powers, and at the beginning almost of what promised to be a most distinguished and useful career in the field of education, he died.

One July day some thirty-five years ago a small boy timidly inquired from an official of the Cambridge High School whether he had passed his examinations and had been admitted to the school. The official asked whether the inquirer thought a fellow who had got more than 90 per cent in all his examinations would pass, and on receiving an affirmative answer told the boy that he had passed. The boy was Thayer, then thirteen or fourteen years old. The promise of this early achievement was more than fulfilled. Thayer easily led his class throughout its college course. Such was his ability that an average of not more than four or five hours a day sufficed for his studies. The rest of his time was given to other pursuits. He played baseball on his class nine, was a member of a number of college societies, and joined in various social activities. In the Law School his intellectual superiority was equally marked. In a class which included not a few exceptionally good men, he was always first and maintained his leadership without exertion.

It is by no means an invariable rule that a first scholar, either in college or in the Law School, makes the best mark in after life. But Thayer's preëminence did not come from the laborious toil of one striving merely for high rank, nor from the superficial aptitude for cramming which may enable a man to acquire for use in examinations information that will never again be at his service. He had extraordinary intellectual powers and capacity, a brain that retained as easily as it absorbed, a memory so tenacious that five years after he had finished the study in the Law School of Ames's Cases on Torts he knew by name and could state the essential facts of each case in the book, more than a hundred and eighty in all. To talk with Thayer on any subject, especially any legal subject, was a keen mental stimulus. His mind to a remarkable degree had the quality described as "edge." Any discussion with him produced an immediate reaction. The most sluggish intellect was

aroused by his animation, while the precision of his mental processes rebuked and punished loose thought and inexact or illogical reasoning.

With such an equipment it was easy to predict success for Thayer as a practitioner, but such equipment alone would not have brought the success that he actually attained. To any matter with which he was entrusted Thayer gave an amount of energy and heart not at all limited by the importance of the subject. He felt that every client was entitled to his best efforts and no pains were too great, no preparation too minute, if calculated to increase the probability of success. Nothing was left to chance, and thoroughly a master of legal procedure and of legal strategy, he overlooked no honorable means of advancing his client's cause. As a junior he was ready and able to assume full responsibility, and relieved his senior of all anxiety lest anything should be forgotten; as senior counsel he made sure that the ground was fully covered. No business turned over to him had to be followed up.

Thayer practiced law in accordance with the highest standards and the best traditions of the bar. Any conduct savoring of pettifoggery or chicanery was abhorrent to him, and he could not tolerate such conduct in others. His keen sense of honor would brook nothing questionable. He served for a number of years on the grievance committee of the Boston Bar Association, and as its secretary with characteristic energy and method organized and systematized the work of the committee. The ethics of the profession were more to him than empty platitudes or counsels of perfection. They were moral principles intended for actual guidance. It was a peculiarly happy selection that made him a member and secretary of the committee appointed by the American Bar Association to frame a code of ethics. To the duties of this committee he gave much time, and contributed largely to the result of its labors, a code that has been adopted substantially unchanged by the bar associations of about half the states in the Union.

In 1910 Thayer was asked to become Dean of the Harvard Law School. He had then attained a distinguished position at the bar and had a large and important business. Already his friends looked forward to the possibility and probability of a great judicial career. Acceptance of the appointment meant a renunciation of the active practice of the law and a serious diminution in his chances

of an appointment to the bench. Although he felt at the time no decided inclination for teaching, service in the Law School appeared to Thayer as the higher opportunity for usefulness. He accepted the appointment and threw himself with his whole heart and soul into the new work. When three years later the offer came of a position on the Supreme Judicial Court he declined it, feeling that whatever his personal inclinations, duty required that, having set his hand to the plough, he should not turn back, especially at a time when doing so would be peculiarly embarrassing to the School.

The five years of Thayer's service as Dean showed a rapid and steady development. To maintain the standard set by Dean Ames as a teacher and an administrator was a task possible only for the highest ability. To do this, coming from active practice, without any real interval of preparation, was possible only for the highest ability coupled with extraordinary exertions. Thayer had the ability and made the exertions. While he was Dean the Law School suffered no diminution in prestige or in solid progress.

The man who had felt no special inclination to teach and had doubted whether he had any special aptitude for teaching left upon his pupils no doubt of his capacity. Each year of his service increased his reputation among the students. He freely gave them his time far beyond the mere requirements of the classroom. Regardless of his own convenience, he remained after every lecture as long as any individual was left who desired to ask questions or discuss legal problems. Intellectual powers such as had brought him success in practice it is not easy to turn at once with equal success to teaching; but the intellectual activity, the swiftness of thought, the closeness of reasoning, the stimulating personality, the untiring devotion to work in hand that had always distinguished Thayer, rendered him in a constantly greater degree inspiring as a teacher.

In the administrative work of his office Thayer was no less successful. He was confronted with problems arising not only from the rapidity with which the School had grown, but also from a change of view as to the proper functions of the law and as to the duties of lawyers. He felt the growing and well-founded belief in the community that the law did not satisfactorily fill its place in

modern civilization, that lawyers did not render to the community the service due from them. He understood that these deficiencies must be remedied. To ensure not only the future success of the School but also the full discharge of its obligations required a development in harmony with these newer ideas. He secured the services of the ablest representatives of such views and started the School on a new era of leadership and supremacy. Thayer was not actuated in this course by any spirit of opportunism. Although brought up in the Common Law and not by nature or by training inclined to extreme sociological views his mind was unusually receptive and, like the Common Law itself, capable of continuous growth and expansion. He could appreciate the force of new theories and had the breadth of outlook carefully to consider and if convinced to adopt such theories even if opposed to his preconceived opinions. It was from full conviction that he used his influence and power as a rejuvenating force.

As to the methods and policy of the School in matters of instruction Thayer had definite and clear-cut views. He knew that true education, especially in the law, consists primarily in stimulating the search for truth and cultivating the spirit of individual and independent analysis and investigations. He knew that these results are best obtained by the play upon the student of minds of differing types. He sought to organize the course of instruction with these ends in view. His ambition was to maintain and raise the standard and to make the Harvard Law School not only a centre, but the centre, of legal education. Mere size was not important. To achieve his purpose required that the material should be of the best, that the School should appeal to and serve, not the greatest number, but the highest type, of students. In the first year of his administration the faculty increased the amount of work required in the second and third years from ten hours a week to twelve and provided that no one could remain after the second year who failed to get for that year at least five per cent above the usual passing mark. These changes caused a falling off in the number of students; but Thayer rightly felt that the improvement in quality was necessary in order successfully to maintain the pre-eminence of the School and to preserve with large classes that "absorbed and excited interest" which, as he said, had always marked the work of its best scholars. Fully conscious himself of

the exacting requirements of a real legal education and of the paramount importance of such an education adequately to fit a man for a worthy legal career, he deprecated the practice of students engaging in occupations such as created a division of interests. Anyone who recognizes the necessity of elevating the legal profession, of maintaining it as a real profession aiming primarily at efficient service and not at pecuniary gain, will fully sympathize with such a policy, and must feel that in following this course Thayer was rendering service of great value, not only to the School but to the public, a service the more necessary at a time when the practice of the law tends to be regarded only as a desirable means of earning a living, and the bar is in much need of an awakening to its public responsibilities.

A means towards further establishing the reputation of the School and promoting the cause of legal education was the introduction of postgraduate study for the degree of doctor of laws. It is hardly possible that such a course of study should ever be undertaken by numbers commensurate with the cost, but to provide the opportunity and so increase interest in law as a science, to turn out even a small number of real legal scholars, appeared to Thayer clearly a part of the duties of the Law School. Nor can it be doubted that the resulting benefit is worth both to the community and to the School far more than the cost.

Education was not to Thayer mere pedantry. He valued it as an essential part of the equipment of a man prepared to play his part in the world. Not himself a deeply learned black letter lawyer, he could sympathize with those who were, if their interest in such learning did not exclude interest in law as a human science. To him the law was not a bundle of dry husks; it was a part of civilization. He loved it as a living and growing thing. A firm believer in the common law, he was deeply interested in it historically, but more deeply interested in its development and in working out the processes of adjustment required by changing conditions. His devotion to legal principles never blinded him to the necessity of administering justice. In an excellent address last winter before The Law Association of Philadelphia he pointed out the urgent importance of adapting legal methods and procedure to the conditions and needs of modern life. His mind was too active to dwell only on the past, but his judgment was too sound to be

led astray by ill-considered suggestions of changes proposed as panaceas.

Taking his position in the Law School was far from meaning for Thayer a life of academic seclusion. He realized the importance of remaining in close contact with active professional life, even if his intense interest in the affairs of the world relating to law would have permitted any such retirement. While abstaining wholly from practice, he continued to serve on the council of the Boston Bar Association, became a member of the executive committee of the Massachusetts Bar Association, and kept fully abreast of all that was going on in legal circles.

Thayer had perhaps a finer legal mind than any man in his generation. Some might excel him in profound learning as to special subjects, some in subtlety of thought, some in forensic oratory. But none excelled him in the combination of perception, concentration, power of analysis, ability to grasp essential facts, understanding of fundamental principles, openness of mind, readiness to apprehend and accept or combat opposing views, united with capacity to apply all his powers and all his knowledge to the subject before him. His talents were such as assured and entitled him to his success as a practitioner, and his even greater growing success as a teacher and an educator. The same talents would equally have assured his success as a judge had he taken a place upon the bench.

The qualities that endeared Thayer to a wide circle of loving and admiring friends are seldom found coupled with such a high intellectual endowment. A fluent and always interesting talker, he was at the same time an interested listener. His buoyancy of spirit and unusually keen sense of humor rendered him a delightful companion. Devoted to his duties, whatever they might be, he was not absorbed in them to the exclusion of any care for the concerns of others. He responded immediately and fully to any call for sympathy. Capable of biting sarcasm, he seldom if ever employed his weapon to inflict unmerited wounds. Loyal to the core and incapable of a mean or dishonorable act, he deserved and received unbounded confidence. Fond of argument and justly tenacious of his opinions, he was not dogmatic and was singularly open to conviction and ready to acknowledge a mistake. Quick to discern and to scorn any sham, he was tolerant of inexperience

and of honest lack of capacity, while no one was more ready to recognize or more eager to commend ability and merit in another, whether friend or opponent. Always generous, he was happily able to gratify his wish to help others, and unostentatiously extended aid to many. One young man of promise, whose good work he had noticed, was when starting in practice relieved of a serious handicap by Thayer's unsolicited offer to guarantee his office rent for a year. Without the knowledge of his friends he devoted far the greater part of his salary from the Law School to the assistance of needy students and others.

Thayer was a man of strong likes and dislikes and quick to form opinions. But he was by nature just and intellectually honest. He did not allow his prepossessions or his prejudices to govern him or adhere to an opinion once formed if it did not stand the test of analysis. He was unflinching in his judgments of men's acts, but not from any hardness. Many times in his work on the grievance committee of the Bar Association he gave a helping hand to men whose conduct he had justly condemned and assisted them in their efforts to make amends and to reform. His relations to his family were ideal and in the midst of exacting work his domestic life was a constant solace. The intellectual side of his nature never overshadowed the human side. As he matured his character and disposition mellowed; he became increasingly considerate of the feelings of others and any early tendency towards the expression of hasty judgments or towards thoughtless cynicism of speech disappeared. His mind shone as brightly as ever, but with a softer light.

The burden that Thayer assumed in becoming Dean of the Law School was very heavy. His character and ideals made acceptance of the post a pledge of all that was in him, of his very life, to successful performance of its duties. His nature was not of the easy-going sort that can be satisfied by avoiding failure, nor was his temperament such that he could forget his responsibilities and give himself up care free to relaxation. To do all things that the interests of the School required, to leave nothing undone that could benefit the School, to develop his own talents to their fullest extent, were with Thayer paramount obligations to which other considerations were made to give way. Praise was insufficient if he failed to satisfy his own standards. His position made demands upon him

which grew with what they fed on; his task was never finished, even temporarily; his mind worked unceasingly. After five years of unsparing labor and constant strain his health became impaired, and this led to his death, in the prime of life and the prime of his usefulness.

The loss suffered by Thayer's death cannot be measured. To the community and to the Law School he gave the service of his great intellectual powers and ripening experience. To his students he gave without stint or measure the best fruits of a wonderful mind and an almost inspired enthusiasm. To his friends he gave a heart pure as a child's, tender as a woman's, strong as a man's. The work of such an one may be done by others, but his place can never be filled.

William H. Dunbar.

It was a large undertaking to succeed James Barr Ames, cut off at the high tide of his fame as a scholar, a teacher and an administrator. It was a large achievement to meet the measure of that undertaking in five brief and heavily-burdened years. After Thayer had proved himself equal to the exacting measure set up by those who had gone before him and had given promise of becoming not the least of that goodly company, it was indeed a hard fate that took him off before the promise could be fulfilled.

Thayer had scant opportunity to show to the world his powers as a legal scholar. A prize essay, written while a candidate for his professional degree, a paper in the Harvard Law Review on a difficult point in the law of torts, three bar-association addresses, one of them published reluctantly after much urging, and a brief note as to the function of teachers of law, give a wholly inadequate picture. Intense conscientiousness impelled him to patient canvassing of all the authorities. He was almost morbidly anxious to be absolutely accurate and to present nothing that was not well matured. He was severely critical and consistently applied his critical powers to his own work. Accordingly he made repeated redrafts of everything that he wrote, and in any event would never have written much in point of quantity. "After all," he said more than once, "the reputation of the school will suffer no injury from

what I do not write." But he had a keen scent for the cases which were significant in the maze of contemporary law reports, a power of reducing jural situations to their lowest terms, and a faculty of seeing through a mass of legal materials and perceiving a principle by which the inert mass might be given life. Moreover, although a man of positive convictions, he was able to detach himself from prepossessions, to perceive and duly weigh all relevant considerations, and to look at the larger aspects of a question, in a time when so many legal questions are social questions also, without losing his footing upon the solid ground. To some extent he had exhibited these qualities in the little that he published. To some extent they are shown in more than one unfinished manuscript to which he had devoted much thought and labor, one of which, it is hoped, may prove ripe for publication. To some extent they are witnessed by a mass of patiently elaborated notes of lectures, critically revised from year to year, which in time would have borne fruit in contributions no less significant than those of his father. Yet these are but feeble testimony, and only those whose fortune it was to listen to him as he discussed the subjects of his study with the grasp and assurance of a master can know how truly we have lost a scholar.

If it was hard to follow Ames the scholar, it was even more hard to follow Ames the teacher, coming to the work of teaching, as Thayer did, for the first time at the age of forty-five. But Thayer had a high sense of the importance of the teaching function and set himself to master this part of his work. He studied a class as carefully as a trial lawyer studies a jury. He was wont to note upon the cover of each examination book, without knowing whose book it was, his impressions of the writer derived from reading it, and he kept careful memoranda with respect to the work, the capacity and the mental characteristics of his students. Also he devoted much time to consideration of methods of presentation, often recording after each lecture his impressions of what he had done and what he had left undone during the hour. This conscientious preparation joined to penetrating analysis, a merciless cross-examining elenchus developed in the forum, to which he submitted his own views no less than those of others, and an intellectual honesty that shirked no difficulties and tolerated no pretense, made itself felt in steady gain in his hold upon classes from the beginning

of his teaching. He had already become a teacher of the first order, and much of the results of his critical study of his vocation was yet to become manifest.

As an administrator Thayer was charged with maintaining and developing a great tradition. In his relations with the students he maintained the standard set by Ames, seeking to have a real personal acquaintance with every student and giving his time to conferences without stint. He was aware of the responsibility imposed upon the school by the possession of its library and gave anxious consideration to the growth of the library in its relation to the income of the school. He was no less aware that the curriculum could not remain for all time as it had come down to him and studied diligently how to improve it. Most of all he came to see the part which law schools and in particular the Harvard Law School may play, if they will, in the period of growth upon which our law has manifestly entered. Nor was he dismayed by the difficulties involved. On the one hand he had no doubt that the school must hold fast to the work of training lawyers for the practice of their profession to which it had been devoted heretofore. On the other hand he recognized that, without abating a jot of this, something more was demanded in an era of legal development no less rich in possibilities than that in which the school under Story's leadership was a factor in the reception of English law and the building thereon of a common law for America. With every inclination from training and environment to confine himself to the lines on which the school had developed in the past, he had the vision to see the service which the law school of today is called to perform and his sensitive conscience and unswerving regard for truth impelled him to heed the call. Happily his critical temper and well-reasoned firmness of purpose enabled him to avoid an over-ambitious program on the one side and an unwise narrowness on the other. In the opinion of a foreign critic, who is not likely to lay too much stress on the side of purely professional training, the plan he had laid out needs little alteration to give for our time "absolutely the best school for lawyers."

It is not easy for one who had known him so short a time to speak adequately of Thayer personally. What stands out permanently in one's memory of him is his conscientiousness, his loyalty, his devotion to duty, his considerateness of others. Not sanguine

and with little outward enthusiasm, he saw so clearly and strode in the path he saw before him so courageously as to derive from his conscience the *élan* which others derive from their temperament. Even a certain depression, born of his critical faculties and his sensitive conscience, was balanced by a sound sense of values and a keen sense of humor. His wit was Greek in its gracefulness and playfulness. Indeed the reading of Greek, which he kept up to the last, had left its mark upon him and one might think of him as one of the well born, well bred, well taught, widely cultured youth with whom Socrates practiced his dialectic. And even as Socrates taught, he thought consistently and he lived consistently—

Χερσίν τε καὶ ποσὶ καὶ νόφ τετράγωνον, ἄνευ ψόγου τετυγμένον.

Roscoe Pound.

A NEW PROVINCE FOR LAW AND ORDER

INDUSTRIAL PEACE THROUGH MINIMUM WAGE AND ARBITRATION

THE new province is that of the relations between employers and employees. Is it possible for a civilized community so to regulate these relations as to make the bounds of the industrial chaos narrower, to add new territory to the domain of order and law? The war between the profit-maker and the wage-earner is always with us; and, although not so dramatic or catastrophic as the present war in Europe, it probably produces in the long run as much loss and suffering, not only to the actual combatants, but also to the public. Is there no remedy?

During a brief sojourn in the United States in the summer of 1914, I had the good fortune to meet many men and women of broad and generous outlook and of admirable public spirit. They were anxious to learn what I, as President of the Australian Court of Conciliation and Arbitration, could tell them of Australian methods of dealing with labour questions. I propose now, on the invitation of the editor of this Review, to state briefly the present position, confining my survey to my own personal experience.

The Australian Federal Constitution of 1900 gave to the Federal Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."¹ Following the example of the United States Constitution, the Constitution left all residuary powers of legislation to the States; and the theory generally held at the time of our constitutional convention was that each State should be left to deal with its own labour conditions as it thought best. But an exception was made, after several discussions, in favour of labour disputes which pass beyond State boundaries and cannot be effectually dealt with by the laws of any one or more States. Just as bushfires run through the artificial State lines, just as the rabbits ignore them in pursuit of food, so do, frequently, industrial disputes.

In pursuance of this power, an Act was passed December 15, 1904, constituting a Court for Conciliation, and where con-

¹ Sec. 51 (XXXV).

ciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that an award, if made, binds the parties. The Act makes a strike or a lockout an offence if the dispute is within the ambit of the Act — if the dispute is one that extends beyond the limits of one State. In other words, the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public.

Under the Act, the Court consists of a President, who must be one of the justices of the High Court of Australia. The High Court is modelled on the Supreme Court of the United States, having often to decide whether Acts are constitutional, but it is also a Court of Appeal from the Supreme Courts of the States. The first President of the Court of Conciliation was appointed February 10, 1905, and, on his resignation in September, 1907, I was appointed as his successor.

The first task that I had to face was not, strictly speaking, conciliation or arbitration. The Federal Parliament imposed certain excise duties on agricultural implements manufactured, but it provided for the remission of the duties in the case of goods manufactured under conditions, as to the remuneration of labour, which the President of the Court should certify to be "fair and reasonable."² The Act gave no guidance as to the model or criterion by which fairness and reasonableness were to be determined. In dealing with the first employer who applied to me for a certificate, I came to the conclusion that the Act was designed for the benefit of employees, and that it was meant to secure for them something which they could not get by individual bargaining with their employers. If A let B have the use of his horse on the terms that B give the horse fair and reasonable treatment, B would have to give the horse proper food and water, shelter and rest. I decided therefore to adopt a standard based on "the normal needs of the average employee, regarded as a human being living in a civilized community." This was to be the primary test in ascertaining the minimum wage that would be treated as "fair and reasonable" in

² Excise Tariff 1906.

the case of unskilled labourers. At my suggestion, many household budgets were stated in evidence, principally by housekeeping women of the labouring class; and, after selecting such of the budgets as were suitable for working out an average, I found that in Melbourne, the city concerned, the average necessary expenditure in 1907 on rent, food and fuel, in a labourer's household of about five persons, was £1.12s.5d. (about \$7.80, taking a dollar as equivalent to 4s. 2d.); but that, as these figures did not cover light, clothes, boots, furniture, utensils, rates, life insurance, savings, accident or benefit societies, loss of employment, union pay, books and newspapers, tram or train fares, sewing machine, mangle, school requisites, amusements and holidays, liquors, tobacco, sickness or death, religion or charity, I could not certify that any wages less than 42s. per week for an unskilled labourer would be fair and reasonable. Then, in finding the wages which should be treated as fair and reasonable in the cases of the skilled employees, I relied mainly on the existing ratios found in the practice of employers. If, for instance, the sheet-iron worker got 8s. per day when the labourer got 6s., the sheet-iron worker should get, at the least, 9s. when the labourer's minimum was raised to 7s.

In the case referred to, the employer did not raise before me the point that the Act was invalid; but, having failed in his application for a certificate, he refused to pay the excise duty, and defended an action to recover the duty before the High Court on the ground that the Act was invalid; and he succeeded, by a majority of three justices to two, on the ground that the Act was not really a taxation Act at all, but an Act to regulate labour conditions, and as such beyond the competence of the Federal Parliament.³ But the principles adopted in the case for ascertaining a "fair and reasonable" minimum wage have survived and are substantially accepted, I believe universally, in the industrial life of Australia.

In the first true arbitration case — that relating to ship's cooks, bakers, etc. — the standard of 7s. per day was attacked by employers, but I do not think that it has been attacked since, probably because the cost of living has been rising. The Court announced that it would ascertain first the necessary living wage for the unskilled labourer, and then the secondary wage due to skill

³ *King v. Barger, Commonwealth v. McKay*, 6 Com. Law Rep. 41 (1908).

or other exceptional qualifications necessary. Treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home, would not be treated as a living wage. As for the secondary wage, it seemed to be the safest course, for an arbitrator not initiated into the mysteries of the several crafts, to follow the distinctions in grade between employees as expressed in wages for many years.

The distinction between the basic or primary or living wage and the secondary wage attributable to exceptional qualifications necessary for the performance of the function is not fanciful; it was forced on the Court by the problems presented and by the facts of industrial life. Yet it has to be borne in mind that though the essential natural needs come first, the conventional needs (*e. g.*, of artisans as distinguished from labourers) become, by usage, almost equally imperative.⁴

The following propositions may, I think, be taken to be established in the settlement of minimum wages by the Court; and it is surprising to find how often, as the principles of the Court's action come to be understood and appreciated, they guide parties disputing to friendly collective agreements, without any award made by the Court.

1. One cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence.⁵

2. This, the basic wage, must secure to the employee enough wherewith to renew his strength and to maintain his home from day to day.⁶

3. The basic wage is the same for the employee with no family as for the employee with a large family. It rests on Walt Whitman's "divine average," and the employer need not concern himself with his employee's domestic affairs.

4. The secondary wage is remuneration for any exceptional gifts or qualifications,⁷ not of the individual employee, but gifts or quali-

⁴ Engine-drivers, 7 Com. Arb. 132, 139 (1913).

⁵ Boot-factories, 4 Com. Arb. 1, 10 (1910); Seamen, 5 Com. Arb. 147, 164 (1911).

⁶ Broken Hill Mine, 3 Com. Arb. 1, 20 (1909).

⁷ Boot-factories, 4 Com. Arb. 1, 10 (1910); Postal Electricians, 7 Com. Arb. 5, 10 (1913); Builders' Labourers, 7 Com. Arb. 210, 217 (1913).

fications necessary for the performance of the functions, *e. g.*, skill as a tradesman, exceptional heart and physique, as in the case of a gas stoker,⁸ exceptional muscular training and power, as in the case of a shearer,⁹ exceptional responsibility, *e. g.*, for human life, as in the case of winding or locomotive engine-drivers.¹⁰

5. The secondary wage, as far as possible, preserves the old margin between the unskilled labourer and the employee of the skilled or exceptional class.¹¹

6. After ascertaining the proper wages, basic and secondary, the Court considers any evidence adduced to show that the employers ought not to be asked to pay such wages.¹² It will consider grounds of finance, of competition with imports, of unfairness to other workers, of undue increase in prices of the product, of injury to the public, etc.

7. The wages cannot be allowed to depend on the profits made by the individual employer, but the profits of which the *industry* is capable may be taken into account. If the industry is novel, and those who undertake it have to proceed economically, there may be a good cause for keeping down wages, but not below the basic wage, which must be sacrosanct. Above the basic wage, bargaining of the skilled employee may, with caution, be allowed to operate.¹³

8. The fact that a mine is becoming exhausted or poorer in its ores is not a ground for prescribing a lower rate than would otherwise be proper. If shareholders are willing to stake their own money on a speculation, they should not stake part of the employee's proper wages also. The Court cannot endanger industrial peace in order to keep unprofitable mines going.¹⁴

9. The Court does not increase the minimum on the ground of affluence of the employer. It is not affected by the fact that one of the employers can, by skilful management, by enterprise, or by good fortune, make very large profits.¹⁵

⁸ Gas Employees, 7 Com. Arb. 58, 71 (1913).

⁹ Shearers, 5 Com. Arb. 48, 79 (1911).

¹⁰ Engine-drivers, 5 Com. Arb. 9, 21 (1911).

¹¹ McKay, 2 Com. Arb. 1, 16 (1907); Ship's Cooks, 2 Com. Arb. 55, 65, 66 (1908).

¹² Broken Hill Mine, 3 Com. Arb. 1, 31 (1909).

¹³ *Ibid.*, 32; Shearers, 5 Com. Arb. 48, 73 (1911); Ship's Officers, 6 Com. Arb. 6, 21 (1912).

¹⁴ Broken Hill Mine, *supra*, 33-34; Engine-drivers, 7 Com. Arb. 132, 139 (1913).

¹⁵ Seamen, 5 Com. Arb. 147, 164 (1911); Gas Employees, 7 Com. Arb. 58, 72 (1913).

10. The minimum rate must be based on the highest function that the employee may be called on to exercise. The employer must not give a plumber labourer's work and pay him labourer's wages if he has also to do plumbing.¹⁶

11. In finding the proper minimum rate, the Court tries to find what would be proper for an employee of average capacity called upon to do work of the class required. If the employer desires to secure the services of an exceptional workman, he is free to do so. The payment of higher rates is left to the play of bargaining.¹⁷

12. The Court does not attempt to discriminate in wages on the ground of comparative laboriousness. Discrimination on such a ground is neither safe nor sound. The Court declined to give an extra rate to hodmen if they carry beyond a certain height.¹⁸

13. The Court will not discriminate in wages as between the several States so as to interfere with the freedom of trade between the States provided by the Constitution.¹⁹

14. The Court will not keep down wages on steamers so as to enable them to beat State railways in competition or to help one competitor against another.²⁰

15. The Court accepts and follows the usual practice of making rates for casual employment higher than the corresponding rates for continuous employment.²¹

16. The Court, in obedience to the Act, provides exceptions to the minimum rate in the case of aged, slow or infirm workers, but the exceptional cases must be disclosed to the representative of the Union, and be well safeguarded.²²

17. But the Court will not provide exceptions to the minimum rate for "improvers," men paid more than boys and less than journeymen, men who are used to beat down the claims of competent journeymen, and are thus a perpetual menace to the peace of the community.²³

¹⁶ Postal Electricians, 7 Com. Arb. 5, 8-9 (1913).

¹⁷ Ship's Stewards, 4 Com. Arb. 61, 63, 68 (1910); Engine-drivers, 5 Com. Arb. 9, 15 (1911); Shearers, 5 Com. Arb. 48, 91 (1911); Builders' Labourers, 7 Com. Arb. 210, 223 (1913).

¹⁸ *Ibid.*, 231.

¹⁹ CONSTITUTION, Sec. 92; Boot-factories, 4 Com. Arb. 1, 13 (1910).

²⁰ Ship's Officers, 6 Com. Arb. 6, 22 (1912).

²¹ Builders' Labourers, 7 Com. Arb. 210, 218 (1913).

²² ACT, Sec. 40; Boot-factories, 4 Com. Arb. 1, 24 (1910).

²³ *Ibid.*, 16.

18. The Court regards the old system of apprenticeship as unsuitable for factories under modern conditions, and it objects to fixing a rigid proportion of apprentices to journeymen without regard to the circumstances, *e. g.*, the character of the output of each factory. But if conditions of apprenticeship are in dispute, the Court will, especially if both sides wish it, and for the sake of peace as well as efficiency, make regulations on the subject. The proper method, however, seems to be, in boot-factories, to co-ordinate the work of the factories with the work of the technical schools.²⁴

19. The Court will not prescribe extra wages to compensate for unnecessary risks to the life or health of the employee or unnecessary dirt. No employer is entitled to purchase by wages the right to endanger life or to treat men as pigs.²⁵

20. The Court gives weight to existing conventions, usages, prejudices, exceptional obligations and expenses of the employees; for instance, that masters and officers are required to keep up a certain appearance, and that stewards must provide themselves with uniform and laundry.²⁶

21. Where it is established that there is a marked difference in the cost of living between one locality and another, the difference will, so far as possible, be reflected in the minimum wage.²⁷

22. But where, as in the case of the wharf labourers at ports, all the employees and nearly all the employers desired that there should be no differentiation, the Court bases the minimum wage on the mean Australian cost of living.²⁸

23. In cases such as that of ship's stewards, where the employees usually receive from passengers "tips" (or "bunce"), the average amount of the tips must be taken into account in finding whether the employee receives a living wage. But the minimum wage will

²⁴ Boot-factories, 4 Com. Arb. 1, 19, 20 (1910).

²⁵ Ship's Cooks, 2 Com. Arb. 55, 59, 60 (1908); Seamen, 5 Com. Arb. 147, 164 (1911).

²⁶ Ship's Officers, 4 Com. Arb. 89, 93, 95 (1910); Ship's Stewards, 4 Com. Arb. 61, 66 (1910).

²⁷ Broken Hill Mine, 3 Com. Arb. 1, 28-30 (1909); Engine-drivers, 5 Com. Arb. 9, 23 (1911); 7 Com. Arb. 132, 141 (1913); Fruit-growers, 6 Com. Arb. 61, 69 (1912); Gas Employees, 7 Com. Arb. 58, 70-74 (1913); Builders' Labourers, 7 Com. Arb. 210, 221 (1913).

²⁸ Wharf Labourers, 8 Com. Arb. (1914).

be raised to its proper level if the practice of tipping can be stopped.²⁹

24. In cases where employees are "kept," found in food and shelter by the employer, the value of the "keep" is allowed in reduction of the wages awarded. At a time when the keep of single men, such as labourers, cost in lodgings usually 15s. per week, the Court reduced the wages by 10s. only. For the 15s. at the family home would go further than it would go for board and lodging outside the home; and the employer who feeds a large number of men can buy the necessary commodities in large quantities and on advantageous terms. The 10s. per week seemed to represent fairly the amount of expenditure of which the home was relieved by the absence of the man.³⁰

25. The principle of the living wage has been applied to women, but with a difference, as women are not usually legally responsible for the maintenance of a family. A woman's minimum is based on the average cost of her own living to one who supports herself by her own exertions. A woman or girl with a comfortable home cannot be left to underbid in wages other women or girls who are less fortunate.³¹

26. But in an occupation in which men as well as women are employed, the minimum is based on a man's cost of living. If the occupation is that of a blacksmith, the minimum is a man's minimum; if the occupation is that of a milliner, the minimum is a woman's minimum; if the occupation is that of fruit-picking, as both men and women are employed, the minimum must be a man's minimum.³²

27. As regards hours of work, when disputed, the Court usually adheres to the general Australian standard of 48 hours; generally $8\frac{3}{4}$ hours on five days, $4\frac{1}{4}$ hours on Saturday. But in exceptional cases the Court has reduced the hours; in one case because of the nerve-racking character of the occupation;³³ in another case, that of builders' labourers, because the men

²⁹ Ship's Stewards, 4 Com. Arb. 61, 64 (1910).

³⁰ Ship's Cooks, 2 Com. Arb. 55, 62 (1908); Ship's Stewards, 4 Com. Arb. 61, 63 (1910).

³¹ Fruit-growers, 6 Com. Arb. 61, 71 (1912).

³² *Ibid.*, 72.

³³ Postal Electricians, 7 Com. Arb. 5, 15-16 (1913).

have to "follow their job," spending much of their own time in travelling.³⁴

28. The Court has conceded the eight hours' day, at sea as well as in port, to deckhands on ships;³⁵ to officers on ships,³⁶ to marine engineers.³⁷ But there are sundry necessary exceptions, and the Master retains the absolute right to call on any man in emergencies involving the safety of the ship; and for other purposes he may call on any man, paying extra rates for the overtime. The hours of navigating officers were sometimes shocking, and involved danger to ship, cargo and passengers.³⁸

29. In certain exceptional cases the Court has granted a right to leave of absence for two or three weeks on full pay to employees after a certain length of continuous service; not, of course, to casual or temporary employees.³⁹

30. The Court refuses to dictate to employers what work they should carry on, or how; or what functionaries they should employ, or what functions for each employee; or what tests should be applied to candidates for employment.⁴⁰

31. The Court leaves every employer free to carry on the business on his own system, so long as he does not perpetuate industrial trouble or endanger industrial peace; free to choose his employees on their merits and according to his exigencies; free to make use of new machines, of improved methods, of financial advantages, of advantages of locality, of superior knowledge; free to put the utmost pressure on anything and everything except human life.⁴¹

32. As regards complaints of disagreeable or onerous conditions, the Court treats as fundamental the consideration that the work of the ship, factory, mine, etc., must be done, a consideration next in order to that of the essential needs of human life. An order will

³⁴ Builders' Labourers, 7 Com. Arb. 210, 228-9 (1913).

³⁵ Seamen, 5 Com. Arb. 147, 159, 160 (1911).

³⁶ Ship's Officers, 4 Com. Arb. 89, 99 (1910).

³⁷ Marine Engineers, 6 Com. Arb. 95, 107 (1912).

³⁸ Ship's Officers, 6 Com. Arb. 6, 16, 17 (1912).

³⁹ *Ibid.*, 15, 25; 7 Com. Arb. 92, 104 (1913); Postal Electricians, 7 Com. Arb. 5, 17 (1913).

⁴⁰ Broken Hill Mine, 3 Com. Arb. 1, 36 (1909); Postal Electricians, 7 Com. Arb. 5, 7, 8, 13, 18, 19 (1913).

⁴¹ Boot-factories, 4 Com. Arb. 1, 18 (1910); Shearers, 5 Com. Arb. 48, 100 (1911); Fruit-growers, 6 Com. Arb. 61, 75 (1912); Gas Employees, 7 Com. Arb. 58, 77 (1913).

not be made that is inconsistent with the effective management of the undertaking.⁴²

33. On the same principle the Court steadily refuses to make orders which would militate against the public interest or convenience. It has refused to order prohibitive overtime rates for leaving port on Sundays;⁴³ it has refused to forbid the employment of casuals or to forbid "broken time" in tramway services. Casuals or "broken time," or both, are necessary to meet the extra traffic at certain times of the day.⁴⁴

These are some of the principles of action adopted by the Court. But, it may be asked, what about piecework? How does the Court fix piecework rates? The first great case in which piecework rates were directly involved was that of the Shearers.⁴⁵ At the time of the arbitration, wool furnished nearly forty per cent of the exports of Australia, nearly £29,000,000 per annum, in addition to the wool used in Australia. In that case the Court prescribed the piecework rates on a timework basis — found the piecework rates which would enable an average shearer to earn such wages per week as would be the just minimum for a man with the qualifications of a shearer if he were paid by time. Having found that the shearer should, as a "skilled" worker, get a net wage of £3 per week for the time of his expedition to the sheep stations to shear, and having found that a rate of 24s. per 100 sheep would give this net result, the Court fixed 24s. per 100 as the minimum rate.⁴⁶ In finding the net returns of the whole expedition, allowances had to be made for days of travelling and waiting, expenses en route, cost of mess and combs and cutters.⁴⁷ This system of finding the net result of the *expedition*, and what would be a fair return for the expedition, was also adopted in the case of persons employed by fruit-growers on the River Murray.⁴⁸ Sometimes the Court protects pieceworkers in making their bargain by prescribing that their remuneration shall not fall below, in result, a certain time-work minimum.⁴⁹

⁴² Ship's Stewards, 4 Com. Arb. 61, 73 (1910); Ship's Officers, 4 Com. Arb. 89, 101 (1910).

⁴³ Seamen, 5 Com. Arb. 147, 160 (1911).

⁴⁴ Tramways, 6 Com. Arb. 130, 144 (1912).

⁴⁵ 5 Com. Arb. 48 (1911).

⁴⁶ *Ibid.*, 73, 79.

⁴⁷ *Ibid.*, 74, 76.

⁴⁸ Fruit-growers, 6 Com. Arb. 61, 68 (1912).

⁴⁹ *Ibid.*, 75.

The system of arbitration adopted by the Act is based on unionism. Indeed, without unions, it is hard to conceive how arbitration could be worked. It is true that there are methods provided by which the Court can intervene for the preservation of industrial peace even when its powers are not invoked by any union; but no party can file a plaint for the settlement of a dispute except an "organization," that is to say, a union of employers or of employees registered under the Act.⁵⁰ One of the "chief objects" of the Act, as stated in Sec. 2, is "to facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations"; and it follows that the Court will not assist an employer in devices to stamp out unionism.⁵¹ It is, of course, better for an employer that he should not be worried by complaints of individual employees and that any complaints should be presented collectively by some responsible union. He has then the advantage of being able to deal with his employees on a consistent scheme, equitable all round the service, and his time is not taken up by petty complaints or individual fads. A demand made on him comes from a responsible executive, with the consent, direct or indirect, of the organized body of members of the union. Moreover, from the point of view of the employees, it is better that an individual employee should not, by complaining, incur the risk of becoming a marked man or of being removed, and the individual employee is generally powerless. From the point of view of the Court and of the public, it is fair to state that in nearly every case — I can only remember one case to the contrary — the influence of Union leaders has always been in the direction of peace. It would not be so, probably, if there were no means of obtaining an improvement of conditions except by strike, actual or threatened, but in Australia, the leaders can hold out to the members of the union a prospect of relief, without strike, from the Court or from some wages board.⁵² It is significant that in the one exceptional case referred to, the leaders of the Union have been converted so that they are now strong advocates of arbitration.

But then comes the difficult question of "preference to unionists."

⁵⁰ Sec. 19.

⁵¹ Tramways, 6 Com. Arb. 130, 143 (1912).

⁵² Marine Engineers, 6 Com. Arb. 95, 100 (1912).

Preference to unionists is the Australian analogue of the "preferential union shop" made familiar in some of the garment industries of the United States. The Act gives the Court power to direct that as between members of organizations (unions) of employees and other persons desiring employment at the same time preference shall be given to such members, other things being equal.⁵³ But it is only a power, not a duty, to order such preference; and the Court is very loth to exercise the power. "The absolute power of choice (between applicants for employment) is one of the recommendations of the minimum wage system, from the employer's point of view — he can select the best men available when he has to pay a certain rate."⁵⁴ For this reason preference was refused in the case of shearers, etc.;⁵⁵ in the case of seamen;⁵⁶ in the case of builders' labourers.⁵⁷ Yet the Court recognizes the difficulty of the position. As was said in the builders' labourers case: —

"The truth is, preference is sought for unionists in order to prevent preference of non-unionists or anti-unionists — to prevent the gradual bleeding of unionism by the feeding of non-unionism. It is a weapon of defence. For instance, some employers here hired men through the Independent Workers' Federation — a body supported chiefly by employers' money, and devised to frustrate the ordinary unions; and those who applied for work at the office of this body would not be introduced to the employer unless they ceased to be members of the ordinary unions and became members of this body. What is to be done to protect men in the exercise of their right as free men to combine for their mutual benefit, seeing that the employing class has the tremendous power of giving or withholding work? The only remedy that the Act provides is an order for preference; and it is doubtful whether such an order is appropriate or effective. It is, indeed, very trying for men who pay full dues to a legitimate union to work side by side with men who do not — with men who look to their own interests only, seeking to curry favour with the employers, getting the benefit of any general rise in wages or betterment of conditions which is secured without their aid and in the teeth of their opposition, men who are preferred (other things being equal) for vacancies and promotion. Every fair man recognizes the

⁵³ Sec. 40.

⁵⁴ *Engine-drivers*, 5 Com. Arb. 9, 25 (1911); 7 Com. Arb. 132, 147 (1913); *Tramways*, 6 Com. Arb. 35, 47 (1912).

⁵⁵ 5 Com. Arb. 48, 99 (1911).

⁵⁶ 5 Com. Arb. 147, 170 (1911).

⁵⁷ 7 Com. Arb. 210, 233 (1913).

difficulty of the position — every man who is not too much of a partisan to look sometimes at the other side of the hedge. In another case recently before me, a non-unionist told me that he acted solely on the basis of his personal interest, without any regard for the interests of his fellow workers. He looked for favours to himself, because he kept away from those who combined for the common good of the whole body. It is not out of consideration for such men that I refuse preference; it is rather out of consideration for such employers as honestly take the best man available, unionist or not. I do not want them to be harassed with the doubt, when selecting men for a post, whether they can prove their appointee to be better than all the unionist applicants. I refuse preference also out of consideration for many who have not joined any union simply because they have not felt the need. In the case of country building work, for instance, it is common for men on farms, &c., when farm work is not pressing, to take a job as builders' labourer. Why should the employer be compelled to bring union labourers from the city? After all, the direct way for unionists to counteract unfair preference of non-unionists is for the unionists to excel — to give to the employer the best service. It is nearly always found that employers prefer a first class man who is unionist to a second class man who is non-unionist.”⁵⁸

The only case in which the Court has ordered preference is the case of a tramway company which deliberately discriminated against unionists and refused to undertake not to discriminate in future.⁵⁹ It is to be observed that the Court is not given power by the Act to order that the employer shall not discriminate against unionists in giving or withholding employment.

The imposition of a minimum wage, a wage below which an employer must not go in employing a worker of a given character implies, of course, an admission of the truth of the doctrine of modern economists, of all schools I think, that freedom of contract is a misnomer as applied to the contract between an employer and an ordinary individual employee. The strategic position of the employer in a contest as to wages is much stronger than that of the individual employee. “The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour.”⁶⁰ Low wages are bad in the worker's eyes, but unemployment, with starvation in the background, is

⁵⁸ 7 Com. Arb. 210, 233-4 (1913).

⁵⁹ Tramways, 6 Com. Arb. 130, 162 (1912).

⁶⁰ Engine-drivers, 5 Com. Arb. 9, 27 (1911).

worse. The position was put luminously once, as well as with unconscious humor, by an employer on whom a plaint was served for settlement of a dispute by the Court. In place of filing an answer, he wrote a letter to the registrar, denying that he was a party to any dispute. "I have never," said he, "quarrelled or disputed with a labourer of any kind. . . . *If we cannot agree, well, we will part; that ends the whole.* . . . Love is the power which will end all struggles, not legislation." Other respondents pin their faith, not to "love," but to the sterner "law of supply and demand." They treat this law as being, in the matter of wages, more inexorable and inevitable than even the law of gravitation, as not being subject, as laws of nature are, to counteraction, to control, to direction. "One may dam up a river, or even change its course; but one cannot (it is said) raise wages above the level of its unregulated price, above the level of a sum which a man will accept rather than be starved."⁶¹ If the Court did nothing else than drag such theories into the light of day, and into free discussion, it would be doing good service to the community. But it is coming to be recognized that what the Court does in fixing a minimum wage is by no means novel in principle. There are many Acts of many legislatures which prescribe minimum conditions on other subjects. For example, Mining Acts often prescribe minimum conditions as to ventilation, timbering, safety appliances, machinery, sanitation. These matters are not left to individual bargaining.

There are no definite figures with regard to the cost to the parties of arbitration proceedings, but the cost is very slight. There are seldom any costs incurred in employing lawyers, for, under Sec. 27 of the Act, lawyers cannot be employed except with the consent of both parties, and the employees generally refuse their consent. The secretary of the organization generally puts its case, and the employers or some permanent officer generally puts the employers' case. The principal expense of an arbitration is that of bringing witnesses. If prohibition proceedings are taken in the High Court to prevent the enforcement of an award on the ground that the Court of Conciliation has exceeded its jurisdiction (of which I shall say more presently), no doubt heavy, very heavy, expenses are incurred, but these are not expenses of the arbitration.

⁶¹ Engine-drivers, 5 Com. Arb. 27, 28 (1911); Ship's Officers, 6 Com. Arb. 6, 18 (1912); Marine Engineers, 6 Com. Arb. 95, 101 (1912).

But it has to be admitted that proceedings in the Court of Conciliation often take a very long time, sometimes weeks, in a few cases, months. The proceedings cannot be otherwise than lengthy, as the disputes of which the Court can take cognizance are so widespread, — must extend from one State into one or more other States. Moreover, the habit is to bring before the employers, and afterwards before the Court, a very long list of conditions in dispute, and the case of each employer has to be fairly considered by the Court in connection with each grievance. The number of employers respondents to a plaint is generally great. There were 311 employers in the Engine-drivers' case;⁶² 570 in the case of the Builders' Labourers;⁶³ 650 in that of the Fruit-growers;⁶⁴ and 2549 at least in that of the Shearers.⁶⁵ The Court has no power to make an award a common rule of the industry; it cannot investigate and settle the proper conditions to be applied in one typical undertaking and then extend the same conditions to other undertakings of the same character. The Act purported to give this power to the Court, but it was held by the High Court, on a case stated, that the Act was in this respect unconstitutional and invalid.⁶⁶ This want of power to make a common rule for the industry not only lengthens the proceedings, but it also may operate to the prejudice of the employers who are bound by the award. For the Court can deal only with employers who employ members of the Union. Some rival employers may have no members of the Union in their employment and therefore have to be excluded from the award. Their hands are free as to wages, while the hands of the others are fettered, and this is, of course, unfair as between competitors in the trade. In one case, that of the boot-factories,⁶⁷ the difficulty was met by the employers and employees concurring in an application before the wages boards of each of the States concerned to have the terms of the award made a common rule for the State. But this remedy is not always available.

There is a provision in the Act⁶⁸ enabling the Court to appoint a board of reference, assigning to it the function of determining

⁶² 7 Com. Arb. 132 (1913).

⁶³ 7 Com. Arb. 210 (1913).

⁶⁴ 6 Com. Arb. 61, 65 (1912).

⁶⁵ 5 Com. Arb. 48, 65 (1911).

⁶⁶ Boot-factories, 11 Com. Law Rep. 311 (1910).

⁶⁷ 4 Com. Arb. 1 (1910); Builders' Labourers, 7 Com. Arb. 210, 235 (1913).

⁶⁸ Sec. 40 a.

specified matters which under the award may require to be determined. Such a provision, if properly drafted and valid, would be of eminent service to peace. Difficulties often arise under an award, owing to the vast variety of methods in the different undertakings, as to the application of the words of the award to some particular case. These and other difficulties ought to be met by collective adjustment, between representatives of the employers on the one side, and the representatives of the Union on the other, with a neutral chairman; but from the nature of the case there would have to be a separate board in each of the centres of the industry. Nothing would tend more to prevent serious friction and to promote mutual understanding of employers and employees. "A suitable Board of Reference, under the aegis of a strong union, is a safety-valve for any industry."⁶⁹ But, unfortunately, as the section stands, with the interpretation put upon it by the High Court, it is practically useless. The parties on both sides of a dispute often seek a board, or rather boards, of reference,⁷⁰ but the Court cannot generally help them. Sometimes, however, the parties to the dispute make and file agreements between the union and the several employers for a board and leave the Court to award on the other subjects in dispute; and the agreements are certified by the Court, and on being filed under Sec. 24 have the same binding effect as an award.⁷¹

There are two important powers of which the Court has frequently availed itself, or threatened to avail itself, with very excellent effect.⁷² These are: (a) the power to withhold an award if it appear "that further proceedings by the Court are not desirable in the public interest";⁷³ and (b) the power to vary an award.⁷⁴ Sometimes, the employees, though seeking an award, have taken up an obstinate attitude, intimating in effect that if the award does not meet their wishes they will not abide by it; and the Court has plainly intimated that it will not proceed with the arbitration on such terms.⁷⁵ It cannot be for the public interest

⁶⁹ Engine-drivers, 7 Com. Arb. 132, 144 (1913).

⁷⁰ Seamen, 6 Com. Arb. 59 (1912).

⁷¹ Engine-drivers, 7 Com. Arb. 132, 135 (1913).

⁷² Fruit-growers, 6 Com. Arb. 61, 78 (1912).

⁷³ Sec. 38 *h*.

⁷⁴ Sec. 38 *o*.

⁷⁵ Gas Employees, 7 Com. Arb. 58, 62 (1913); Broken Hill Mine, 3 Com. Arb. 1, 20 (1909).

to proceed with the arbitration under such a constraint. Arbitration by the Court is meant to be a substitute for the method of strike, and "you cannot have award and strike too."⁷⁶ In one case, while the Court was preparing an award for seamen and firemen, information came that the firemen of the S. S. "Koombana" refused to work on the ship unless a certain chief steward were removed. The position was serious; the ship carried the mails, as well as passengers and cargo, for ports on the West Australian coast. There was an agreement in existence under which it was a breach of agreement on the part of the Union if by reason of any dispute a vessel were detained twenty-four hours. The Court intimated that it would not make its award so long as the agreement was not observed. As a result, officials of the Union conducted suitable firemen to the port where the vessel lay, put them on board, and the "Koombana" went on its way; then, and not till then, the Court gave its award.⁷⁷

The power to vary an award has also been held over the head of a recalcitrant Union. It is not fair to keep the employers bound by the award if the Union takes the benefit of the award and rejects the burden. The Court has power to lower or annul the minimum wage in such a case if necessary.⁷⁸ Fortunately it never has been necessary. I may give one case in point. The wharf labourers were on strike in Brisbane; seamen who were enjoying the benefit of an award were ordered to unload their vessel. They were naturally indisposed to comply, but, before refusing, they telegraphed to the Executive of their Union for directions. They were told by the Executive to unload or they would lose the award. They unloaded.

Another very valuable power is that conferred by Parliament in 1910, under which the President may, when a dispute exists or is threatened, summon any person to attend a conference in his presence. The attendance is compulsory, enforceable by penalty.⁷⁹ Frequently a quiet talk at such a conference has prevented a strike which was imminent.⁸⁰ Frequently the parties arrange to proceed

⁷⁶ *Liquor Trade*, 7 Com. Arb. 255 (1913).

⁷⁷ *Seamen*, 5 Com. Arb. 147, 173-4 (1911).

⁷⁸ *Fruit-growers*, 6 Com. Arb. 61, 78 (1912).

⁷⁹ Sec. 16 a.

⁸⁰ *Seamen*, 4 Com. Arb. 108 (1910); 5 Com. Arb. 147, 154 (1911); *Fruit-growers*, 5 Com. Arb. 37, 183 (1911); 6 Com. Arb. 61, 62 (1912); *Steamboat Engine-men*, 6 Com. Arb. 60 (1912); *Bakers*, 7 Com. Arb. 257-8 (1913).

for arbitration and make temporary arrangements for carrying on work until the award.⁸¹ Sometimes an actual strike confined to one State though the dispute extended to two States, has been stopped, the men going back to work at the old rates until the award.⁸² A further amendment was made in the Act in 1911, under which, if no agreement has been reached at the conference, the President can refer the dispute into the Court for arbitration.⁸³ The fact that this whip is in the hands of the President, to be used in the last resort, and that the party with the stronger position for the time being will have to submit to an award if he takes up an obstinate attitude against all agreement, is found to operate as a strong inducement to compromise and to reasonable arrangements by consent. Agreements in lieu of award have often been fixed up in a conference or as the result of a conference.⁸⁴ The agreements are generally produced in Court when the case is called on, and the President certifies to them, and has them filed, and they operate, are enforceable, as an award.⁸⁵ In one long case, where the Court was faced with a dispute in ten tramway undertakings, no less than eight of the undertakings arranged agreements during the course of the long hearing, with the assistance of the President given in frequent interviews with the parties in chambers.⁸⁶

It must not be supposed that the desire for the assistance of the President or of the Court is confined to employees. At first there was a tendency on the part of employers, individually and in association, to resent interference, as preventing the employers from carrying on, as they said, their own business in their own way. But facts have been too strong for them. Employers now frequently request the President to intervene and to summon a conference in

⁸¹ Export Butchers, 4 Com. Arb. 82, 87 (1910); Glass Bottle Makers, 6 Com. Arb. 176 (1912); Steamboat Engine-men, 7 Com. Arb. 37 (1913); Bakers, 7 Com. Arb. 257-8 (1913).

⁸² Export Butchers, 7 Com. Arb. 52-54 (1913).

⁸³ Sec. 19 *d*.

⁸⁴ Engine-drivers, 6 Com. Arb. 126 (1912); Glass Bottle Makers, 6 Com. Arb. 176 (1912); 7 Com. Arb. 43 (1913); Seamen (as to manning), 7 Com. Arb. 2 (1913); Journalists, 7 Com. Arb. 112, 113 (1913); Liquor-trade, 6 Com. Arb. 129 (1912); 7 Com. Arb. 254 (1913).

⁸⁵ Sec. 24.

⁸⁶ Tramways, 6 Com. Arb. 130, 140 (1912); and see Journalists, 7 Com. Arb. 112, 113 (1913).

order to prevent a stoppage of work.⁸⁷ They seek regulation, by agreement or award, in order that they may not find their plant lying idle and their business at a standstill, and, in some cases, a season lost.

Perhaps it will be well to give a concrete case. There is, in Victoria, a great butchering trade in lambs for export, involving, I believe, more than a million pounds per annum. The lambs are sent down to Melbourne in the spring, September or October; and unless they are butchered at once they deteriorate in condition and the season is lost. The men suddenly refused to go to work at the old rates; telegrams flew up to the country settlements to stop trucking any more lambs; the settlers were faced with the prospect of losing their market, and the storekeeping and incidental industries with the prospect of grievous loss. It so happened that the same demand was made on employers in New South Wales, so that there seemed to be a two-State dispute which gave jurisdiction to the President. A conference was summoned at the request of the employers; the men induced to go to work under the conditions already in operation on a promise that the Court would arbitrate and make the award retrospective to the resumption of work, and the season was saved.⁸⁸ The parties prepared themselves peacefully to discuss their differences before the Court, but — this is the point — *the work went on*.

Another concrete case, showing the desire of both sides for definite regulation of conditions by the Court, is that of the Ship's Officers. The men, in their demands, had been too specific; the High Court had decided that the dispute must be treated as confined to the specific demands made, and that the Court of Conciliation could not prescribe a remedy for any grievance different from that remedy demanded. The Court of Conciliation found that the granting of the demands, as asked, would tend to promote strife rather than peace in the industry, and stated its difficulties to the parties. Both parties were so anxious for a definite arrangement of conditions that they consented to embody in an agreement *any*

⁸⁷ Seamen, 4 Com. Arb. 108 (1910); 5 Com. Arb. 147, 154 (1911); Fruit-growers, 5 Com. Arb. 37 (1911); Waterside Workers, 6 Com. Arb. 3 (1912); Glass Bottle Makers, 6 Com. Arb. 176 (1912); Liquor Trade, 7 Com. Arb. 254 (1913); Export Butchers, 7 Com. Arb. 52 (1913); Victorian Stevedoring Co., 5 Com. Arb. 1 (1911).

⁸⁸ Export Butchers, 7 Com. Arb. 52, 54 (1913).

terms whatever that the President thought proper, whatever the ambit of the dispute, whatever the jurisdiction of the Court. The President accordingly continued the hearing of the case and drew up an agreement which both parties signed and which they have both loyally observed.⁸⁹

There is such a strong desire for the assistance of the machinery of the Act that on several occasions an attempt has been made by employers, with or without the concurrence of employees, to induce the President to intervene in cases in which he has had to refuse his assistance, on the ground that the dispute does not extend beyond one State and must be dealt with, if at all, by State authorities.⁹⁰ Quite recently the President has had, however, to make an exception to his rule not to meddle, even by consent, with matters outside his jurisdiction. There was a dispute between labourers and artisans on the one side and the Commonwealth Government on the other, as to conditions of labour in the construction of a Naval base in Western Port, Victoria; all parties signed a submission to arbitration, leaving everything to the determination of the President as in a voluntary arbitration. In view of the serious effects of a stoppage of the works in time of war, the President consented to act, heard the parties, and gave an award, and the parties are peacefully acting in accordance with it.⁹¹

But the course of the Court, like the course of true love, does not always run smooth. It has to meet some bitter opposition. Sometimes the opposition comes from a union of employees — generally, a union which avowedly accepts the doctrine of the “class war,” and aims at “the emancipation of labour by the abolition of the wage system.”⁹² I have even seen a cartoon, in a labour newspaper, showing a labourer walking towards a gate marked “Freedom,” and a bull-dog with a collar marked “Arbitration” bars his path. It is but fair to say that this cartoon appeared in a State which has a local arbitration court. But the attacks on the Court and its awards are, of course, generally made from the side of employers, many of whom naturally resent any curtailment of their powers. The applications for prohibition against the President have been

⁸⁹ Ship's Officers, 4 Com. Arb. 89, 91 (1910); Hairdressers, 6 Com. Arb. 1 (1912).

⁹⁰ Victorian Stevedoring Co., 5 Com. Arb. 1 (1911).

⁹¹ Naval base — not reported.

⁹² Fruit-growers, 6 Com. Arb. 61, 65, 78 (1912).

sometimes in part or temporarily successful. Prohibition is applied for because of some alleged excess of the Court's jurisdiction, and the argument generally turns on the questions, was there a dispute, and if there was, did it extend beyond one State. Sometimes the argument turns on the validity of some section of the Act. The proceedings are very long and very costly, and it is astonishing what a wealth of learning is involved in the meaning of the word "dispute" and the words "extending beyond the limit of any one State." The discussions occupy a very considerable proportion of the Commonwealth Law Reports, but they would not interest those for whose information I write this article. The legal discussions do not affect the principles or methods of action of the Court of Conciliation in cases where there is jurisdiction.

It has to be admitted that the awards, in nearly all cases, have been made in a period when the cost of living is rising and that therefore they have generally increased the existing minimum rate. The Court found, about 1911, that the cost of living was substantially increasing, but it refused to raise the basic wage until the increase could be quantitatively stated.⁹³ It suggested the expediency of official statistics on the subject, and the Commonwealth Statistician now furnishes periodically statistics which have materially assisted the Court. According to the Commonwealth Statistician, the cost of living, taking Australia as a whole, has increased by twenty-five per cent from 1901 to 1913. For such necessities as could be bought in 1901 for £1, one must now pay 25s.⁹⁴ What will happen if the cost of living should decrease — if the minimum for the basic or living wage shall have to be lowered? It is a fair question, but it is for the future to give the answer. I wish to confine my words to my personal experience. Yet there have been cases in which the Court has refused increases or has actually decreased the minimum rates, and the employees have listened to the reasons and loyally submitted. In the case of the Shearers,⁹⁵ the rates for shearing, 24s. per 100, as fixed by my predecessor, were not increased; and the strongest union in Australia, the Australian Workers' Union, acquiesced. In the same case, the Court found that too high minimum rates had

⁹³ Engine-drivers, 5 Com. Arb. 9, 14, 16 (1911).

⁹⁴ Postal Electricians, 7 Com. Arb. 5, 12 (1913).

⁹⁵ Shearers, 5 Com. Arb. 48 (1911).

previously been fixed for wool-pressers and lowered them, stating its reasons. There was no strike, no refusal to work, no expression, that I know, of discontent. In the case of the Builders' Labourers,⁹⁶ the Court fixed lower rates for Ballarat and Bendigo than for Melbourne, and lower rates for Melbourne than for Sydney, all because of differences in the cost of living. The Union leaders were troubled because these cities had always maintained the same "union rate"; but they told the members of the Union the Court's reasons, and there was peace. Again, in the same case, the Court fixed for Melbourne a lower minimum rate for scaffolders and demolishers than had been previously fixed by the wages board — $1/3\frac{1}{2}$ per hour instead of $1/4\frac{1}{2}$ per hour; and the men submitted. The truth is, I think, that if the men secure the essentials of food, shelter, clothing, etc., they are not so unreasonable as is sometimes supposed. They do not love strikes for the sake of strikes; and the great majority are generally quite willing to submit to reason if they feel that they are reasonably treated.

This article is confined, as I stated at the beginning, to the Federal Court of Conciliation and to my own actual experience in connection therewith. But American readers should know that in each of the six Australian States there is some wages board system under the State law or some industrial or arbitration Court. Victoria was the first State to adopt a system of wages boards, about 1896; and her example has been more or less followed in Queensland, South Australia and Tasmania. Western Australia has an arbitration Court, and New South Wales has a combination of the two systems, wages boards and an industrial Court. There is no organic connection between the State systems and the Federal system. The object of the wages boards is primarily to prevent sweating or under-payment; the object of the Federal Court is to preserve or restore industrial peace. The Federal Court deals with disputes, as such, and prescribes wages, etc., merely as incidental to the prevention or settlement of disputes; the wages board prescribes minimum wages and has no direct relation to disputes. But, as is obvious from the nature of the case, the systems often overlap. A wages board consists, generally, of representatives

⁹⁶ Builders' Labourers, 7 Com. Arb. 210 (1913).

selected by employers and of representatives selected by employees in equal numbers, with a neutral chairman. There is not, I think, any fixed principle stated by the legislatures for the guidance of the boards in prescribing the minimum wage. At one time, the Victorian legislature enacted that the minimum wage should not exceed the wage paid by "reputable employers;" but this negative provision has been found unsuitable, and repealed. The wages boards cannot deal with all industrial conditions; the Federal Court can deal with any industrial condition that comes into dispute. The wages boards do not publish the reasons for their determinations; the Federal Court does. As a result I find that the wages boards frequently look for guidance in their action to the reasoning of the Federal Court. The wages boards, within the limits of area assigned to them, bind all employers by their determinations; the Federal Court can only bind those who are concerned in the dispute. The wages boards, being State creations, are very much affected by the consideration of interstate competition.⁹⁷ In dealing with boot-factories, the New South Wales tribunal would have fixed the minimum for journeymen at 9s. per day, but for the fact that the rival factories of Victoria had a minimum of 8s. per day. The Federal Court when asked to intervene, was able, as an Australian tribunal, to bind the employers of both States to pay the 9s. per day.⁹⁸ Another weakness in the wages board system is that employees, in the presence of an employer or a possible employer, have not the independent position which would enable them to act fearlessly. This is especially the case where, as in the case of city tramways, there is only one undertaking where a tramway man can get employment. In the case of the Brisbane tramways it appeared that it was the manager who, as a member of the wages board, made all the proposals, and that every one of his proposals was carried unanimously.⁹⁹ Again, the decision of the wages board of one State is frequently inconsistent with the decision of the wages board of an adjoining State. There is no one final co-ordinating authority as in the case of the Federal Court, and the result is often that contrasts appear, and dissatisfaction arises, and industrial trouble. For instance, a large mining district, of essentially

⁹⁷ Engine-drivers, 5 Com. Arb. 9, 17 (1911).

⁹⁸ Boot-factories, 4 Com. Arb. 1, 8 (1910).

⁹⁹ Tramways, 6 Com. Arb. 130, 149 (1912).

the same physical and industrial character, with the same cost of living, is divided by the artificial boundary line between two States. The wages board of one State prescribed one set of wages and conditions, the wages board of the other State prescribed a lower set. The consequences were disastrous.¹⁰⁰ A New South Wales wages board gave in the case of Builders' Labourers,¹⁰¹ the lowest rate to scaffolders, and the highest to hodmen. The Victorian wages board gave the highest rate to scaffolders. The New South Wales board gave a low rate to demolishers; the Victorian board gave the highest rate. The Federal Court, when it came to act, prescribed a flat minimum rate for all the labourers, and the employees were satisfied. They knew that a man of exceptional value as a scaffolder or in any other capacity would still be able to demand and obtain a rate higher than the minimum. It is often said that the minimum rate tends to become the maximum, but there has been no proof of such tendency as yet. Moreover, the wages boards are often not suitably grouped, and there is a tendency to ignore the interests of unrepresented minorities, of employers as well as of employees. For example, there was in Victoria a "Hay, chaff, wood and coal board," composed, as to employers, of ordinary wood, coal and produce retailers. They managed to get a determination which kept their own yardmen at low wages, but fixed a disproportionately large minimum for yardmen who handled coke, because the Gas Company of the city was practically the only vendor of coke and it was not represented on the board.¹⁰² But most of these defects, and other defects which I could point out, are not of the essence of the system and will probably be removed or obviated in the light of experience. Employers have assured me that they welcome the fixing of minimum rates by the boards or by the Court. They know now definitely what they must pay, and, so long as they pay it, they feel no more the incessant nagging of unions or employees as to wages. Nor can any impartial person deny the immense relief which the system of wages boards has afforded to thousands of the most helpless families throughout Australia. Wages boards constitute one of the most useful factors of those which tend, in the words of

¹⁰⁰ Engine-drivers, 7 Com. Arb. 132, 145 (1913).

¹⁰¹ Builders' Labourers, 7 Com. Arb. 210 (1913).

¹⁰² Gas Employees, 7 Com. Arb. 58, 65 (1913).

Russell Lowell, to "lift up the manhood of the poor" and to provide proper sustenance and upbringing for the children of the nation.

Perhaps I should add here that up to the present I have not been able to trace any increase of price of commodities to the fixing of minimum wages. It is not the function of the Court to ascertain the truth as to the causes of increased prices, but the Court watches for any sidelights on this important subject. In one case, I believe, a wages board raised the wages of milk carters by 1s. per day and the milk vendors at once raised the price of milk by 1d. per quart. For 100 quarts per day, this would mean an increase of receipts to the amount of 8/4 per day, so that the milk vendors had raised the price of milk far beyond the amount necessary to recoup them for the additional wages.

It will be asked, however, what is the net result of the Court of Conciliation? Have strikes ceased in Australia? The answer must be that they have not. There have been numerous strikes in Australia, as elsewhere. But since the Act came into operation there has been no strike extending "beyond the limits of any one State." Those who are old enough to recall the terrible shearers' strike and seamen's strike of the "nineties," with their attendant losses and privations, turbulence and violence, will realize how much ground has been gained. The strikes which still occur are strikes within a single State, and disputes within a single State are outside the jurisdiction of the Court. It can be safely said that, since the Act, every dispute "extending beyond the limits of any one State" comes before the Court or the President, either on the application of parties to the dispute, or on the initiative of the officers of the Court.¹⁰⁸ Moreover, with the exception of one doubtful case, in which I was not personally concerned and do not know the full particulars, there has been no instance of an award being flouted by the employees, no instance of the employees refusing to work under an award. There have been cases in which parties have differed in the interpretation of an award in its application to exceptional circumstances; there have been instances of inadvertent disobedience; and these cases have sometimes come to the courts in the form of an action for a penalty. But these were cases in

¹⁰⁸ Sec. 19.

which the award was treated as regulating the rights of the parties, not treated as a thing to be rejected.

In 1911, Parliament entrusted to the Court another formidable function, the settling of wages hours and conditions of labour for federal public servants. This function does not rest on the constitutional power to make laws for conciliation and arbitration in industrial disputes;¹⁰⁴ it rests on the absolute power of the Commonwealth in relation to its own servants. The public servants are allowed to group themselves in unions, "organizations," as they think fit, and to approach the Court with a plaint. It seems at first sight curious that Parliament should entrust any tribunal with a power of adjudicating on such subjects, but Parliament has been careful to retain the final control of the Commonwealth finances. For the award does not come into operation till the expiration of thirty days after it has been laid before both Houses, and Parliament can, if it sees fit, pass a resolution disapproving of the award. This remarkable jurisdiction over public servants deserves a study all to itself, and I can only say, though there have been several important awards under it no award has yet met with the disapprobation of Parliament and no resolution of disapproval has even been tabled.

In conclusion, I may state that I am not unaware of the far-reaching schemes, much discussed everywhere, which contemplate conditions of society in which the adjustment of labour conditions between profit-makers and wage-earners may become unnecessary. Our Australian Court has nothing to do with these schemes. It has to shape its conclusions on the solid anvil of existing industrial facts, in the fulfilment of definite official responsibilities. It has the advantage, as well as the disadvantage, of being limited in its powers and its objects. Its objective is industrial peace, as between those who do the work and those who direct it. It has no duty, it has no right, to favour or to condemn any theories of social reconstruction. It neither hinders nor helps them. But it is obvious that even if all industries were to be carried on under State direction, industrial peace would be as vitally important as it is now; and that it could not be secured without recognition of the principle which the Court has adopted, that each worker must have, at the

¹⁰⁴ Sec. 51 (XXXV).

least, his essential human needs satisfied, and that among the human needs there must be included the needs of the family. Sobriety, health, efficiency, the proper rearing of the young, morality, humanity, all depend greatly on family life, and family life cannot be maintained without suitable economic conditions. The reasoning which has lately committed to the Court the function of settling conditions of labour for public servants would not be less, would be even more applicable, if the State had more servants than it has.

Yet, though the functions of the Court are definite and limited, there is opened up for idealists a very wide horizon, with, perhaps, something of the glow of a sunrise. Men accept the doom, the blessing of work; they do not dispute the necessity of the struggle with Nature for existence. They are willing enough to work, but even good work does not necessarily ensure a proper human subsistence, and when they protest against this condition of things they are told that their aims are too "materialistic." Give them relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals, when

"Body gets its sop, and holds its noise, and leaves soul free a little."

Henry Bournes Higgins.

HIGH COURT OF AUSTRALIA, MELBOURNE.

NEGLIGENCE

NEGLIGENCE is often defined as consisting of a breach of duty. That is wrong. The duty in such a case can be defined only as a duty to use care, *i. e.*, not to act negligently; and to define the duty so, and then to define negligence as consisting of a breach of the duty, is to define in a circle. The misconception has arisen from a failure to distinguish between a negligent wrong, which, like all wrongs, involves a breach of duty, and the negligence itself, which is one element in the wrong. It is true that negligence which in the particular case is not a breach of any legal duty is of no legal importance; but that does not touch the question of its nature as negligence. There are many cases where the law does not require care, where therefore negligence is not legally wrong; but it is none the less negligence. We must have a conception of negligence as it is in itself, independent of the conception of duty, in order that we may use it as a *praecognoscendum* in the definition of various duties. The subject of this article is the nature of negligence, not duties to use care.

There seems to be no difference in respect to its nature between contributory negligence and negligence towards others, which may be tortious. The latter, when wrongful, is a breach of a perfect legal duty owed to some one else, for whose breach an action will lie. The former may be regarded, when it has any legal effect, as a breach of an imperfect legal duty to use care for the safety of one's self or one's belongings in certain cases where some one else has an interest in such safety. The duty is a legal duty, but an imperfect duty only inasmuch as no action will lie for its breach. Its sanction consists in the refusal of a remedy which might otherwise have been had for the other party's breach of duty.

Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct which does not involve such a risk.

Negligence is conduct, not a state of mind. It is most often caused by carelessness or heedlessness; the actor does not advert properly to the consequences that may follow his conduct, and therefore fails to realize that his conduct is unreasonably danger-

ous. But it may be due to other states of mind. Thus the actor may recognize the fact that his conduct is dangerous, but may not care whether he does the injury or not; or, though he would prefer not to do harm, yet for some reason of his own he may choose to take a risk which he understands to be unreasonably great. This state of mind is recklessness, which is one kind of wilfulness, and negligent conduct due to recklessness is often called wilful negligence. Some courts have denied that there is any such thing as wilful negligence. But that is because they have failed to distinguish between negligence, which is outward conduct, and carelessness, which is a state of mind. Negligent conduct may also be due to a mere error of judgment, where the actor gives due consideration to his conduct and its possible consequences, and mistakenly makes up his mind that the conduct does not involve any unreasonably great risk. He is not therefore excused, if his conduct is in fact unreasonably dangerous.¹ As will be explained later, he must judge and decide as a reasonable and prudent man would; so that if he is not in fact such a man, he may decide wrongly and be guilty of legal negligence though he acted as well as he knew how to. The rule that mere error in judgment is not negligence has a different meaning, which will be explained further on. Whatever the state of mind be that leads to negligent conduct, the state of mind, which is the cause, must be distinguished from the actual negligence, which is its effect. Conversely, if in a given case the actor does nothing that involves an unreasonably great risk, his conduct is not negligent, it amounts legally to due care, however careless or reckless he may be in his mind.² Just as a man can do wrong though his state of mind is not blameworthy, so he can do right though his state of mind is blameworthy.

Negligent conduct may consist in acts or omissions, in doing unreasonably dangerous acts or in omitting to take such precautions as reasonableness requires against danger. As will be explained below there is generally no duty to take such precautions. But the failure to take them is nevertheless negligent. It has often been laid down that negligence is doing what a reasonable and prudent man would not have done or not doing what such a man would have done. It has indeed been said that negligence always

¹ *Hover v. Barkhoof*, 44 N. Y. 113 (1870); *Roberts v. Smith*, 2 H. & N. 213 (1857).

² *Wanless v. North Eastern Ry. Co.*, L. R. 6 Q. B. 481 (1871), per Bramwell, B.

consists in omission. This arises from confusion between negligence and carelessness. Carelessness does consist in an omission to take thought about the consequences of one's conduct; and it is that omission which has been mistaken for negligence in the legal sense.

To make conduct negligent the risk involved in it must be unreasonably great; some injurious consequences of it must be not only possible or in a sense probable, but unreasonably probable. It is quite impossible in the business of life to avoid taking risks of injury to one's self or others, and the law does not forbid doing so; what it requires is that the risk be not unreasonably great. The essence of negligence is unreasonableness; due care is simply reasonable conduct. There is no mathematical rule of percentage of probabilities to be followed here. A risk is not necessarily unreasonable because the harmful consequence is more likely than not to follow the conduct, nor reasonable because the chances are against that. A very large risk may be reasonable in some circumstances, and a small risk unreasonable in other circumstances. When due care consists in taking precautions against harm, only reasonable precautions need be taken, not every conceivable or possible precaution. And precautions need not be taken against every conceivable or foreseeable danger, but only against probable dangers.³ The books are full of cases where persons have been held not negligent for not guarding against a certain harmful event, on the ground that they need not reasonably have expected it to happen.

Sometimes a person is under a duty to insure safety, absolutely to prevent the happening of certain damage. Such duties, which may be called peremptory duties, lie entirely outside of the law of negligence. However, the failure to perform the duty is often called negligence, or it is said that in such a case negligence is conclusively presumed, as has been said, for instance, where the keeper of a savage dog has failed to prevent it from biting some one. But that is a mere misconception, or at best a useless and misleading fiction.

The reasonableness of a given risk may depend upon the following five factors:

(1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.

³ The *Nora Costello*, 46 Fed. 869 (1891); *Flynn v. Beebe*, 98 Mass. 575 (1868).

(2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object. The reasonableness of a risk means its reasonableness with respect to the principal object.

(3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct, — is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.

(4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.

(5) The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk. The following case will serve as an illustration.

The plaintiff's intestate, seeing a child on a railroad track just in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by the train. The jury were allowed to find that he had not been guilty of contributory negligence.⁴ The question was of course whether he had exposed himself to an unreasonably great risk. Here the above mentioned elements of reasonableness were as follows:

(1) The magnitude of the risk was the probability that he would be killed or hurt. That was very great.

(2) The principal object was his own life, which was very valuable.

(3) The collateral object was the child's life, which was also very valuable.

(4) The utility of the risk was the probability that he could save the child. That must have been fairly great, since he in fact succeeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.

(5) The necessity of the risk was the probability that the child would not have saved himself by getting off of the track in time.

Here, although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral ob-

⁴ *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502 (1871).

ject and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. The same risk would have been unreasonable, had the creature on the track been a kitten, because the value of the collateral object would have been small. There is no general rule that human life may not be put at risk in order to save property; but since life is more valuable than property, such a risk has often been held unreasonable in particular cases, which has given rise to *dicta* to the effect that it is always so. But in the circumstances of other cases a risk of that sort has been held reasonable.

Sometimes the collateral object, and therefore the utility and necessity of the risk, which relate to that object only, cannot be considered at all in deciding upon the reasonableness of the risk. There are certain objects which the law designs to protect, which may be called legal objects, and others which it does not attempt to protect, which may be called personal objects. Thus the law protects human life and bodily safety, the safety of property, and various other valuable objects. To some extent it protects pecuniary condition, *i. e.*, the avoidance of pecuniary loss is generally, but, as the decisions now stand, not always, a legal object. A person has rights of life, bodily security, property, and pecuniary condition,⁵ and other rights in various objects or conditions of fact. But generally, subject to some exceptions which are not important here, the law does not protect the state of a person's mind or feelings. There is no general right of mental security, as there is of bodily security, which can be violated by a person's being subjected to disagreeable or painful mental experiences, such as fright, anxiety, mortification, or discomfort.

There are various special rules as to what objects are legal, to be protected by the law, and what are purely personal and are denied legal protection, which cannot be gone into here in detail. Thus an object may be made a legal one as between two persons by some agreement or arrangement between them. For example, although generally a person is not excused for taking a risk which would otherwise be unreasonable because he will thereby promote his own

⁵ I have explained the nature of the right of pecuniary condition, and how it differs from the right of property, in Chapter XI of my book, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW*, where also I have criticised the decisions which in certain cases have refused protection against pecuniary loss on the ground that no right was violated, and tried to show that they were based on a misconception.

comfort or convenience, comfort and convenience being personal objects only, yet as between a carrier and his passenger the passenger's comfort and convenience are legal objects, and a passenger may subject himself to some risk to promote his own comfort and convenience without, as against the carrier, being therefor chargeable with contributory negligence. So the performance of a legal duty, *i. e.*, the object to be attained by such performance, is a legal collateral object. A person may be excused for taking a risk in the performance of his duty. Not so as to mere moral duties, nor as to contract duties to third persons.⁶ The rule seems to be that if the collateral object is a legal one, it may be taken account of; if a purely personal one, not. Some examples of the disregarding of personal objects are as follows.

A railroad train did not stop at a station where it ought to have stopped. Therefore a passenger for that station tried to get off while the train was in rapid motion, and was hurt. He was held guilty of contributory negligence. The court said that it was no excuse that his wife was expecting him by that train, and would be anxious about him if he did not arrive. The saving his wife from anxiety was a purely personal object.⁷

A man having to attend to a sudden call of nature, out of modesty sought a place where he could not be seen. It was also a dangerous place, and he was injured. Apparently there was no other private place available. The court said that the purpose for which he went there could not be taken account of in determining whether he was negligent in doing so. The dictates of modesty did not create any legal object.⁸

A building in which were stored a large sum of money and also a horse took fire. The possessor of the building was bound to use care to save both, but it was only possible to save one. From motives of humanity he saved the horse and let the money go. He was held not to have used due care for the money. As property, the horse was of much less value than the money, and the saving of suffering to the horse was not a legal object. If he could not save both pieces of property, he should have saved the more valuable one.⁹

⁶ The *James Adger*, 3 Blatchf. 515 (1856).

⁷ I cite this case from memory, not having been able to find it again.

⁸ *Van Schaick v. Hudson River R. R. Co.*, 43 N. Y. 527 (1871).

⁹ *Toledo, P. & W. R. R. Co. v. Pindar*, 53 Ill. 447 (1870).

When the collateral object is the saving of expense, there is no doubt that that is a legal object. A person, though he may be bound to go to some expense to prevent harm, need not incur an unreasonable expense. The excessive expense of taking certain precautions against danger, which might have been taken, has often been held a sufficient reason for not taking them.¹⁰ But the pecuniary condition of the person called upon to incur the expense, so that a given expenditure will be more or less onerous to him, is generally not important. The precautions which a railroad company, for instance, ought to take for the safety of its passengers are the same for a poor company, which can ill afford the expense of taking them, as for a rich one.¹¹ The question in such cases is: can such an expenditure be reasonably required in general? No company need take precautions which would call for an expenditure which it would be unreasonable to require from railroad companies generally. So the successful conduct of a business and the making of profits are legal objects as between all persons concerned in it; so that an employer cannot be required to take precautions for the safety of his employees in it, which would cost more than such a business could afford.

However, some courts have held that poor persons may be excused on the ground of their poverty from taking expensive precautions which a rich person would be bound to take. There are a good many cases where young children have been allowed to play in dangerous city streets unattended, and have been run over and hurt. On the question whether the child's parents were negligent in permitting him to get into the street or to be there alone, some courts have held that the poverty of the parents, which made it impossible for them to give close attention to the child, because of the pressure of other work, or to employ a servant to attend to the child, was not relevant,¹² while other courts have held it relevant.¹³

Conduct which is not directed to any object, which is aimless, is *per se* unrational. When, however, in a particular case the col-

¹⁰ Riddle v. Proprietors of Locks & Canals, 7 Mass. 169 (1810); Cooper v. Dallas, 83 Tex. 239, 18 S. W. 565 (1892).

¹¹ Denver & R. G. R. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578 (1902); Pennsylvania R. R. Co. v. Books, 57 Pa. St. 339 (1868).

¹² Cumming v. Brooklyn City R. R. Co., 104 N. Y. 669, 10 N. E. 855 (1887).

¹³ Del Rossi v. Cooney, 208 Pa. St. 233, 57 Atl. 514 (1904).

lateral object cannot be considered, it must not be assumed that the risk was taken wantonly and for no object. The question will then be, whether, considering how people generally act and the ordinary exigencies of life, it will generally be reasonable to act in that way, can a general rule be laid down that that sort of conduct is generally reasonable or unreasonable; ¹⁴ *e. g.*, is it generally reasonable to get off of a fast moving railroad train because it does not stop at one's station? However, the fact that no reason is shown for doing a dangerous act may be evidence that it was unreasonable and negligent.¹⁵

The test of reasonableness is what would be the conduct or judgment of what may be called a standard man in the situation of the person whose conduct is in question.

A standard man does not mean an ideal or perfect man, but an ordinary member of the community. He is usually spoken of as an ordinarily reasonable, careful, and prudent man. That definition is not exactly correct, because in certain cases other qualities than reasonableness, carefulness, or prudence, *e. g.*, courage, may be important; but it will do for our present purpose. It is because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation, that questions of reasonableness and negligence are usually left to the jury.

Every man, whether he is a standard man or not, is required to act as a standard man would. If by chance he is not such a man, he may, as has been said, make a mistake and act so as to be guilty of legal negligence, though he has used all such care and forethought as he was capable of. In the case of contributory negligence there is an exception to this rule in the case of abnormal persons, such as children and persons of unsound mind. They are not required to act like a standard man, but only to use such judgment as they are capable of. But as to negligence which is not merely contributory, as to negligent wrongs against others, the standard man test applies to their conduct also. Women are not abnormal persons, except perhaps in respect to courage.

Anything that a standard man would do is reasonable. If there are several different courses which he might take, any one of them

¹⁴ *Le Blanche v. London & N. W. Ry. Co.*, 1 C. P. D. 286 (1876).

¹⁵ *Finlayson v. Chicago, B. & Q. R. R. Co.*, 1 Dill. 579 (1871).

is reasonable, even though one would be more reasonable than another.¹⁶ All that the law requires of a man is reasonable conduct, not the most reasonable nor even the more reasonable. Also even a standard man, being human and therefore fallible, may err in his judgment. Conduct which in fact causes injury, if due to an error of judgment which a standard man might make, is not negligent. This is the meaning of the statement above mentioned, that mere error of judgment is not negligence. But this must be distinguished from an error which a standard man would not make.

The situation of the actor is subjective, not objective. It consists of such facts as are known to him. It would plainly be absurd and unjust to require a person to regulate his conduct with reference to facts of which he was ignorant.¹⁷ When, however, a person knows that he is ignorant of essential facts, it may be unreasonable for him to act at all. But in some circumstances a person may be charged with knowledge which in fact he has not, and be held to accountability as if he had it. When a person is under a duty to take precautions against a possible danger, there is usually an ancillary duty to use care to find out what precautions are needed; and for the purpose of the principal duty he is charged with all knowledge which he would have got by properly performing the ancillary duty.

The jury in deciding whether certain conduct involved an unreasonably great risk are deemed to be acquainted with the teachings of common experience, and evidence to prove that is not necessary nor admissible. It has been thought that the actor himself must be deemed to have the same knowledge, and should be held negligent, if he does something that the common experience of mankind shows to be unreasonably dangerous. It is believed that the cases of the jury and the actor are not parallel, and that as to the latter there is only a *primâ facie* presumption that he has such knowledge, which he may, if he can, rebut by evidence of his ignorance. Thus if a man should try to open a can which he knew to contain nitro-glycerine with a chisel and hammer, and an explosion

¹⁶ *Cartwright v. Chicago & G. T. Ry. Co.*, 52 Mich. 606, 18 N. W. 380 (1884); *Metropolitan Ry. Co. v. Wright*, L. R. 11 App. Cas. 152 (1886).

¹⁷ *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524 (1872); *Minneapolis Gen. Electric Co. v. Cronon*, 166 Fed. 651 (1908); *Western Union Tel. Co. v. Meyer*, 61 Ala. 158 (1878); *Blood v. Tyngsborough*, 103 Mass. 509 (1870).

should result, if the question were of his negligence in doing so, in the present state of our knowledge the jury could find without any evidence being adduced that his act was in fact very dangerous. It would no doubt be presumed that the actor knew it; but it is believed that he would be allowed to prove in his defence that he was actually ignorant of the properties of that substance. Of course, if he thought that the can contained not nitro-glycerine but condensed milk, that belief of his would be a part of his situation, and no question would arise as to the teachings of experience about nitro-glycerine.

Supplementary to the above mentioned general principles relating to the standard man test and the nature of the actor's situation, there are certain more special rules, two or three of which will be briefly noticed by way of illustration.

A custom is usually evidence that conduct in accordance with it is reasonable. A custom includes the way of acting of standard men. It may also sometimes tend to show that conduct contrary to it is unreasonable. But the actor's own habitual way of acting is not relevant to the reasonableness of his own conduct, though it may be so on the question of what others may reasonably expect him to do.

If a person is caught in a sudden emergency, which would perturb the judgment of a standard man, and has to act quickly, he may be excused for doing something that would be unreasonable if he had had time for more deliberate action. The emergency is a part of his situation. But he must still act as a standard man would act in such an emergency.¹⁸

Ordinarily a person may regulate his conduct on the assumption that others will act rightly and reasonably. But in a particular case this assumption must not be persisted in, when the actor knows facts showing that it will not be true.

In certain cases skill or special knowledge is an element in due care; *i. e.*, it is unreasonable for a person who has not competent knowledge or skill to do certain acts.

The reasonableness or unreasonableness of conduct is an inference from data. The data consist of the conduct in question and the facts of the actor's situation. The existence of the data is a

¹⁸ New Orleans, S. L. & C. R. R. Co. v. Burke, 53 Miss. 200 (1876).

question of fact. When the data are disputed, the question of negligence must go to the jury, with proper instructions from the court if necessary. The data being given, the inference of reasonableness or unreasonableness, of due care or negligence, is in its nature one of fact, the data furnishing the minor premise and the major premise being drawn from common experience, whereas in a true inference of law the major premise is a rule of law. Therefore the question is regularly for the jury. But in a perfectly clear case, where it is plain that only one reasonable inference is possible, the court will decide it as law. If no reasonable inference is possible, the court must decide the question against the party who has the burden of proof, usually the party who asserts that the other was negligent, and must not permit the jury to make a decision which would rest upon a mere guess and not upon reasonable inference.

However, a decision by the court that certain conduct was or was not reasonable or negligent becomes a precedent. The circumstances of a case in which such a decision is made may be so peculiar that a similar case will never arise again. If so, the precedent is of no importance as a precedent. But the group of facts may on the other hand be one that may often arise, and the precedent be controlling whenever that happens. In this way, although negligence is regularly in law and always in its own nature a question of fact, a number of positive rules of considerable generality have been evolved, that certain conduct in certain circumstances is or is not negligent *per se* or as law. When one of those rules applies, the question of negligence is really one of law. Instances of such rules are the rules about looking and listening before crossing a railroad track; the rule that it is not *per se* negligent to act so as to expose another to temptation to do wrong, though that may be negligent in particular circumstances; the rule that it is negligent to point a gun at another person and pull the trigger, even though the actor believes the gun to be unloaded.

Although duties as to due care do not fall within the intended scope of this article, a few words as to such duties will be added.

A duty to use care is a duty to act or omit with reference to the attainment of a certain end or object, what has been above spoken of as the principal object. The law sets that end before the actor and commands him to direct his conduct towards its attainment,

either by doing acts to accomplish it or by abstaining from acts which will tend to defeat it. But in common-law duties the law specifies only the end, not any particular means to be used. The duty is a generalized one to do whatever is reasonably necessary. The actor chooses for himself, at his peril, what particular acts he will do or abstain from. Therefore, in the case of such a generalized duty, it is error for the court to decide or permit the jury to find that due care required the use of specific means, though such an error may be harmless where those were plainly the only possible means.¹⁹ To do so would be to impose a special duty, different from the generalized duty to use care, which the court or jury has no right to do. For instance, although an innkeeper must use due care for his guests' personal safety, it cannot, in the absence of a statute, be laid down as a rule of law that he is negligent in not providing his house with fire escapes.²⁰

When a common-law duty exists to direct conduct towards a certain end, certain particular means are sometimes required by statute. Thus an apothecary ought to use care not to sell poison in circumstances where danger will probably arise from its being mistaken for a harmless medicine. If there is such a danger, he can guard against it in various ways, and under the generalized duty he may choose any of those ways. But a statute may require him to put a particular kind of label on the bottle. So a city may be under a generalized duty to use care to prevent persons from falling into an excavation in the street, which it can perform by taking various precautions. But a statute may specifically require a fence or lights at night.

Such statutes create specialized duties, which in their own nature are not really duties to use care for an end, but are positive peremptory duties to do certain acts precisely described. The object to be attained merely furnishes the reason why such a duty was created; it does not enter at all into the definition of the duty, as does the object when the duty is really to use care. Such duties lie in strictness outside of the law of negligence. But breaches of them are usually called negligence. When the object is also the object of a generalized duty to use care, and the specialized duty in fact

¹⁹ *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522 (1876); *Legge v. Tucker*, 1 H. & N. 500, 26 L. J. Ex. 71 (1856).

²⁰ *Yall v. Snow*, 201 Mo. 511, 100 S. W. 1 (1906).

overlaps the generalized duty and merely, in effect, points out a preferable manner of performing it, the action may usually be for a breach of either duty; and if the generalized duty is sued upon, the breach of the specialized one will usually be evidence, sometimes conclusive evidence, of negligence. In such cases there seems to be no very strong objection to classing the specialized duty among duties to use due care and calling its breach negligence. But when there is no generalized duty to use care for a certain object, either no common-law duty at all or the common-law duty is not simply to use care but is a peremptory duty to accomplish the end, such a classification and nomenclature is wrong and confusing. Thus the duty of the keeper of a fierce dog, which he knows to be such, to prevent it from biting another person is not a duty to use care. It is peremptory. If the dog bites any one, the keeper is liable, whether he was negligent or not. On the other hand, dogs not being generally dangerous, if he does not know of the dog's propensity, he is under no duty at all. In either case a statutory duty to muzzle the dog should not be classed as a duty to use care, or letting the dog go at large unmuzzled, as negligence.

There is a negative duty of due care of very great generality, resting upon all persons and owed regularly to all persons, not to do negligent acts, *i. e.*, acts which are unreasonably dangerous to persons or tangible property. There is some conflict of opinion as to whether this duty is owed to persons who are in the situation of trespassers or licensees.

There is no affirmative duty of equal generality, *i. e.*, no general duty to do acts, to take precautions, to prevent injury to others. The general rule is, that a person is not bound to do acts for others' benefit; he may sit still and let things take their course. Affirmative duties to do acts to protect others arise only out of special circumstances in which the actor is placed. Without trying to go into details, to define the duties precisely, or to make an exhaustive enumeration, the most important of those affirmative duties are as follows:

(1) A person who has done or is doing an act that will be unreasonably dangerous unless precautions are taken against the danger, must use due care to take such precautions as reasonableness requires. If the precautions are not taken, then in an action for a tort usually either the doing the act, which would be a breach

of the preceding duty and a malfeasance or misfeasance, or the omission of the precautions, which would be a non-feasance and a breach of this present duty, may be made the ground of complaint. When the precautions ought to be taken at the time of the act, the doing the act without the precautions is often spoken of as doing a lawful act in an improper manner, which is a misfeasance.

(2) A person who delivers a thing to another or furnishes a thing for another's use, comes under duties to use care either not to deliver or furnish a thing which is unreasonably dangerous at all, or, if the thing is dangerous but it is nevertheless not wrong to deliver or furnish it, to take precautions, if reasonableness requires that, against the danger. Often reasonableness will not require any precautions. There is no general rule that it is unreasonably dangerous to deliver or furnish a dangerous thing to or for another even without taking any precautions against the danger. The deliverer or furnisher may understand the nature of the thing and be able to guard himself; or it may be a sufficient performance of the duty to warn him of the danger. In the case of furnishing things for use, there is some conflict of opinion as to what kinds of things are so dangerous as to bring this duty into operation. It is laid down that the thing must be "inherently dangerous." There is also a great and irreconcilable difference of opinion as to who the person is for whose use the thing is deemed to be furnished, and to whom the duty is owed.

(3) In some circumstances a person having a dangerous thing in his possession which is attractive to children or animals, in a place where, led by their natural instincts which they cannot be expected to resist, they will be tempted to meddle with it and so expose themselves to danger, must take reasonable precautions against that. The authorities conflict as to whether this duty applies when the child or animal is a trespasser.

(4) The possessor of a dangerous thing must use due care to prevent it from doing harm. This duty is owed for the protection of persons or things being where they are by virtue of a right. There is no general duty not to keep dangerous things in one's possession, and to do so is not *per se* negligent. As to some kinds of dangerous things, *e. g.*, dangerous animals and under the old common law fire, there is a peremptory duty to prevent them from doing harm, which is not merely a duty to use care. In some places there is

such a strict duty as to actively dangerous things generally; in other places not.

(5) A person who invites another person to put himself or his belongings into a place of danger must take such precautions as reasonableness requires, if any, to protect him against the danger. This is sometimes spoken of as a duty to make the place safe or to provide a safe place; but that is not in general a correct statement of the duty. In many cases the duty may be performed in that way. That will often be the most convenient, or sometimes the only practicable, way of performing it; but if the place is not or cannot be made safe, the taking of other precautions may be a sufficient compliance with the duty. Sometimes giving warning to the invitee is enough. This duty is owed only to invitees, not to persons who come into the place by right, nor to licensees or trespassers. But there seems to be a more limited duty to licensees, to use care to protect them against concealed danger in the nature of traps.

(6) Bailees of things or services owe certain duties of active care, even aside from contract, breaches of which may give ground for actions of tort.

(7) Such duties may be created by contract.

(8) Such duties arise from certain relations, such as that of husband and wife or parent and child. These are often imperfect duties. Public officers may have such duties.

(9) Many equitable duties are of this kind, *e.g.*, duties of trustees as to the trust property, which resemble duties of bailees.

Henry T. Terry.

NEW YORK CITY

WORKING UNDER FEDERAL EQUITY RULES

THE large number of equity causes commenced in the United States Courts since the new Federal Equity Rules became effective (February 1, 1913), in which these rules have been called to the attention of the courts for interpretation, particularly during the second year, enable more definite conclusions to be drawn as to their effectiveness in securing the results sought by their promulgation, and the practitioner to determine more or less definitely how to proceed under them.

The reported cases alone, all of which, so far as I have been able to ascertain, are referred to herein (to say nothing of those unreported), indicate the vast amount of work that has been done by the federal judges and the attorneys practicing before them in determining the meaning of various of these rules and the mode of applying them.

It is certain that the federal courts generally are doing their best to apply these rules in such a manner as to secure the most efficacious results for litigants and meet their needs under local conditions. There is, however, a divergence in the application of and procedure under certain of the rules in different districts. In some districts the court has prepared, and in others is now formulating, local rules ¹ supplementary to the general Equity Rules necessary to be complied with in practice before the particular court making them.

During the first year under the new rules the courts were lenient in permitting cases, pending at the time these rules became effective, to be carried on under the practice then existing, and, for that reason, the second year's test of these rules is a better one than that of the first year.

The many clearly defined opinions of the courts in interpreting the meaning and scope of the rules show numerous differing, and, in some instances, irreconcilable decisions. This condition makes it essential for the attorney to familiarize himself with the interpretation of these rules by the different judges in each locality, as

¹ Under Federal Equity Rule 79.

well as to be acquainted with the local supplementary rules of the different District Courts, in order to safeguard his clients' interests.

The end of the first year under the Equity Rules showed quite a diminution in the number of pending causes in certain districts, as some of the courts insisted on these cases being put upon the trial calendar, and, if not ready for trial, dismissed them under Rule 57, which resulted in a final disposition of a large number of causes of old standing and where the issues had long been dead.

The end of the second year's period fails to show a corresponding decrease in the number of pending causes in most districts.

Where attorneys on both sides are disposed to try their cases promptly, it now often takes as long to have a case disposed of on final hearing, whether the evidence is taken in open court or otherwise, as under the old rules.

The inability in such cases to reach a more speedy determination of equity causes is due largely to the crowded condition of the trial calendars and the necessity of disposing of cases generally in their regular order rather than by special assignment when the case is ready for submission on final hearing, as was quite common under the old procedure. The practicability of the new Equity Rule² which has brought about the most radical departure from the old equity practice requiring that "in all trials in equity, the testimony of witnesses shall be taken orally in open court" and that "the courts shall pass upon the admissibility of all evidence offered as in actions at law" has not been satisfactorily demonstrated, for, in some instances, the trial of these equity causes in open court is requiring the constant attendance of a judge for many weeks of continuous, close and confining work.

Within the three months preceding June 1, 1915, in the Southern District of New York, where the practice of compelling the trial of equity causes in open court has been rigidly adhered to, one case consumed the entire time of one of the judges for a period of over six weeks, and, at that time, the end was not in sight. In another equity case being tried simultaneously, the entire time of

² Federal Equity Rule 46.

another judge in New York City was completely occupied for four weeks, after which, extensive briefs were permitted to be filed requiring the further consideration of the court. Likewise in New Jersey, during the past spring, a single equity case occupied more than eight weeks of the time of the court in hearing the evidence and arguments, aside from the time which must be and is now being consumed in reading briefs.

It is true that the taking of evidence in open court in equity causes is conducive to the elimination of some immaterial matters from the record, and the actual period of time during which the evidence is being taken is usually somewhat less than under the former procedure. The judges are working to their utmost capacity to speed the causes and render prompt decisions after the close of these open court trials, notwithstanding which it is impossible for them to dispose of as large a number of cases in a given period of time on final hearing as under the old practice, because so much time is consumed in attending while the evidence is being taken.

In the Southern District of New York there are probably more equity cases brought than in any other district in the United States. During the past year twenty District judges have been especially assigned from other circuits to assist in the disposition of causes pending in New York City.³ In addition, two Circuit

	DAYS
³ Hon. Wm. I. Grubb.....	Alabama..... 89
Hon. John C. Rose.....	Maryland..... 18
Hon. John M. Killits.....	Ohio..... 38
Hon. Howard C. Hollister.....	Ohio..... 39
Hon. Edw. E. Cushman.....	Washington..... 37
Hon. A. B. Anderson.....	Indiana..... 26
Hon. Henry A. M. Smith.....	South Carolina..... 10
Hon. Gordon Russell.....	Texas..... 19
Hon. Wm. B. Sheppard.....	Florida..... 24
Hon. Walter Evans.....	Kentucky..... 17
Hon. Jeremiah Neterer.....	Washington..... 25
Hon. J. Otis Humphrey.....	Illinois..... 19
Hon. Rufus E. Foster.....	Louisiana..... 27
Hon. Wm. C. Van Fleet.....	California..... 18
Hon. F. H. Rudkin.....	Washington..... 44
Hon. A. L. Sanborn.....	Wisconsin..... 22
Hon. Wm. H. Pope.....	New Mexico..... 23
Hon. F. S. Dietrich.....	Idaho..... 20
Hon. C. W. Sessions.....	Michigan..... 20
Hon. Edw. S. Farrington.....	Nevada..... 15

judges formerly of the Commerce Court ⁴ and five District judges ⁵ from other districts within the Second Circuit have spent more or less time in the trial of cases in New York. The different members of the Court of Appeals of the Second Circuit have also rendered assistance where it has been possible for them to act, to dispose of preliminary motions and the like. Notwithstanding all this assistance and the extremely high pressure under which the judges are constantly and conscientiously working, and the high average number of days of holding court maintained by them, ⁶ it takes from

	DAYS
⁴ Hon. Wm. H. Hunt.....	162
Hon. Julian W. Mack.....	155
	DAYS
⁵ Hon. Van Vechten Veeder.....Eastern District.....	16
Hon. James L. Martin.....(late of Vermont).....	93
Hon. John R. Hazel.....Western District.....	48
Hon. Geo. W. Ray.....Northern District.....	71
Hon. Edwin S. Thomas.....Connecticut.....	47

⁶ The record of the U. S. District Court, So. Dist. N. Y., for the year 1913, shows that one of the judges actually presided in court one hundred and eighty days, and other judges for nearly as many, including one day each week for naturalization hearings and bankruptcy motions, but exclusive of numerous days when the judges were in court to hear motions especially set down, either on Saturdays or days when they would otherwise be in chambers; nor does it show the several days' attendance of some of the judges in other districts in the Second Circuit. (Judge Holt in New Haven; Judge Mayer in Jamestown, Judge Hand in Vermont.) In addition to this, at least one judge has been present in chambers transacting *ex parte* business on practically every business day during the year and the other resident judges have been present in chambers, when not sitting in court, except when kept busy by illness or court business in other districts or during the vacation session.

The judges of the Circuit Court of Appeals also sat in the District Court a total of fifty days, which is in addition to the work done by them in the Circuit Court of Appeals. The total number of days of regular sessions of the District Court with judges present and presiding, held during the calendar year of 1913 at New York City, was nine hundred and thirty-three. These figures, of course, include the trial of all kinds of cases, but do not include the time spent by judges in writing opinions, hearing various matters in chambers, in conferences, and in arranging for the various hearings, which is necessarily largely done by the judges outside of the time occupied in court.

In 1914, certain of the judges in New York were actually present and presided at the regular sessions of the court held during that year, one hundred and seventy days, and, due to the large number of outside judges who sat in the Southern District of New York, by special assignment, the total number of days that the judges sat in the United States District Court during the year 1914 was ten hundred and eighty-seven, and, for the first four months of 1915, this total number was five hundred and eighty-four.

(Information obtained through the courtesy of Judge Learned Hand and Deputy Clerk William Tallman.)

seven months to a year before an equity cause can be reached for trial after being placed upon the trial calendar. This is particularly significant in view of the fact that the working conditions and efficiency of the clerk's office have been vastly improved in this district, owing to its having recently been thoroughly systematized, thus reducing to a minimum the detail work of the judges.

No one unfamiliar with the actual conditions existing in the United States courts can realize the tremendous load which the federal judges are carrying in their endeavor to give litigants and the public generally prompt action in the various matters brought before them, for, with the ever-increasing load which is being placed upon the federal judges by Congress, and the additional work imposed by the new Equity Rules of taking the evidence of witnesses in open court, little gain on the court calendars has been made in various of the districts. This is true in New York, despite the fact that so extensive an advantage has been taken of the amendment to Chap. I, Sec. 18 of the Judicial Code.⁷ It would seem that resort must necessarily be had to the practice of either referring equity cases to an examiner or master, and have the causes submitted to the court on printed records, briefs and final argument, or that additional judges be appointed to secure a more speedy determination of these causes.

The clearing of the calendars in some of the districts is much more largely due to the energy, hard and prompt work of the judges themselves than to any change in the practice.

If either party insists, the courts generally will order the testimony of all of the witnesses within their jurisdiction to be taken in open court, although some of the federal judges in certain districts where there is a large amount of business (and there is no provision under the statutes for allowing judges from other circuits to be called in, as in the Second Circuit) have ordered that the evidence in some cases (such as patent cases involving intricate mechanical or electrical problems) be taken before a master or an examiner, particularly if agreed to by the parties, on the theory that such a cause is an exceptional one under the rules.⁸ By adopting this procedure, the calendars of these courts have been somewhat relieved of congestion.

⁷ Act of October 13, 1913.

⁸ Federal Equity Rule 47.

Perhaps the most striking result accomplished by taking the testimony of witnesses orally in open court under the new rules has been to cut down materially or eliminate the testimony of so-called expert witnesses who have no particular qualifications to testify as such. While this has effected a small saving to litigants, it has increased the operating expenses of some of the courts and has otherwise affected the conditions of the court calendars generally to such an extent as to counteract materially the benefits gained.

The new rules have also served as an impetus, to the courts and attorneys alike, toward eliminating from the court calendars all except live and active cases. Various plans have been tried by the different judges for insuring the trial of cases when they are called on the calendar under the local rules, and these are in some instances securing beneficial results. For instance, in the Eastern District of Michigan, both the law and equity calendars were heavily overloaded, there being something in excess of two thousand cases on these calendars, and, as the same judge sat in both kinds of cases, it was with difficulty that a trial of an equity case could be had within any reasonable time. By the procedure there adopted, a bulletin is placed in the courtroom, on which appears each week a list of cases to be reached that week, and when they are reached on the schedule, made up largely under local rules (generally and colloquially known in Michigan as the "Eleven Commandments"), they are tried or stricken from the calendar. The court in this way secures the result of having cases to try, and being able to dispose of them, when the time fixed arrives. This means that the court moves the active cases along and disposes of them, instead of spending a large amount of time in going over old cases in which the issues are dead or dying. The court, by insisting that the causes be tried when reached, or else be stricken from the calendar, has reduced the number of pending cases so that in February of this year there were about one hundred and twenty-five cases pending on both calendars. This illustrates in a general way the situation in other districts.

In Chicago there is a call of the pending cases which have been on the calendar for more than a year, at certain dates announced in advance; the cases which are not ready for trial and in which

there is no showing made for a continuance are dropped from the calendar, to be reinstated only upon a proper showing, and because of the failure of such showing, in a large number of cases, they are permanently disposed of in this manner.

In view of the numerous decisions under these rules during the second year of their existence, and of the mode of applying them, I shall make mention, so far as possible, of any specific rulings effective in different circuits not common to all, and refer to each rule upon which there is a reported decision since they were enacted, and shall give as complete a list of all the decisions under each of the rules, both reported and unreported, as I have been able to obtain.

The rule ⁹ relative to the keeping of various books in the clerk's office is not strictly adhered to in the different districts, nor can counsel rely upon his receiving the notice required to be given of orders entered in his absence.¹⁰ He must be upon constant inquiry to ascertain what orders are being entered in pending cases. In numerous districts the clerks, under the direction of the court, refuse to file *pro confesso* decrees except upon notice to the adverse party, notwithstanding the rules.¹¹

Under the rule relating to the enforcement of final decrees ¹² the question of validity of a particular decree was raised on the ground that it did not specifically provide for a writ of execution. The court, in liberally interpreting this rule, held the decree valid, and says that such recital is immaterial "because the general rules in equity provide that when the judgment is for the payment of money only it shall be enforced by writ of execution."¹³

The rule ¹⁴ relative to a decree for "deficiency in foreclosures, etc." has been considered in maintaining the jurisdiction of the court.¹⁵

The rule requiring an answer to be filed within twenty days after the subpoena is served, and for a default and decree *pro confesso*,

⁹ Federal Equity Rule 3.

¹⁰ Under Federal Equity Rule 4.

¹¹ Federal Equity Rules 5, 12, 16 and 17.

¹² Federal Equity Rule 8.

¹³ *Richards v. Harrison*, 218 Fed. 134, 137 (1914).

¹⁴ Federal Equity Rule 10.

¹⁵ *St. Louis, I. M. & S. Ry. Co. v. Bellamy*, 211 Fed. 172, 180 (1914).

in the event the answer is not filed within this time and no extension is had from the court enlarging it,¹⁶ has generally been liberally interpreted, and the defendant permitted to plead such defenses as are available to him, even though the answer is not filed within the time specified. These cases are unreported. In one case the defendant was held strictly to the time prescribed by the rule. As the Court of Appeals affirmed this ruling,¹⁷ counsel for defendant must be exceedingly prompt in getting his answer on file, specifically setting up all of the defenses upon which he intends to rely. Failure to do this, or to secure an order in advance from the District Court, extending the time for answering, may be disastrous, as this is treated as within the discretion of the District Court.

The courts have incidentally referred to the rule¹⁸ abolishing technical forms of pleading. Some courts are very liberal in their interpretation of the rule permitting amendments generally in the furtherance of justice, and at every stage of the proceeding are disregarding "any error or defect in the proceedings which does not affect the substantial rights of the parties." But others have been very strict and have refused to admit amendments, even upon terms. In some unreported patent causes, where a defendant has either been unable to secure, or failed to set up in his original answer, the anticipating devices upon which he must rely to substantiate his claims of non-infringement, or invalidity of a patent, courts have refused to permit such amendments setting up new defenses, while in others the courts have permitted such amendments, even on the day of trial. This demonstrates the necessity of using the utmost diligence and caution in getting all pertinent matter before the court at the outset, even though the rule under discussion itself indicates liberality and reported decisions are to the same effect.

The courts in the reported decisions¹⁹ hold that "technical errors are to be disregarded," and have stated that this rule but

¹⁶ Federal Equity Rule 12.

¹⁷ *Board of Levee Com'rs v. Tensas Delta Land Co.*, 204 Fed. 736 (1913).

¹⁸ Federal Equity Rule 18; *Acme Steel Goods Co. v. American Metal Fasteners Co.*, 206 Fed. 478 (1913); *Sheeler v. Alexander*, 211 Fed. 544 (1913).

¹⁹ *Marconi Wireless Telegraph Co. v. National Electric Signaling Co.*, 206 Fed. 295 (1913); *Gaumont v. Hatch*, 208 Fed. 378 (1913); *Sheeler v. Alexander*, 211 Fed. 544 (1913); *Williams v. Pope*, 215 Fed. 1000 (1914).

"expresses the conclusion to which courts of equity had arrived before the adoption of the rule."²⁰

Further and particular statements in pleadings may be required under the rules,²¹ but exceptions to bills, answers and other proceedings for scandal or impertinence no longer obtain. While this matter may be stricken by the court upon such terms as it sees fit, under the rules, the courts are reluctant to strike such matters; but when stricken under an order of the trial court, this cannot be corrected by *mandamus* or *certiorari* when an appeal lies on the whole controversy.²²

The transfer of an action at law, erroneously begun as a suit in equity, is now readily accomplished, and the rules applicable²³ have saved time and expense to litigants, without counterbalancing difficulties.

By the Act of March 3, 1915, there was added after Section 274 of the Judicial Code three new sections, No. 274A, 274B and 274C, dealing particularly with the question of procedure in case a suit at law should have been brought in equity, or a suit in equity should have been brought at law. (Federal Statutes, Annotated, April, 1915, Pamphlet Supplement No. 2, p. 35.)

Judge Dickinson, of the Eastern District of Pennsylvania, well states the general tendency of the courts in this regard, while considering a motion to dismiss a certain cause for want of equity on the ground that the plaintiff had an adequate remedy at law, when he said,

"Rule 22 expressly provides what shall be done at 'any time it appears' that the suit should have been brought at law. More than this, Rule 23 commands us not to dismiss a bill on this ground. The case may be proceeded with, and when it appears, if it does develop, that this case should be tried at law and the amount of damages assessed by the verdict of a jury, this may be done."²⁴

²⁰ Medical Society of So. Car. v. Gilbreth, 208 Fed. 899, 926 (1913).

²¹ Federal Equity Rule 20. Williams v. Pope, 215 Fed. 1000 (1914); Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515 (1913).

²² Federal Equity Rule 21; Williams v. Pope, 215 Fed. 1000 (1914); Lovell-McConnell Mfg. Co. v. Bindrim, 219 Fed. 533 (1914).

²³ Federal Equity Rules 22 and 23.

For exception see Goshen Mfg. Co. v. Myers Mfg. Co., 215 Fed. 594 (1914), now pending on writ of *certiorari* in the United States Supreme Court; Linden Inv. Co. v. Honstain Bros. Co., 221 Fed. 178 (1915).

²⁴ Goldschmidt Thermit Co. v. Primos Chemical Co., 216 Fed. 382, 383 (1914).

See also: Cubbins v. Miss. River Commission, 204 Fed. 299 (1913); Heckscher v.

The same variance between the judges as to what is required in the form of a bill of complaint still continues to exist, although the majority of judges sanction the short form of the bill, first approved by Judge Tuttle.²⁵ In a comparatively recent case,²⁶ Judge Chatfield, of the Eastern District of New York, in considering a bill alleging infringement of a patent and the allegations necessary in such a bill, holds the bill sufficiently specific under the new Equity Rule²⁷ which requires "a short and simple statement of the ultimate facts." The allegations in the bill before him were substantially that "B, being the inventor, being entitled to a patent, duly filed an application; that on the.....day of.....all of the requirements of the statutes of the United States then in force, having been duly complied with, letters patent were duly issued." A motion to dismiss was made.²⁸ The Court considered the motion substantially as a demurrer, and held that the mere allegation that "Defendant infringed by making and offering for sale a patented article" is an insufficient one as to infringement and sustained the motion on that ground.

The former uncertainty as to whether it is necessary to state in a bill of complaint the grounds upon which the court's jurisdiction depends, and the ultimate facts upon which the plaintiff asks relief without stating evidence, is still causing considerable discussion, due to differences of opinion among the courts as to the meaning of the rule²⁹ relative thereto, though the weight of authority seems to approve and speak with commendation of a concise statement of jurisdictional and fact averments, and follow the rule as laid down in the *Carbureter Co.* case,³⁰ in which this subject was

Penn. Steel Co., 205 Fed. 377, 379 (1913); Cartwright v. Southern Pac. Co., 206 Fed. 234 (1913); Sturges v. Portis Mining Co., 206 Fed. 534, 539 (1913); United States v. Utah Power & Light Co., 208 Fed. 821 (1913); American Car, etc. Co. v. Merchants Despatch Transp. Co., 216 Fed. 904, 911 (1914) (Interpreting Rule 23); Curriden v. Middleton, 232 U. S. 633 (1914); Vosburg Co. v. Watts, 221 Fed. 402 (1915).

²⁵ Zenith Carbureter Co. v. Stromberg Motor D. Co., 205 Fed. 158 (1913); 27 HARV. L. REV., 634-35.

²⁶ General Bakelite Co. v. Nikolas, 207 Fed. 111 (1913).

²⁷ Federal Equity Rule 25.

²⁸ Federal Equity Rule 29. See also, Tyler Co. v. Ludlow-Saylor Wire Co., 212 Fed. 156 (1914).

²⁹ Federal Equity Rule 25.

³⁰ Zenith Carbureter Co. v. Stromberg Motor D. Co., 205 Fed. 158 (1913).

fully discussed. This is not a safe criterion, for, in certain equity causes (patent and trade mark causes), it has been held that it is necessary to plead the language of the statute under which the grant or registration was made. Before preparing a bill in any specific suit, the pleader should consider the various cases here cited,³¹ and ascertain the rules adopted in the particular district where the suit is to be brought.

It seems absurd that it should be necessary to plead the statutes, particularly in patent cases where the entire cause of action rests upon a government grant.

Judge Orr, of the Western District of Pennsylvania, has painstakingly considered and reviewed the requirements of Bills of Complaint and points out that brevity and simplicity of allegation are within the purpose of the Rules 25 and 30, which should be of great help to the profession, in *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*³²

A very slight amendment to Rule 25 would materially shorten the pleadings and lessen the uncertainty in this character of cases. It would eliminate delays incident to subjecting the more concise form of bill to a motion to dismiss³³ or for a further and particular statement.³⁴

Under the present rules, if it is desired to speed the cause, it is much safer to follow the longer form, notwithstanding an inherent desire of many attorneys to avoid prolixity.

It has been specifically held that the rule³⁵ which, on its face, appears to give the plaintiff the right to join as many causes of action cognizable in equity as he may have against the defendant,

"cannot be used as the means to bring into the equitable jurisdiction of this court (the District Court) a cause of action between the parties over which the court could not have jurisdiction unless diverse citizen-

³¹ *Sawyer v. Gray*, 205 Fed. 160 (1913); *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515 (1913); *Wilson v. American Ice Co.*, 206 Fed. 736 (1913); *Acme Steel Goods Co. v. American Metal Fasteners Co.*, 206 Fed. 478 (1913); *General Bakelite Co. v. Nikolas*, 207 Fed. 111 (1913); *Alexander v. Fidelity Trust Co.*, 215 Fed. 791 (1914); *Williamson v. Pope*, 215 Fed. 1000 (1914); *State of Maine L. Co. v. Kingfield Co.*, 218 Fed. 902 (1914); *Destructor Co. v. City of Atlanta*, 219 Fed. 996 (1914).

³² 222 Fed. 950 (1915).

³³ Federal Equity Rule 29.

³⁴ Federal Equity Rule 20.

³⁵ Federal Equity Rule 26.

ship of the parties gave the United States courts general jurisdiction over the case,"³⁶

and that matters ordinarily cognizable at law cannot be joined with a cause of action in equity "for the purpose of bringing the amount involved within the jurisdiction of the United States District Court,"³⁷ and this rule has been interpreted by some courts in connection with Rule 30 to give the defendant the same right in joining causes of action by way of counterclaim, as the plaintiff has joined in its bill of complaint under this rule.³⁸

The purpose of the rule³⁹ relating to stockholders' bills under the authorities seems

"to exclude cases brought by a stockholder collusively, in order to give an apparent jurisdiction to a court which would not have it if the suit were by the corporation,"⁴⁰

and to afford the stockholder relief without the necessity of taking the matter up with the managing director or trustees, where the facts warrant the assumption that such a request would be futile.⁴¹

The courts are generally liberal in permitting amendments to the bill, and such amendments, even after the defendant has filed its pleadings, have been permitted in a number of unreported cases, although it is unsafe to be careless about preparing the original bill on the assumption that such amendments will be permitted.

Although demurrers and pleas were abolished by the new rules, the large number of cases in which the substitute motions to dismiss have been used indicates a change in name and form rather than substance.

The rule⁴² providing for the motion to dismiss, which motion is heard in advance of the trial, has brought about a somewhat more speedy determination of the preliminary issues than under the old procedure, and, to that extent, has been advantageous.

³⁶ *Vose v. Roebuck Weather S. & W. S. Co.*, 210 Fed. 687, 688 (1914).

³⁷ *Bucyrus Co. v. McArthur*, 219 Fed. 266, 267 (1914).

³⁸ *Marconi Wireless Telegraph Co. v. National Electric Signaling Co.*, 206 Fed. 295 (1913); *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377 (1914).

³⁹ Federal Equity Rule 27; *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. 529 (1915).

⁴⁰ *Kelly v. Dolan*, 218 Fed. 966, 970 (1914).

⁴¹ *Wathen v. Jackson Oil Co.*, 235 U. S. 635 (1915); *Dana v. Morgan*, 219 Fed. 313 (1914).

⁴² Federal Equity Rule 29.

The courts very properly refuse to give consideration to demurrers under this rule, as is well illustrated by the opinion of Judge Sanford, where he says, relative to a demurrer to a petition in bankruptcy:

"The demurrer to the petition in bankruptcy must be stricken out without consideration of its merits. Proceedings in bankruptcy generally are in the manner of proceedings in equity."⁴³

Likewise, the courts approve the raising of defenses which could formerly have been raised by demurrer by the motion to dismiss, for it has been held that

"The defendant is, therefore, justified and correct in his practice in applying to the court, by means of the present motion, with respect to the determination of what facts must be shown in the complaint to constitute a valid cause of action."⁴⁴

The large number of reported decisions,⁴⁵ as well as the longer list of unreported ones, indicates the extent of the use of this motion, and the result secured by it, in some instances finally determining the cause of action without the necessity of answer or proof under it.

In a recent patent case, Judge Orr, of the Western District of Pennsylvania, entertained at the beginning of the trial a motion to dismiss the bill of complaint for want of patentable novelty and invention appearing on the face of the pleadings and the patent. The five days' notice required by Rule 29 having been waived by plaintiff, the motion was treated as a demurrer under the old practice and after hearing arguments of counsel, the Court sustained the

⁴³ *In re Jones*, 209 Fed. 717, 718 (1913).

⁴⁴ *General Bakelite Co. v. Nikolas*, 207 Fed. 111, 112 (1913); *New Fiction Pub. Co. v. Star Co.*, 220 Fed. 994 (1915).

⁴⁵ *Hyams v. Old Dominion Co.*, 204 Fed. 681 (1913); *Sawyer v. Gray*, 205 Fed. 160 (1913); *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515 (1913); *Wilson v. American Ice Co.*, 206 Fed. 736 (1913); *General Bakelite Co. v. Nikolas*, 207 Fed. 111 (1913); *Puget Sound Elec. Ry. Co. v. Lee*, 207 Fed. 860 (1913); *Adler Goldman Com. Co. v. Williams*, 211 Fed. 530 (1914); *Bogert v. Southern Pac. Co.*, 211 Fed. 776 (1914); *Tyler Co. v. Ludlow-Saylor Wire Co.*, 212 Fed. 156 (1914); *Alexander v. Fidelity Trust Co.*, 214 Fed. 495 (1914), 215 Fed. 791 (1914); *So. Western Surety Ins. Co. v. Wells*, 217 Fed. 294 (1914); *Destructor Co. v. City of Atlanta*, 219 Fed. 996 (1914); *Boyd v. N. Y. & H. R. Co.*, 220 Fed. 174 (1915); *Ralston Steel Car Co. v. National Dump Car Co.*, 222 Fed. 590 (1915).

motion, found the patent invalid and dismissed the bill. (Decision unreported.) In some districts a motion to dismiss has been made at the close of plaintiff's proofs and a ruling had on the motion without prejudice to defendant's rights to submit proofs after the ruling upon the motion had been unfavorable to defendant.

The line of distinction among the cases relating to the rules governing what may be included in the answer,⁴⁶ so marked at the end of the first year's operation of the Federal Equity Rules,⁴⁷ has not only been maintained in the numerous decisions under these rules during the second year of their operation, but has become even more pronounced, and it is rather significant that judges in the same circuit, and even in the same district, are interpreting the rule differently. One line of decisions interprets the rule liberally⁴⁸ and allows the defendant to plead in its answer affirmative matters entirely independent of and not in any way arising out of the cause of action set up in the bill. The other line of decisions interprets the rule strictly⁴⁹ and holds that any affirmative relief asked for in the answer must be germane to, or arise out of, the original proceeding. These latter courts, instead of being in the majority as they were a year ago, now appear to be in the minority.

One of the reasons (in addition to the ambiguity of the rule

⁴⁶ Federal Equity Rules 30 and 31.

⁴⁷ 27 HARV. L. REV., 636-9.

⁴⁸ *Vacuum Cleaner Co. v. American Rotary Valve Co.*, Judge Lacombe (N. Y.), 208 Fed. 419 (1913); *Salt's Textile Mfg. Co. v. Tingue Mfg. Co.*, Judge Martin (Conn.), 208 Fed. 156 (1913); *Motion Picture Pat. Co. v. Eclair Film Co.*, Judge Rellstab (N. J.), 208 Fed. 416 (1913); *McGill v. Sorensen*, Judge Chatfield (N. Y.), 209 Fed. 876 (1913); *Miss. Valley Trust Co. v. Washington Northern R. Co.*, 212 Fed. 776 (1914); *Electric Boat Co. v. Lake Torpedo Boat Co.*, Judge Rellstab (N. J.), 215 Fed. 377 (1914); *U. S. Expansion Bolt Co. v. Kroncke Hdw. Co.*, Judge Sanborn (Wis.), 216 Fed. 186 (1914); *Buffalo Specialty Co. v. Vancleef*, Judge Sanborn (Ill.), 217 Fed. 91 (1914); *Hurley Mach. Co. v. Broka Mfg. Co.*, Judge Landis (Ill.) (Unreported); *Portland Wood Pipe Co. v. Slick Bros. Const. Co.*, Judge Dietrich (Idaho), 222 Fed. 528 (1915).

⁴⁹ *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, Judge Dodge (Mass.), 204 Fed. 103 (1913); *Williams Patent Crusher, etc. Co. v. Kinsey Mfg. Co.*, Judge Hazel, 205 Fed. 375 (1913); *Adamson v. Shaler*, Judge Geiger (Wis.), 208 Fed. 566 (1913); *Atlas Underwear Co. v. Cooper Underwear Co.*, Judge Geiger (Wis.), 210 Fed. 347 (1913); *General Bakelite Co. v. Nikolas*, 207 Fed. 111 (1913); *Klauder-Weldon D. M. Co. v. Giles*, Judge Dodge (Mass.), 212 Fed. 452 (1914); *Sydney v. Mugford Printing, etc. Co.*, Judge Thomas (Conn.), 214 Fed. 841 (1914); *Kawneer Mfg. Co. v. Hester Mfg. Co.*, Judge Carpenter (Ill.) (Unreported); *United States v. Woods*, 223 Fed. 316 (1915).

itself) why this rule has been so much in controversy is due to the fact that the defendant in patent, trade mark or unfair competition suits attempts to sue the complainant in its answer in the same cause of action under a patent which it owns, or, on a complaint of unfair competition, as a counter-irritant for the cause of action brought by the complainant, and in some instances where it has no real defense to the validity of the plaintiff's patent or to the question of infringement.

Some courts, under a motion to make the answer more definite and certain, have required the defendant to state very specifically the exact defenses set up in the answer that he intends to rely upon at the trial, and in one case, Judge Clarke of the Northern District of Ohio, Eastern Division, in entertaining such a motion, compelled the defendant in a patent cause to specify in what respect each of the patents pleaded by him disclosed any of the elements or combination of elements described in plaintiff's patents, and in what respect they negated the novelty and invention of the device therein shown and described.⁵⁰

The motion to strike out is permitted as a means for testing the sufficiency of affirmative defenses in the answer; it has been used in some unreported cases in lieu of exceptions abolished by the rules.⁵¹ Supplemental pleadings have been permitted⁵² which allege material facts occurring after the original pleading, or facts of which the party was not cognizant at the time the original pleading was filed (such as judgments or decrees of a competent court rendered after the commencement of the suit), particularly where the supplemental matter related to the matters at issue.⁵³

Where an amendment to a bill has been made, answers must be filed to this within ten days, except under extraordinary conditions.⁵⁴

The rule⁵⁵ permitting parties generally to intervene has not thus far been extensively considered, and it is too early to say what the

⁵⁰ *Coulston v. H. Franke Steel R. Co., Inc.*, 221 Fed. 669 (1915).

⁵¹ Federal Equity Rule 33.

⁵² Federal Equity Rule 34; *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103 (1913); *Marconi Wireless Telegraph Co. v. National Electric Signaling Co.*, 206 Fed. 295 (1913); *Sheeler v. Alexander*, 211 Fed. 544 (1913).

⁵³ *Kryptok Co. v. Haussmann & Co.*, 216 Fed. 267 (1914).

⁵⁴ Federal Equity Rule 32.

⁵⁵ Federal Equity Rule 37.

effect of this rule is to be. The reported decisions⁵⁶ indicate a rather strict construction of this rule, although it is to be noted that the reasoning applied to it is somewhat analogous to that of Rule 30, and the decision which most fully discusses this rule is one by a court giving the restricted construction to Rule 30.

One or more representatives of a class may sue or defend for the whole where it is impracticable to bring them all before the court,⁵⁷ but the allegations must be sufficient in order to enable one party to do this.⁵⁸ The court may also finally determine a cause in the absence of persons who will be proper parties,⁵⁹ but the decrees entered shall be without prejudice to those absent, although this does not permit the court to proceed in a case where the indispensable parties are not before it.⁶⁰

The Courts of Appeal, in cases where the testimony of witnesses has been taken before the trial court,⁶¹ are apparently giving greater weight to the findings of that court than where the evidence was taken by depositions. As was said by Judge Sheppard, speaking for the Court of Appeals of the Fifth Circuit:

"We recognize the rule that the findings of fact . . . by the District Court are entitled to great weight by the Appellate Court. The reason for the rule is based upon the trial court's opportunity for judging the credibility of witnesses; the reason for the rule ceases, however, when the trial court's finding is based . . . on depositions."⁶²

There are but few reported decisions relative to the rules requiring testimony to be taken orally in open court,⁶³ that of allowing depositions to be taken in exceptional cases,⁶⁴ and permitting affidavits of expert witnesses to be filed in patent and trade mark cases.⁶⁵ Although the practice of filing affidavits is being more or

⁵⁶ *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347 (1913); *Gaumont v. Hatch*, 208 Fed. 378 (1913).

⁵⁷ Federal Equity Rule 38.

⁵⁸ *Raich v. Truax*, 219 Fed. 273 (1915).

⁵⁹ Federal Equity Rule 39.

⁶⁰ *Hyams v. Old Dominion Co.*, 204 Fed. 681 (1913).

⁶¹ Under Federal Equity Rule 46.

⁶² *Hamburg-Amer. Packetfahrt A. G. v. Gye*, 207 Fed. 247, 253 (1913).

⁶³ Federal Equity Rule 46.

⁶⁴ Federal Equity Rule 47; *P. M. Co. v. Ajax Rail Anchor Co.*, 216 Fed. 634, 636 (1914); *Victor Talking Machine v. Sonora Phonograph Corp.*, 221 Fed. 676 (1915).

⁶⁵ Federal Equity Rule 48; *North v. Herrick*, 203 Fed. 591 (1913); *Acme Steel Goods Co. v. American Metal Fasteners Co.*, 206 Fed. 478 (1913).

less extensively followed by some attorneys, it is not by any means universally used. The courts usually permit such affidavits to be filed upon the petition of the parties desiring to use them.

In some instances, attorneys have attempted by petition to compel their opponents to file expert affidavits in advance of the trial. The courts, however, so far as I have been able to ascertain, have not granted any such petition by an adverse party where the right to take the testimony of experts in open court was insisted upon. This, perhaps, is due to the fact that some courts are refusing to permit experts to testify unless they have the proper qualifications, and, in some instances, have stricken out affidavits and testimony of experts on the ground that they were not properly qualified and because they express opinions clearly within the province of the court. Judge Mayer tersely says of such expert witnesses:

"In the Southern District (of New York) we never allow an expert, since the new rules, to express his opinion as to the patentability, or construe claims for us. What we want him to do is to give us the mechanical construction, explain the technique of the alleged patented article or alleged infringement, etc., but never let them construe claims for us, nor do we let them express opinions as to invention or non-invention. We think that that is our duty."

Under the rule permitting the court to deal with the costs of incompetent, immaterial or irrelevant depositions,⁶⁶ some orders have been made taxing the expense of plaintiff, incurred in attending on the taking of an immaterial and irrelevant deposition of the defendant's witness.⁶⁷

The plaintiffs are sometimes proving substantially all of their *primâ facie* case by depositions of witnesses residing more than one hundred miles from the place of trial, under notice given to the adverse party, and these depositions are used as the opening evidence at the trial before the court. This saves considerable of the court's time. In such instances, this evidence is taken before a commissioner, examiner, master or notary, under the statutes, as provided in the rules.⁶⁸

A radical change is accomplished by the rules relating to cases

⁶⁶ Federal Equity Rule 51.

⁶⁷ *Stillwell v. McPherson*, Judge Ray (Unreported) (1914).

⁶⁸ Federal Equity Rule 54 (*supra*).

going on the trial calendar after the time for taking depositions has expired.⁶⁹ In the Southern District of New York, as an illustration, the clerk places an equity case upon the trial calendar twenty days after the filing of the answer, unless within that time an order is made permitting the taking of depositions under Rule 47, or affidavits under Rule 48, or notice be given to the clerk of the taking of depositions under the Revised Statutes. If such order is entered or notice given, the cause is not placed upon the calendar until the expiration of the time limited by Rule 56, provided both parties give this notice to the clerk, unless otherwise ordered, but in some unreported cases it has been held that the case will be put upon the calendar at the end of the time consumed by the plaintiff in taking depositions, if no such notice has been given by the defendant, and thus deprived the defendant of taking any evidence by deposition. This, however, is not the universal practice.

In a recent case,⁷⁰ Judge Chatfield considered a motion by plaintiff to take depositions, which he granted upon the showing made, saying:

"The application denied . . . has been renewed upon additional papers, which are intended to comply with Equity Rule 56."

The Court did say, however, that while the papers before him did not set forth in detail entirely satisfactory reasons showing inability to produce upon the trial the witnesses named, etc., and that the rule had not been fully met, still it had been substantially complied with, and, as the other parties would not be hurt, he would permit the testimony to be taken by depositions.

The second year has seen substantial strides in the use of interrogatories under the new rules, although there is little uniformity in the decisions as to the practice of directing defendant to answer interrogatories. In patent cases the use of interrogatories is becoming particularly common. Frequent use is being made of them to get information from the defendant on the question of the matters of the alleged infringing article. Some of the decisions hold that when plaintiff has reasonable grounds of suspicion that defendant's machine or process is an infringement, plaintiff is entitled to have the interrogatories answered. Other cases hold that

⁶⁹ Federal Equity Rule 56.

⁷⁰ *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 217 Fed. 175, 176 (1914).

the mere suspicion of infringement is not sufficient and that plaintiff must present reasonable grounds of certainty for infringement before defendants will be directed to answer interrogatories which involve a disclosure of defendant's process or apparatus.

In the Northern District of Illinois the Court had before it a motion to strike out portions of the answer, and in holding that under the rules ⁷¹ interrogatories may be filed by either party requiring the other to state material matters relating to the nature of the case and the facts supporting it, but not mere evidence, said:

"This Rule 58 was in substance taken from Order 31 of the English Equity Rules of Practice, which has been in force for a considerable time, and has been construed and applied in very many English cases. It is well settled by these decisions that the disclosure of evidence is not required. The nature of the case and the facts supporting it may be required to be stated. Mere evidence or facts tending to prove the nature of the case or the facts upon which it is based are quite generally held not proper to be inquired into. . . . The second, third, and fourth interrogatories inquire as to the opinion of the complainant as to the construction of the patent. This is a matter to be supplied by expert testimony in support of the contention of infringement, or the validity of the patent, or both. It is a matter purely evidentiary and one which within the English rule, and the proper construction of Rule 58 cannot be inquired into. The same considerations apply to interrogatories 5, 6, and 7, inquiring whether complainant has manufactured devices under its patent, whether it has any interest in other patents, and whether it considers defendant's device to infringe any such other patents. . . . The 8th and 9th interrogatories, inquiring whether complainant contemplates bringing other patent suits, and whether it had knowledge of one of the letters pleaded in the answer, should be treated in the same way. All of the interrogatories should be struck out except the first." ⁷²

This decision has gone quite as extensively into what may be considered as proper interrogatories, particularly in patent causes, as any one that has been reported.

Interrogatories are being used for numerous purposes, and the answers to them have been used as a basis for a successful motion to dismiss.⁷³

⁷¹ Federal Equity Rule 58; *Luten v. Camp*, 221 Fed. 424 (1915); *Blast Furnace Appliances Co. v. Worth Bros. Co.*, 221 Fed. 430 (1915).

⁷² *P. M. Co. v. Ajax Rail Anchor Co.*, 216 Fed. 634, 636 (1914).

⁷³ *Bronk v. C. H. Scott Co.*, 211 Fed. 338 (1914); 27 HARV. L. REV., 636.

The rule relating to exceptions to masters' reports ⁷⁴ has recently been held ⁷⁵ to apply to bankruptcy causes.

The rules relating to the reference to proceedings, powers and reports of the master under the rules ⁷⁶ were substantially the same under the former practice and but few recent decisions are reported relative thereto.⁷⁷

In considering the rule relating to petitions for rehearing,⁷⁸ Judge Day probably discusses more rules than are considered in any other case, and, in doing so, says:

"It would seem to be the spirit of these new equity rules that they were drawn by the Supreme Court with the intent of leaving the judge free to adjust the matters in the interests of substantial justice, as he sees fit, unhampered by precedent and by technical definitions and distinctions."

This statement fairly expresses the purpose of the rules, although the results secured by them in some instances are hardly fulfilling that purpose.

Temporary restraining orders have been granted in some instances under the rules ⁷⁹ without notice, where it clearly appeared that immediate or irreparable loss or damages would result to the applicant before the matter could be heard on notice,⁸⁰ and in some instances temporary restraining orders have been granted pending a motion for preliminary injunction for infringement of a patent where the delay of a hearing of a motion was at the defendant's request.

The preparation of records on appeal is causing considerable inconvenience to the clerks of both the District and Appellate Courts as well as to attorneys and judges, owing to the uncertainty as to what shall be incorporated into the transcript upon appeal. In some districts the rules require that the record below

⁷⁴ Federal Equity Rule 66.

⁷⁵ *In re Pierce*, 210 Fed. 389 (1914).

⁷⁶ Federal Equity Rules 59 to 68 incl.

⁷⁷ Under Rule 62, *In re Automatic Musical Co.*, 204 Fed. 334 (1913); Under Rule 63, *In re Beckwith*, 203 Fed. 45 (1913); *In re Beckwith v. Malleable Iron Range Co.*, 207 Fed. 848 (1913); Under Rule 66, *In re Pierce*, 210 Fed. 389 (1914); *International Harvester Co. v. Carlson*, 217 Fed. 736 (1914); Under Rule 59, *Goldsmith Silver Co. v. Savage*, 211 Fed. 751 (1914).

⁷⁸ *Sheeler v. Alexander*, 211 Fed. 544, 545, Rule 69 (1913).

⁷⁹ Federal Equity Rule 73.

⁸⁰ *Triumph Electric Co. v. Thullen*, 209 Fed. 938 (1913), 212 Fed. 143 (1914).

be printed, and in cases where the evidence has been taken by deposition this is quite generally the practice; when the record has thus been printed, the entire labor of preparing the record for the Court of Appeals has to be done over, and additional expense incurred, if the rules are strictly complied with. The Courts of Appeal appreciate this, and generally have permitted such records as have been printed below to be used in the Court of Appeals without being abstracted and reprinted, and, in fact, some of the Courts of Appeal indicate very plainly that they prefer to have a complete record before them with the testimony of witnesses in form of questions and answers rather than in the narrative form. In some instances, however, the courts indicate that these rules⁸¹ should be strictly complied with,⁸² although the costs for the infraction of the rules have been imposed only in rare instances upon the defending solicitors or the parties, and in extreme cases.

The Supreme Court, by the promulgation of the new rules, and its own decisions, has indirectly brought about a very radical saving in the expense of perfecting appeals and getting equity causes before the Appellate Court. Since February 1, 1913, the Supreme Court has rendered decisions⁸³ which practically eliminate all of the burdensome expense of appeal where the records are printed below and where these are either agreed upon by the parties or approved by the courts; these decisions make it unnecessary for the clerk of the lower court to make any comparison of the record, or prepare an index, where this has been previously printed.

The new rules have given great impetus to the disposition of the courts to curtail expenses to litigants in every possible way and to secure a speedy disposition of cases which have come before them, and attorneys are generally now co-operating with them in securing these results, but it is evident that they must not be too strictly adhered to, if equity causes are to be promptly disposed of in the most economical way for litigants.

Wallace R. Lane.

CHICAGO, ILLINOIS.

⁸¹ Federal Equity Rules 75, 76, 77.

⁸² *Coxe v. Peck*, 208 Fed. 409 (1913); *Wong Keow v. United States*, 215 Fed. 95 (1914); *In re Equity Rule 75*, 222 Fed. 884 (1914); *Pittsburg C. C. & St. L. Ry. Co. v. Glinn*, 208 Fed. 989 (1913).

⁸³ *Rainey v. Grace & Co.*, 231 U. S. 703 (1914); *Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.*, 235 U. S. 383 (1914).

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EZRA RIPLEY THAYER, for four years Dean of the Harvard Law School, died suddenly on Tuesday, September 14, less than two weeks before the opening of the term. From the tributes in another part of this issue may be gained an appreciation of the incalculable sense of loss which his death has left among the legal profession as a whole, as well as among the friends of the Law School. The loss was felt no less keenly among the students of the School. Indeed it is not easy to express in words the personal sorrow of those whom academic work had brought into intimate contact with him. Among the many treasures which these men will carry away from their course at the Law School there are few that they will prize more highly than the memory of Dean Thayer as a teacher, a legal scholar, and a friend.

THE LAW SCHOOL. — The death of Dean Thayer has necessitated the appointment of an Acting Dean. The choice has fallen on Prof. Austin W. Scott, whose previous experience as a teacher in the School, and as Dean, for one year, of the Law School of Iowa State College, renders him peculiarly fitted to fill the responsible position. A rearrangement of some of the courses of instruction has also been rendered necessary. The course on Evidence will this year be given by Arthur D. Hill, LL.B. '94, and the course on Torts by Chester A. McLain,

LL.B. '15. Both Mr. Hill and Mr. McLain are former editors of the REVIEW. The School also has the long-awaited pleasure, this year, of welcoming back Prof. J. I. Westengard, LL.B. '98, who has been on leave of absence as legal adviser to the King of Siam since 1903. He will give the courses on third-year Property, on Deeds, and on International Law.

COMPULSORY SALES UNDER THE CLAYTON ACT. — It has become a deep-rooted principle of the modern common law that only an exceptional class of business enterprises, grouped under the designation of common employments, are under any affirmative duty to serve the public on demand, without discrimination, and for a reasonable remuneration. There is undoubtedly a strong modern tendency, despite supposed constitutional restrictions, to permit the legislature to add new types of business to this class.¹ Indeed the historical validity of the whole distinction between "public service" companies and ordinary businesses has been disputed,² and it has been urged that in the extension of public-service obligations to "private" business lies the solution of modern trade problems.³

Whether, aside from the conception of public employment, there is not in the rich field of common-law precedent some other principle from which can be evolved an obligation, under certain circumstances, to serve the public equally, and a correlative right on the part of individuals to require such service, is the question presented in the first case to arise under the Clayton Act. *The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566. The defendant, the manufacturer of "Cream of Wheat," had induced jobbers to maintain prices at such a level that retailers could not profitably sell to the public below fourteen cents a package. The plaintiff, owner of a chain of stores, and a regular customer of the defendant, sold to the public at twelve cents. The manufacturer thereupon refused to sell him any more of the cereal. The plaintiff brought suit in the federal district court, praying that the price-maintenance scheme be declared in contravention of the anti-trust laws, and that the defendant be restrained from "cutting off the said plaintiff's supply" of "Cream of Wheat." Judge Hough refused to grant a preliminary injunction.⁴

Under federal authorities an attempt to fix prices among retailers is an unreasonable restraint of trade under the Sherman Law.⁵ Under Section

¹ *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *The Pipe Line Cases*, 234 U. S. 548. For a discussion of the tendency which these cases illustrate, see 28 HARV. L. REV. 84.

² Adler, "Business Jurisprudence," 28 HARV. L. REV. 135.

³ *Ibid.*, at pp. 160 ff.

⁴ An appeal is pending in the Circuit Court of Appeals.

⁵ That price-fixing is unreasonable restraint of trade has been decided by the federal courts in numerous decisions holding contracts unenforceable. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Bauer & Cie v. O'Donnell*, 229 U. S. 1; *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24. A recent decree enjoining such practice at the suit of the United States is based on that principle. *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725 (decree filed Sept. 20, 1915). The California

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16 of the Clayton Act, therefore, the plaintiff is entitled to a decree enjoining the illegal conduct if he can show that it threatens him irreparable injury.⁶ This mode of relief, however, would bring the plaintiff no substantial benefit. A breakdown of the price-maintenance scheme among retailers will not secure to the plaintiff a supply of the coveted article. Indeed the plaintiff is not, on accurate analysis, injured by a violation of the Sherman Law, since it is not the illegal feature of the scheme — the price maintenance — but the failure to deal with the plaintiff, from which he is suffering.⁷ It is, of course, possible to give the plaintiff what he wants by framing a decree in the alternative, directing the defendant to discontinue the illegal scheme or sell to the plaintiff. But there is nothing in any of the anti-trust laws to warrant such a decree, where the plaintiff is not himself suffering from positive illegal conduct. In the principal case the only relief which would help the plaintiff would be a decree compelling a sale at customary prices. But the defendant is not a public-service company, either at common law or by legislative fiat.⁸

There is, however, it is submitted, a common-law principle on which a statutory prohibition against discrimination among customers, involving, if need be, compulsory sales, can be predicated without raising any constitutional doubts even where the business is not a public service. It is a principle that is familiar in the law of torts. Let it be supposed

and Washington courts distinguish the price-fixing of articles manufactured in competition with commodities identical except in quality and brand. Thus the vendors of a special brand of olive oil, sold as such, of "Ghirardelli's Ground Chocolate" and of "Fisher's Blend of Patent Flour" have been allowed to regulate prices. *Grogan v. Chaffee*, 105 Pac. 745; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355; *Fisher Flouring Mills Co. v. Swanson*, 137 Pac. 144. But as the line of reasoning of the federal cases seems to be that the legitimate benefit and protection to the manufacturer is more than counterbalanced by the evils attending the stifling of competition among jobbers and retailers, a distinction based solely on the competitive nature of the commodity does not seem sound, nor likely to be adopted by the federal courts. Further, though "Cream of Wheat" consists of a staple commodity known as "purified middlings," yet the defendant is marketing it as "Cream of Wheat," and the fact that the same article can be obtained under a technical or otherwise differing name does not distinguish but identifies the principal case with the main body of decisions.

But though an inflexible dogma condemning all price maintenance may satisfy the test of legal reasoning, it seems hardly adequate to meet the facts of business necessity. Price-fixing may under certain circumstances be reasonable. Although competition among retailers be desirable and opposition to economic means of distribution as such cannot be encouraged, yet a carefully nursed business dependent upon the maintenance of a uniformly fair selling price should be allowed to protect itself against the "piratical" attacks of an unfair price-cutter. Nevertheless, it would seem that price maintenance is at least *prima facie* unreasonably in restraint of trade, and that only upon inquiry into the details of a business can this presumption of unreasonableness be rebutted. Upon application for preliminary injunction, therefore, as in the principal case, the practice of price-fixing should, it is submitted, be considered in restraint of trade.

⁶ (1915) 1 FED. STATS., ANN. SUPP. 127.

⁷ There was also an allegation that the defendant threatened to cut off the supply of jobbers who furnished the plaintiff with "Cream of Wheat." The court does not seem to have been convinced that this attempt showed sufficient prospect of success to injure the plaintiff seriously.

⁸ Whether the manufacture of a breakfast food is a business sufficiently "affected with a public interest," within the rule of *Munn v. Illinois*, 94 U. S. 113, to enable Congress to impose on it the obligations of common employment is a question which existing federal decisions leave in doubt. See n. 1, *supra*.

that a manufacturer, solely to gratify a private spite against a certain retailer, sells his product, an article of general consumption, to all retail stores within competing distance at very low prices, but refuses to sell to the retailer whom he is trying to injure. Clearly the retailer should be given a right of action against the manufacturer, on the broad principle that intentional damage without justification is actionable.⁹ To maintain an action on this theory, however, it is not necessary that the purpose be solely to injure the plaintiff; it is enough if it is one that the law does not countenance. Thus an injury inflicted intentionally by means of a strike called for the purpose of establishing a closed shop has been held actionable, the purpose of the strike being considered illegal.¹⁰ On similar grounds injury by a manufacturer against a retailer by means of a discrimination whose purpose is illegal restraint of trade should be actionable. And since the injury arises out of the sales made to competitors, and since these sales are discriminatory only as long as the defendant refuses to sell to the plaintiff, an alternative decree directing the defendant to sell to all equally or to none would be entirely proper. In this way what is virtually a compulsory sale could be effected.

To enable the federal courts to issue such a decree there must, however, be legislative authority. The power to enjoin violation of the Sherman Law does not, as has been indicated, avail the plaintiff in the principal case. The Clayton Act makes it illegal to "discriminate in price,"¹¹ a phrase which does not seem to cover a refusal to sell at any price. It would require, therefore, a statutory prohibition against all discrimination among consumers for the purpose of restraining trade, to justify the relief sought in the principal case.¹² With such a statutory prohibition, it is submitted, a compulsory sale would not be unconstitutional.

⁹ Thus where a wealthy banker, for the sole purpose of gratifying a private spite against a local barber, set up a rival barber shop and operated it at a loss with a view to driving the barber out of business, he was held liable in tort at the suit of the barber. *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946. But see *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163.

¹⁰ *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Fairbanks v. McDonald*, 291 Mass. 287, 106 N. E. 1000. Criticism of these cases has not questioned the correctness of the principle that intentional injury is actionable unless justified, but has been on the ground that the social interest in trade unionism affords a justification. See 28 HARV. L. REV. 529.

¹¹ Sec. 2.

¹² Such legislation would seem most fruitful were it to consist of additional power granted to the Federal Trade Commission, enabling it to exercise regulative and judicial functions similar to those so profitably engaged in by the Interstate Commerce Commission. But more pressing than the need of regulation is the necessity of shifting from the shoulders of the legal expert the burden of shaping the business practice of the country through continuous interpretation of the common-law phrase, "unreasonable restraint of trade." The Clayton Act, which prohibits specific abuses only "where the effect . . . may be to substantially lessen competition" (Secs. 2, 3, and 7), leaves the courts facing the old problem. And the Trade Commission is empowered merely to assist, not to substitute, the courts.

However, it is not impossible that the courts may themselves shift this burden through an extension of the principle laid down in the *Abilene* case, that the Interstate Commerce Commission is the only body which can pass on such an administrative question as railroad rates. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. The United States Supreme Court has interpreted the Sherman Act, in *dictum*, as limiting individual redress to such cases where a determination of illegal-

THE EFFECT OF AN OVERRULING DECISION UPON ACTS DONE IN RELIANCE ON THE DECISION OVERRULED. — A recent Mississippi case raises a question which tests the soundness of an old and respected theory of the common law. The court there refused to give a change of its construction of a criminal statute a retroactive effect on the prior acts of the defendant, which the court had pronounced innocent at the time he committed them. *State v. Longino*, 67 So. 902.¹ The decision went partly on the ground that the conviction of the defendant under such circumstances would violate the constitutional prohibition of cruel and unusual punishments. But that reason seems clearly unsound;² and a broader ground, on which the court also relied, must be taken to justify the result.

According to the orthodox theory of Blackstone, which still claims at least the nominal allegiance of most courts, a judicial decision is merely evidence of the law, not law itself; and when a decision is overruled, it does not become bad law; it never was law, and the rule announced in the later case has been the law all the time.³ But where in reliance on the earlier decision men have acquired contract or property rights which are valid under the law as then declared by the highest court of the state, or have done acts which according to that law are innocent, as in the principal case, the logical outcome of this doctrine would often cause great hardship and injustice. When confronted by this situation, however, the great majority of the courts have refused to go the whole length of the doctrine, but have made a so-called exception to it.⁴

The question has most often come up in cases involving contract rights. In a series of cases in which state courts had held statutes au-

ity has been reached in a suit by the Attorney-General. *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165; see 28 HARV. L. REV. 691. An analogous interpretation of the Clayton and Trade Commission Acts involves no further step. If individual redress with threefold damages, specifically provided for in the Sherman Law, is predicated upon the determination of illegality in a government suit, the relief granted by Section 16 of the Clayton Act can be interpreted as dependent upon the establishment of unlawful practices by the Trade Commission. This construction is aided by the consideration that the Clayton Act provides that facts established in Trade Commission suits shall be *prima facie* evidence in private actions based thereon. It is an important distinction, however, that an individual may sue before the Interstate Commerce Commission, while he has no such standing before the Trade Commission. Legislation giving him such standing would clearly warrant an extension of the rule of the Abilene case to suits under the Clayton Act.

¹ This case is more completely stated in this issue of the REVIEW, p. 103.

² As was pointed out by Weaver, J., in *State v. O'Neil*, 147 Ia. 513, 535, 126 N. W. 454, 461, this prohibition is directed against excessive or unreasonable punishment after it is assumed that the defendant is guilty. In the principal case the statutory penalty was imprisonment for not more than five years, for receiving a bank deposit while having good cause to believe the bank insolvent. That can hardly be called an unreasonable punishment if it is assumed that the defendant is guilty of the crime, which is in fact the point at issue. For further discussion of this constitutional provision, see 24 HARV. L. REV. 54; COOLEY, CONSTITUTIONAL LIMITATIONS, 471; WATSON, CONSTITUTION, 1510.

³ 1 BL. COM. 68-71. See *Harbert v. Monongahela River R. Co.*, 50 W. Va. 253, 255, 40 S. E. 377, 378; *Storrie v. Cortes*, 90 Tex. 283, 291, 38 S. W. 154, 158.

⁴ See *Center School Township v. State*, 150 Ind. 168, 173, 49 N. E. 961, 963, where the court said that though in general a change in judicial decision had a retrospective effect, the courts would not apply it so as to impair vested rights such as property rights or those resting on contracts. See also cases cited in note 9.

thorizing the issuance of municipal bonds constitutional at the time the bonds were put on the market, but had afterwards reversed themselves and held the statutes unconstitutional, the Supreme Court, in upholding the validity of the bonds, enunciated the rule that a change in the judicial construction of a statute by a state court would be given a prospective and not a retroactive effect in its operation on contracts which when made were valid under the law as then expounded by the state court.⁵ In a later case the court applied the same rule to a change in the position of a state court on a common-law question.⁶ From the language of the municipal bond cases it seems that the Supreme Court then felt that to give the overruling decision a retroactive effect would violate the constitutional provision against impairing the obligation of contracts.⁷ But it seems no longer possible to rest these municipal bond cases on the constitutional ground, since later decisions have established that the prohibition against the impairment of contracts applies only to legislative acts and not to judicial decisions.⁸ State courts are, therefore, free to give an overruling decision a retroactive effect in regard to vested rights and no appeal lies to the Supreme Court; but most of the states have held nevertheless that as to contract and property rights the change in decision does not operate retrospectively.⁹

⁵ *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678; *Douglass v. Pike County*, 101 U. S. 677; *Taylor v. Ypsilanti*, 105 U. S. 60; *Louisiana v. Pilsbury*, 105 U. S. 278. In *Douglass v. Pike County*, *supra*, p. 687, Waite, C. J., said: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

⁶ *Muhlker v. Harlem R. Co.*, 197 U. S. 544. A statute directed a railroad in the street in front of the plaintiff's premises to elevate its tracks, and the state court refused the plaintiff compensation, overruling a previous case which declared that abutting property owners had an easement of light and air in the street through contracts with the city, arising when they conveyed the fee of the street to the city solely for street purposes. The Supreme Court took jurisdiction on a writ of error to the state court on the ground that the statute impaired the obligation of the plaintiff's contract, and the court in determining what that obligation was considered only the law as declared by the state court at the time plaintiff acquired his property. Fuller, C. J., White, Peckham, and Holmes, JJ., dissented. For discussion of this case, see 19 HARV. L. REV. 67; 9 COL. L. REV. 163.

⁷ Waite, C. J., in *Douglass v. Pike County*, 101 U. S. 677, 687: "We cannot give them [the later decisions] a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

⁸ *Central Land Co. v. Laidley*, 159 U. S. 103; *Bacon v. Texas*, 163 U. S. 207; *Turner v. Wilkes County Commissioners*, 173 U. S. 461. This construction seems justified by the wording of CONST., Art. I, Sec. 10 [1]: "No State shall pass any . . . law impairing the obligation of contracts." It is difficult to reconcile these cases with *Muhlker v. Harlem R. Co.*, 197 U. S. 544, 570.

In *Bacon v. Texas*, *supra*, at p. 220, the court distinguishes the municipal bond cases on the ground that the Supreme Court has jurisdiction, on writ of error to a federal court following the later decision of a state court, to reverse for misconstruction of the state statute, whereas it has "no jurisdiction to review a judgment of a state court made under precisely the same circumstances." See also *Central Land Co. v. Laidley*, *supra*, at p. 111.

⁹ *Farrior v. Security Co.*, 92 Ala. 176, 9 So. 532; *County Commissioners v. King*, 13 Fla. 451; *Hasket v. Maxey*, 134 Ind. 182, 33 N. E. 358; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331; *Harris v. Jex*, 55 N. Y. 421; *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693; *Menges v. Dentler*, 33 Pa. St. 495; *Geddes v. Brown*, 5 Phila. 180; *Herndon*

In criminal cases the question of the effect of an overruling decision upon one who acted in reliance on the earlier decision has seldom arisen. The few previous cases that have decided the point are in accord with the principal case.¹⁰ The result there reached was obviously just, and, it is submitted, was also correct on principle.¹¹ Although it is settled that the constitutional prohibition of *ex post facto* laws, like the provision against impairing the obligation of contracts, prevents only legislative acts and not judicial decisions,¹² the courts, following a perfect analogy, should not allow an overruling decision to operate retroactively, wherever a statute could not do so.¹³ It is quite as unjust for the court to declare that a certain act is innocent, and after a man has committed it relying on that decision, to tell him that the court was mistaken and that he is a criminal, as it is for the legislature to pass an *ex post facto* statute declaring a man a criminal for an act that he has previously done.¹⁴ "Parties are presumed to know the existing law, but not to know the law better than the courts, or to know what the law will be at a future day."¹⁵ The courts do in fact make law;¹⁶ a decision is law until it is overruled,¹⁷ and

v. Moore, 18 S. C. 339; *State v. Mayor*, 109 Tenn. 315, 70 S. W. 1031; *Vermont & C. R. Co. v. Vermont Central R. Co.*, 63 Vt. 1, 21 Atl. 262. *Contra*: *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213; *Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154. See discussion in 15 HARV. L. REV. 667.

In most jurisdictions in civil cases this rule is limited to vested rights accruing before the overruling decision. In the following cases the court held the parties had acquired no vested rights and therefore the later decision operated retroactively in regard to them even though they had done some act in reliance on the earlier decision. *Center School Township v. State*, 150 Ind. 168, 49 N. E. 961; *Gross v. Whitley County Commissioners*, 158 Ind. 531, 64 N. E. 25; *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944; *Lewis v. Symmes*, 61 Oh. St. 471, 56 N. E. 194.

¹⁰ *State v. O'Neil*, 147 Ia. 513, 126 N. W. 454; *State v. Bell*, 136 N. C. 674, 49 S. E. 163. See *State v. Fulton*, 149 N. C. 485, 492, 63 S. E. 145, 147. In *Lanier v. State*, 57 Miss. 102, there is a *dictum* that "the doctrine of *stare decisis* in criminal cases cannot allow violators of the law a vested interest in previous rules erroneously sanctioned." In the O'Neil case the court was unanimous in the result, but followed three different lines of reasoning in reaching it.

¹¹ The principal case expressly limited its decision to situations involving a change of statutory construction. No criminal case involving an overruled decision on the common law has been found where this point was decided, but it is submitted that there is no logical distinction between the two cases and that none should be made. In both situations the defendant should equally be protected.

¹² *Ross v. Oregon*, 227 U. S. 150.

¹³ See 18 YALE L. J. 422 for a suggested distinction between the treatment of acts *mala prohibita* and acts *mala in se* in this regard. It is submitted that such a distinction is purely historical and arbitrary, and should not be attempted. All acts alike should be protected if done while the court pronounced them innocent. As a matter of fact, it will rarely happen that any court will declare innocent an act which could be classified as *malum in se*.

¹⁴ In regard to the impairment of contracts by change of decision, see article in 23 AM. L. REV. 190.

¹⁵ *Farrior v. Security Co.*, 92 Ala. 176, 181, 9 So. 532, 533.

¹⁶ See article by Ezra R. Thayer in 5 HARV. L. REV. 172; article by C. J. Bonaparte in 23 GREEN BAG 507; GRAY, THE NATURE AND SOURCES OF THE LAW, §§ 489, 492, 494, 506, 508, 540-542.

¹⁷ We are considering primarily the operation of the overruling decision which would make prior acts criminal. If before a defendant's act the court had held it criminal, and later overruled the earlier decision and held the act innocent, the defendant should not be punished. The retrospective operation of the second decision in that case would not be *ex post facto*, and a statute could be given a similar retrospective force. An overruling decision should be treated the same as a statute which purports to oper-

the ancient fiction that decisions are only evidence of the law should be discarded. It is significant that in nearly every case where that fiction conflicts with obvious justice, the courts are disregarding it and reaching the just result;¹⁸ that they are more and more coming to acknowledge that they do make law¹⁹ and to act on that principle.

IS A CHANGE OF JUDGES IN THE COURSE OF A CRIMINAL TRIAL UNCONSTITUTIONAL? — The words of Mr. Justice Holmes in *Kepner v. United States*,¹ "there is to-day more danger that criminals will escape justice than that they will be subjected to tyranny," seem to be justified once more by the recent decision of the Circuit Court of Appeals, Second Circuit, in *Freeman v. United States* (not yet reported). In that case the defendant was being tried for a statutory misdemeanor. The presiding judge became ill in the middle of the trial, and another was appointed to take his place, with the express assent of the defendant. The court held that the substitution was a violation of the defendant's inalienable right of trial by jury, a right which he could not waive. With all deference, the opinion is not as convincing as one could wish. It is mostly a resumé of cases, with some stress laid on *Crain v. United States*,² which was expressly overruled by the Supreme Court two years ago.³

The decision raises the old question of the meaning of the provisions of Article III, Section 2, Clause 3, as explained or modified by the Sixth Amendment.⁴ By the rules of constitutional construction, "trial by jury" is given the meaning it had in England when the Constitution was framed, that is, trial by a jury of twelve men, presided over by a court.⁵ There seems, however, to have been no common-law rule that the judges must remain the same throughout the trial.⁶ The question has

ate retrospectively. It may do so in all cases except where it would impair contract or property rights or make innocent acts criminal; but the overruled decision should be the law to govern all vested rights acquired, and all acts which it declared innocent, committed before its reversal.

¹⁸ See cases cited in notes 5, 9, and 10.

¹⁹ Holmes, J., *dis.*, in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 371: "That fiction [that courts only declare the law] had to be abandoned and was abandoned when this court came to decide the municipal bond cases. In those cases the court followed Chief Justice Taney . . . in recognizing the fact that the decisions of the state courts of last resort make the law for the state. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of law. . . . Whatever it [the law of the state] is called it is the law as declared by the state judges and nothing else."

¹ 195 U. S. 100, 134.

² 162 U. S. 625.

³ *Garland v. Washington*, 232 U. S. 642, 647.

⁴ "The trial of all crimes, except in cases of impeachment, shall be by jury." CONST., Art. III, Sec. 2, Cl. 3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense." Amendment VI.

⁵ 1 HALE, PLEAS OF THE CROWN, 33; See *Lamb v. Lane*, 4 Oh. St. 167, 179; *Capital Traction Co. v. Hof*, 174 U. S. 1, 13.

⁶ The opinion practically admits this, as Rogers, J., says: "An examination of the cases in the English courts discloses no warrant for believing that a substitute of judges

never come before the federal courts, and the state decisions are brief and conflicting.⁷ It has been decided, however, that a judge who did not preside at the trial may hear a motion for a new trial⁸ or impose sentence.⁹ Although it may be said in these cases that the defendant has had his requisite trial by jury before the change occurs, the practical effect of the substitution is identical with that in the principal case, and the language used in the opinions covers both.¹⁰ In both cases the second judge is equally capable of performing his functions if he acquaints himself with the testimony from the record. Nor is it essential that he should see and hear the witnesses, for it is always permissible to give evidence by deposition if the opponent consents.¹¹ Indeed, the essential propriety of the proceedings is shown by the fact that had the parties gone through the formality of agreeing to start the trial again, to accept the present jury, and to have the evidence already presented read from the record, no question of constitutionality could have been raised.

The court, however, deciding that the defendant did not have a "trial by jury" within the meaning of the Constitution, had to consider whether he had not waived his rights by assenting to the procedure. They concluded that the constitutional provisions did not confer a privilege on the defendant, but imposed a mandate on the courts, for the purpose of protecting the public interest that the accused should be safeguarded, even against his will. The result seems in accordance with authority. On similar reasoning, the Circuit Court of Appeals for the First Circuit has held that a defendant cannot consent to the withdrawal of a juror and a consequent verdict by eleven only.¹² Many state courts, however, have reached a contrary result,¹³ but under constitutional pro-

would be sustained without a trial *de novo*." This seems rather a negative way of sustaining the burden of proof. In fact, two of the cases cited show that a change of judges was not objected to, at least in misdemeanors. See *Rex v. Pinney*, 5 Car. & P. 254; *Queen v. O'Connell*, 11 Cl. & F. (App. Cases) 155.

⁷ The following cases have held similar proceedings valid: *People v. Henderson*, 28 Cal. 465; *People v. Cassalman*, 10 Cal. App. 234, 101 Pac. 693; *York v. State*, 91 Ark. 582; *Foson v. Commonwealth*, 12 S. W. 263 (Ky.). See *State v. Lautenschlager*, 22 Minn. 514. *Contra*: *People v. Norton*, 76 Hun (N. Y.) 7; *People v. Shaw*, 63 N. Y. 36; *Durden v. People*, 192 Ill. 493, 61 N. E. 317. In the cases where the trial was held invalid it did not appear that the new judge read the record, or that the defendant assented to the substitution.

⁸ *United States v. Meldrum*, 146 Fed. 390; *People v. McConnell*, 155 Ill. 192, (40 N. E. 608). See *United States v. Harding*, 1 Wall. Jr. 127, Fed. Cas., No. 15,301; *Fire Insurance Co. of New York v. Wilson*, 8 Pet. (U. S.) 291. The rule of these cases has since been incorporated in a statute. R. S., § 953.

⁹ *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128.

¹⁰ See *Fire Insurance Co. of New York v. Wilson*, *supra*. At page 303 Mr. Justice McLean says: "He [the new judge], as the successor of his predecessor, can exercise the same powers, and has the right to act in every case that remains undecided upon the docket as fully as his predecessor could have done. The court remains the same, and the change of incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

¹¹ *Diaz v. United States*, 223 U. S. 442; *Reynolds v. United States*, 98 U. S. 145.

¹² *Dickinson v. United States*, 150 Fed. 801. See 8 COL. L. REV. 577. *Accord*: *People v. O'Neill*, 48 Cal. 257. *Cf.* *Queenan v. Oklahoma*, 190 U. S. 548. See also *United States v. Shaw*, 59 Fed. 110, 114.

¹³ *State v. Kaufman*, 51 Ia. 578, 2 N. W. 275; *Commonwealth v. Dailey*, 12 Cush.

visions not so clearly mandatory as that of Article III. It is clear that a jury may be waived entirely in minor offences,¹⁴ but only when the punishment does not exceed (imprisonment for) one year.¹⁵ This distinction is based on the fact that such petty crimes were not tried by jury at common law. The defendant, of course, may always relinquish his rights by pleading guilty;¹⁶ the right of being present in court may be waived,¹⁷ as also that of confronting the witnesses,¹⁸ at least where a capital offence is not involved. It seems, however, that the words of Article III must be taken as imposing a command, as distinguished from these privileges granted by the amendment.¹⁹ Consequently, since the offense in the principal case was too serious to come within the rule of the *Schick* case,²⁰ the court's decision on the question of waiver seems correct.

This point need never have been raised, however, as the court was backed by neither reason nor authority in deciding that the defendant had not, in fact, had his constitutional trial by jury. It is noteworthy that the recent decisions of the Supreme Court show a decided tendency to treat technical requirements less as fundamental rights than as matters of procedure.²¹ In fact, the theory of a public interest to safeguard the prisoner, whether regarded as an example of over-tender regard for the accused, or as a survival of the eighteenth century notion of protection against a tyrannical magistracy, is rather out of date.²² In view of the practical consequences of the decision, it is especially unfortunate that the court felt compelled to force the principal case within the terms of the constitutional command. In the first place, the defendant is given an opportunity to gamble on his chances at the first trial, sure of a reversal above if he loses. Moreover, the sickness or death of a judge in the middle of a criminal trial will necessitate a trial *de novo*, the recall of all the witnesses, and a great expenditure of money and time; all this without any real gain in substantial justice.

(Mass.) 80; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773. But see *contra*: *Cancemi v. People*, 18 N. Y. 128; *People v. Stewart*, 64 Cal. 60. Cf. the last case with the California cases cited in n. 6, *supra*.

¹⁴ *Schick v. United States*, 195 U. S. 65; *Darst v. People*, 51 Ill. 286; *Logan v. State*, 86 Ga. 266, 12 S. E. 406; *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068. See *Belt v. United States*, 4 App. Cas. (D. C.) 32. See WILLOUGHBY, CONSTITUTIONAL LAW, 419 *et seq.*

¹⁵ *Low v. United States*, 169 Fed. 86; *Territory v. Ortiz*, 8 N. Mex. 154, 42 Pac. 87. See 9 HARV. L. REV. 353.

¹⁶ *State v. Almy*, 67 N. H. 274, 28 Atl. 372. See *State v. Kaufman*, 51 Ia. 578, 580, 2 N. W. 275, 276.

¹⁷ *Diaz v. United States*, 223 U. S. 442; *United States v. Shepherd*, 1 Hughes 520. But see *Hopt v. Utah*, 110 U. S. 574.

¹⁸ *Diaz v. United States*, *supra*; *State v. Polson*, 29 Ia. 133.

¹⁹ See *Low v. United States*, 169 Fed. 86, 91. But cf. *Belt v. United States*, 4 App. Cas. (D. C.) 32.

²⁰ See n. 14, *supra*.

²¹ See *Hawaii v. Mankichi*, 190 U. S. 197. At page 218 Mr. Justice Brown says: "The rights (jury trial and indictment by grand jury) alleged to be violated are not fundamental in their nature, but concern merely a method of procedure." See *Garland v. Washington*, 232 U. S. 642, 646. See also *Diaz v. United States*, *supra*. Cf. *Hopt v. Utah*, *supra*.

²² See McCLAIN, CONSTITUTIONAL LAW, §§ 243, 254; 25 HARV. L. REV. 179.

THE PROPOSAL TO LEGALIZE THE SECONDARY BOYCOTT. — The report of the Commission on Industrial Relations proposes *inter alia* to legalize that horror of our legal theorists, the secondary boycott.¹ Injunctions have generally issued against secondary boycotts,² many upon the theory of protecting the right of the plaintiff to have a free market for his labor, capital, or wares.³ That his market may be lawfully impaired by competition is indisputable, but he does have this right in a certain sense, — a right not to be so injured by unlawful conduct. What is unlawful conduct remains to be considered. The following facts, substantially those of a late New Jersey case,⁴ are illustrative of what has been generally regarded as illegal. The plaintiff corporation, A., announces its intention to abrogate its former policy of running union shops only, whereupon its employees, members of B. union, join with affiliated unions, C., in withdrawing their custom from A. and from D., retailers who deal with A. They also distribute circulars to persuade members of the public, E., not to deal with A. or D., thereby reaching A. indirectly.

A few decades ago courts were first confronted with our unprecedentedly complicated industrial conditions and the unprecedented legal problems which necessarily accompanied them. What was to be their guiding star on this uncharted sea? Many chose the principle that all harm intentionally caused is actionable unless justified.⁵ Historically,

¹ A majority of the Commission seem to favor the recommendation. See Report of Commission on Industrial Relations, pp. 136, 281, 302, 383. For dissent, see p. 407.

² The term "secondary boycott" is here used to describe the situation where a boycotting combination brings pressure to bear on parties not directly involved in the dispute, in order to reach the plaintiff; in other words, what has been called "conscription of neutrals." See 20 HARV. L. REV. 448; 28 *id.* 696. This involving of outside parties is often considered the decisive element. See article by Wm. H. Taft in MCCLURE'S MAGAZINE, June, 1909, p. 204, cited in *Pierce v. Stablemen's Union*, 156 Cal. 70, 76, 103 Pac. 324, 327. For the origin of the word "boycott," see *State v. Glidden*, 55 Conn. 46, 76.

³ *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Hey v. Wilson*, 128 Ill. App. 227; *Walsh v. Ass'n of Master Plumbers*, 97 Mo. App. 280; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; *My Md. Lodge, etc. v. Adt*, 100 Md. 238, 59 Atl. 721; *Loewe v. Cal. State Fed. of Labor*, 139 Fed. 71; *Metallic Roofing Co. v. Jose*, 12 Ont. L. R. 200; *Mathews v. Shankland*, 56 N. Y. Supp. 123. See 20 HARV. L. REV. 434, 438, 448; 44 AM. L. REG. (n. s.) 465, 470 ff.; 17 GREEN BAG 210, 215 ff.; 22 HARV. L. REV. 458. *Contra*, *Parkinson v. Building & Trades' Council*, 154 Cal. 581, 98 Pac. 1027; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Lindsay & Co., Ltd. v. Mont. Fed. of Labor*, 37 Mont. 264, 96 Pac. 127; *Bender v. Local Union, etc.*, 34 Wash. L. Rep. 574; *Macaulay v. Tierney*, 19 R. I. 255, 33 Atl. 1; *Scottish Co-op. Soc. v. Glasgow Fleshers Ass'n*, 35 Sc. L. R. 645.

⁴ *A. Fink & Son v. Butchers' Union*, 95 Atl. 182 (N. J.). In this case, however, the defendants distributed circulars containing the false statement that the plaintiff had locked them out and also displayed a red skull and crossbones. In so far as the former act was libelous, or the latter carried a threat of violence, they were of course subject to injunction.

⁵ *Walker v. Cronin*, 107 Mass. 555, 562; *Martell v. White*, 185 Mass. 255, 258, 69 N. E. 1085, 1086; *Delz v. Winfree*, 80 Tex. 400, 404, 16 S. W. 111, 112; *Tuttle v. Buck*, 107 Minn. 145, 149, 119 N. W. 946, 947; *De Minico v. Craig*, 207 Mass. 593, 598, 94 N. E. 317, 319; *Moore v. Bricklayers' Union*, 23 Oh. Wkly. Bull. 48, 52;

the tendency of the law from early times had been otherwise. It had laid the primary emphasis upon the overt act, by which and according to which the various forms of action and theories of recovery were evolved. In an ever increasing number of cases, however, the defendant's state of mind came to be considered material after the court had taken its bearings by reference to the defendant's act.⁶ The new theory, which makes its great primary classification one of injuries which are intentional and those which are not, emphasizes an element which the law has hitherto hesitated to deal with. It is an historical anomaly. On this ground it might be urged that this principle has no place in the common-law system. If we reject it, it would follow in the case above stated that all B. and C. have done is to cease dealings with A. and D., and to persuade E. to do likewise, — acts which are *primâ facie* innocent, just as acts of violence, defamation, or fraud are certainly *primâ facie* illegal.

It seems unlikely, however, that a principle so fruitful, and so flexible amid changing industrial conditions, will fail to gain a foothold in Anglo-American law, even if it cuts across the grain of our whole legal growth. Yet even if it is adopted no cause of action need arise under the facts above stated. There has been much discussion as to when desire to injure another should render unlawful an act otherwise lawful.⁷ In so far as it is possible to generalize, it seems an ideal toward which the law might well develop to attach the consequence of illegality to any intentional injury whenever the desire to injure the plaintiff is predominant.⁸ Yet in the case we are considering, the attention of the defendants is reasonably directed toward strengthening themselves economically; the loss to A. and D. is incidental only.⁹ Whence, then, comes the illegality? The doctrine that it enters through the mysterious properties of the word "conspiracy," which render combined action illegal where individual action would be lawful, has not much support in modern authority, the tendency being to recognize that combination is only material in that it increases the capacity for doing injury.¹⁰ Liability

Parkinson v. Building & Trades' Council, 154 Cal. 581, 603-604, 98 Pac. 1027, 1036. See POLLOCK, TORTS, 8 ed., 21; 20 HARV. L. REV. 262; 26 *id.* 259.

⁶ Nothing less than the whole common law can prove or disprove this statement. The following cases, however, are suggestive. Weaver v. Ward, Hob. 134; Fletcher v. Rylands, L. R. 1 Exch. 265, L. R. 3 H. L. 330; Brown v. Collins, 53 N. H. 442.

⁷ See Allen v. Flood, [1898] A. C. 1, 92, 93, 125, 172, 173; Passaic Print Works v. Ely Walker Dry Goods Co., 105 Fed. 163, 166; May v. Wood, 172 Mass. 11, 14, 51 N. E. 191, 192; Chesley v. King, 74 Me. 164, 172; 18 HARV. L. REV. 411; 20 *id.* 451. Upon turning to the mental element we are met with a confusion in terms. The defendant makes certain physical motions with the expectation or hope that certain consequences will follow. Such consequences of a certain degree of remoteness are called his intention, while consequences one degree more remote have often been called his motive, but there is no sufficient agreement in the books on the application of these terms to render the distinction illuminating.

⁸ This is more nearly the civil-law conception of "abuse of right" than a common-law tenet. Cf. authorities collected in AMES, CASES ON TORTS, 3 ed., 882 n., with those in n. 62 L. R. A. 683 *ff.*

⁹ Cf. "Le motif de leur (des ouvriers) conduite pouvait être uniquement d'obéir aux règlements et de sauvegarder des intérêts de l'union ouvrière." Gauthier v. Perrault, 6 Quebec Q. B. 65, 89.

¹⁰ See Scott Stafford Opera Co. v. Minneapolis Musicians Ass'n, 118 Minn. 410, 414, 415, 136 N. W. 1092, 1094; Macauley v. Tierney, 19 R. I. 255, 264, 33 Atl. 1, 4;

is accordingly rested on some other theory. It is hard to see how the mere indirectness of the methods used has any significance *per se*. That may, however, be a strong indication that the defendant's predominant state of mind is vindictive, which, as above suggested, should turn the balance against him.¹¹ The less direct a boycott is, the less likely it is to be effective,¹² and if, for instance, the present scheme is not calculated to reach A., D. might well claim an injunction on the ground that he was being injured from mere spite. But no such claim could here be made, for A. is complaining because the method adopted is too effective.

Any discussion of legislation aiming at the legality of the secondary boycott must not overlook the fact that psychologically the principle that intentional injury is *prima facie* actionable bears peculiarly hard on the defendant. It concentrates attention on the plaintiff's wrong and makes it a matter of secondary consideration what overt act the defendant has done. The defendant may still justify, but he must convince a mind that has approached the problem from a starting point unfavorable to him. Furthermore, it is scarcely possible to deny that combinations of workmen have been treated more severely by the courts than combinations of traders or employers.¹³ This is unjustifiable theoretically, and the advantage that waiting power generally gives capital in competition with labor does not render it more defensible practically. If the law is not to assume closer supervision over the incidents of the industrial struggle through compulsory arbitration, to equalize the contest by withholding legal or equitable actions which in practice are chiefly serviceable to one side only seems most in consonance with the underlying spirit of the common law.

THE DOCTRINE OF THE PRESUMPTION OF A LOST GRANT AS APPLIED AGAINST THE STATE. — In a suit in equity to confirm title, brought by a grantee from the state under a 1907 patent, the Supreme Court of Mississippi recently held that a grant from the state to the defendant would be presumed from the latter's peaceful and uninterrupted possession for over twenty years. *Caruth v. Gillespie*, 68 So. 927 (Miss.).¹ The

Lindsay & Co., Ltd. v. Mont. Fed. of Labor, 37 Mont. 264, 273, 96 Pac. 127, 130; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 616; *Sweeney v. Coote*, [1906] 1 Ir. Ch. 51, 109.

¹¹ The vindictive nature of the action in some cases has amply warranted enjoining it. *Quinn v. Leathem*, [1901] A. C. 495; *Miller v. Collet*, 32 New Zealand L. R. 994; *Martell v. Victorian Coal Miners' Ass'n*, 25 Australian L. T. 40, 120. Cases are also to be distinguished where breach of contract is induced. *Temperton v. Russell*, [1893] 1 Q. B. 715; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924; *Jackson v. Stonfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14. See *New Jersey Ptg. Co. v. Cassidy*, 63 N. J. Eq. 759, 763, 53 Atl. 230, 232. Violence is of course out of the question. *Beck v. Ry. Teamsters' Union*, 118 Mich. 497, 77 N. W. 13. And fining one not affiliated with the defendants must generally be illegal. *March v. Bricklayers', etc. Union*, 63 Atl. 291, 79 Conn. 7.

¹² See MITCHELL, ORGANIZED LABOR, 289.

¹³ See Lewis in 44 AM. L. REG. (n. s.) 491-492; "Report of Commission on Industrial Relations," 135, 383; 28 HARV. L. REV. 697, n. 5.

¹ A more complete statement of the facts of this case will be found on p. 106 of this number.

law seems tolerably clear that the doctrine of the presumption of a lost grant will operate against the state as against an individual, even where the state is a party to the action.² This is certainly true where, as in the principal case, the state is not itself bringing any action,³ and the two classes of cases would appear indistinguishable, since in the principal case, for instance, it is necessarily adjudicated that the state had in 1907 no title which it could grant to the plaintiff. On the other hand, there is no doubt that where the Statute of Limitations is concerned, in a case of admittedly adverse possession, the old maxim of *nullum tempus occurrit regi* prevails and the state cannot be barred.⁴ At first sight it seems strange that the doctrine of the presumption of a lost grant should operate against the state, while the Statute of Limitations cannot, for in almost all other circumstances the lost-grant doctrine and the operation of the statute are governed by similar principles and produce precisely similar results.

The doctrine of the presumption of a lost grant was developed by the courts to remedy the situation where incorporeal hereditaments, to which the statutes of limitation did not apply, had been enjoyed for a long period of time without interruption.⁵ Like so many novel doctrines of the law, it had its inception in the fictional form of a so-called presumption of fact to be weighed by the jury under direction.⁶ It rapidly developed into a true presumption of law — a rule which, under given conditions, bound the jury to a given verdict. And finally in 1881 the fiction was wholly discarded in England by the House of Lords and the presumption held to be no presumption at all but a positive rule of substantive law.⁷ This last step has also been taken by the majority of the courts in this country.⁸ Moreover, the doctrine of the presumption of a lost grant has generally been applied in its variations by strict

² *United States v. Chavez*, 175 U. S. 509. In *State v. Dickinson*, 129 Mich. 221, 88 N. W. 621, the court intimated that the presumption might not apply without corroborating circumstances, such as the loss of many documents in the neighborhood.

³ *Reed v. Earnhart*, 10 Ired. (N. C.) 516; *Matthews v. Burton*, 17 Gratt. (Va.) 312; *Crooker v. Pendleton*, 23 Me. 339. In the latter case it is again suggested that some slight corroborating evidence may be necessary to raise the presumption.

⁴ *United States v. Hoar*, 2 Mason (U. S.) 311; *Lindsey v. Miller's Lessees*, 6 Pet. (U. S.) 666. See WOOD, LIMITATIONS, 3 ed., § 52; 15 HARV. L. REV. 146. The doctrine is based on the old notion that laches can never be attributed to the crown. See CO. LIT. 57 b. Its basis in reason is that the state is less qualified to act promptly than an individual. There is the further more modern consideration that the people should not be deprived of their property through the carelessness of state officials.

⁵ Perhaps the clearest account of the development of this doctrine is to be found in the opinion of Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 85, 103, showing how it arose to supplement the Statute of Limitations and then followed step by step the analogy of the various statutes — changing its period with theirs from the indefinite limit beyond the memory of man to the twenty years finally established by the Statute of 21 JAC. 1, c. 16. See also 2 TIFFANY, REAL PROPERTY, § 445.

⁶ See J. B. Thayer in 3 HARV. L. REV. 141, 149.

⁷ *Dalton v. Angus*, L. R. 6 App. Cas. 740.

⁸ *Tyler v. Wilkinson*, 4 Mason (U. S.) 397, 402; *Ward v. Warren*, 82 N. Y. 265; *Lehigh Valley R. R. v. McFarlan*, 43 N. J. L. 605; *Carmody v. Mulrooney*, 87 Wis. 552. See 2 GREENLEAF, EVIDENCE, 16 ed., § 539. Two North Carolina cases in successive years are worthy of close study in order to see how even in one year the court practically crossed the line between a real presumption and a rule of substantive law. *Reed v. Earnhart*, 10 Ired. (N. C.) 516; *Bullard v. Barksdale*, 11 Ired. (N. C.) 461. See also 2 WASHBURN, REAL PROPERTY, 6 ed., § 1250.

analogy to the rules governing the acquisition of title by adverse possession under the Statute of Limitations, although reaching a result inconsistent with its own logical origin.⁹ The final point of similarity between the two doctrines is that fundamentally the same notion of public policy is responsible for them both — that long-continued peaceful enjoyment of real property rights should not be disturbed.¹⁰

But although the doctrine of the presumption of a lost grant has developed along exactly the same lines that govern the operation of the Statute of Limitations and has in substance merely supplemented the Statute in the case of incorporeal hereditaments, it may have retained its original function as a true presumption when applied to corporeal hereditaments.¹¹ At all events, it is applied against the state as a true presumption.¹² The state, in other words, may always rebut the presumption arising from undisturbed possession and show that the claimant actually never had title. Thus regarded, there is no reason why it should not apply against the state as against an individual.¹³ It is a very different matter from absolutely divesting the state of its title by the Statute of Limitations, for an opportunity of curing the negligence of the state officials in bringing no action for twenty years is afforded by allowing the state to prove that as a matter of fact the claimant never had any real title. Moreover, as a rule of procedure merely, the lost-grant doctrine has a basis of reason, without being subject to criticism as judicial legislation. Long continued adverse possession raises a fair inference that the alleged owner would have brought an action if he had a right to do so, which may properly cast the burden on the

⁹ Perhaps the best example of this is found in the cases where during the use of the land or the easements the owner has been under some disability, such as infancy or insanity. The majority of cases hold that this period of disability cannot be subtracted from the time of enjoyment, on the analogy of the interpretation of the Statute of Limitations. *Tracy v. Atherton*, 36 Vt. 503; *Wallace v. Fletcher*, 30 N. H. 434. But see *contra*, *Lamb v. Crosland*, 4 Rich. (S. C.) 536. Yet the disability shows clearly that the failure of the owner to interrupt was not due to his having no right to do so, and thus upsets completely the logical basis of the presumption.

¹⁰ See *Story, J.*, in *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 109. "Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions." Sentences of this sort can be found in almost every opinion dealing with either doctrine.

¹¹ It is impossible to determine this definitely one way or the other from the authorities, since all such cases would be decided simply under the Statute of Limitations. The only occasion when the question would be likely to arise is where the state is a party, and, as will be seen, the presumption is then treated as a true presumption anyway, for another reason, — namely, that the state is a party. It is conceivable that the question might also arise where the full statutory period had not yet run in the case of corporeal hereditaments. See *Crooker v. Pendleton*, *supra*, 23 Me. 339, 342; 4 WIGMORE, EVIDENCE, § 2522. But in such a case the presumption would also of necessity have to be treated as a true one.

¹² This may be seen from a careful consideration of the principal Mississippi case and from the cases cited in notes 2 and 3, *supra*. But see note 15, *infra*. Moreover, it was definitely held in *Crane v. Reeder*, 21 Mich. 24, 77, that the presumption would not arise where other facts clearly showed that there was no title behind the long possession.

¹³ This point was again elaborately decided by the Circuit Court of Appeals last June in the case of the presumption of payment. *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926.

claimant to show that there was in fact no grant.¹⁴ The only difficulty in thus applying the doctrine as a true presumption, when the state is involved, is that for all other purposes it is treated as a conclusive rule of substantive law, and that it has become quite unnatural to regard it as anything else.¹⁵

MAY THE LEGISLATURE, WITHOUT JUDICIAL REVIEW, PREVENT A REFERENDUM BY DECLARING ITS ACT WITHIN THE EMERGENCY EXCEPTION? — The frequent conflict between the judicial and legislative branches of government has been interestingly presented by a series of cases in Washington, all involving the same question in slightly different phases.¹ A recent amendment to the Washington constitution provided that no bills should take effect for ninety days, thereby giving an opportunity for a referendum, but excepting bills for certain emergency purposes from the operation of this provision.² Can the legislature conclusively determine that a bill falls within this exception, or is its determination subject to judicial review? The Washington court exercised a power to review; other courts dealing with substantially similar provisions have differed as to the answer.³

Really two closely related questions are involved. Is it a political question to determine whether a bill properly falls within the exception? Was it the intent of the people to vest the ultimate power as to this exception in the legislature or in the judiciary? If it is a political

¹⁴ See 2 GREENLEAF, EVIDENCE, 16 ed., § 539 *a*. Where the owner has only a future estate the trespasser gets no easement if he does not injure the *corpus* of the estate. *Wheaton v. Maple & Co.*, L. R. (1893) 3 Ch. 48. On the same reasoning no prescriptive right to ancient lights has been recognized in this country since it would be absurd to argue that because a man does not build a wall against his neighbor's house he has no right to do so. *Parker v. Foote*, 19 Wend. (N. Y.) 308.

¹⁵ See *Reed v. Earnhart*, 10 Ired. (N. C.) 516, 518, *supra* n. 3, where the court, while actually applying the presumption of a lost grant against the state, admits that it "is not based upon the idea that one actually issued, but because public policy and 'the quieting of titles' make it necessary to act upon that presumption." Likewise in *Matthews v. Burton*, 17 Gratt. (Va.) 312, 318, *supra*, where the state is involved, though the facts do not necessitate the presumptions being treated conclusively, the court says: "I think now we might go further and adopt this presumption as a conclusion of law, and engraft it as a canon of the law of real property." And again in *Crooker v. Pendleton*, 23 Me. 339, 342, *supra*, the court, though treating the presumption as a true one, is led into saying: "The presumption is bottomed upon the same principle as the statute of limitations and is analogous to it."

¹ *State ex rel. Brislaw v. Meath*, 147 Pac. 11; *State ex rel. Blakeslee v. Clausen*, 148 Pac. 28; *State ex rel. Case v. Howell*, 147 Pac. 1159; *State ex rel. Case v. Howell*, 147 Pac. 1162.

² WASH. CONST., Art. II, § 1 (b). "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, . . ."

³ *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145. See *Attorney-General ex rel. Barbour v. Lindsay*, 178 Mich. 524, 145 N. W. 98, *accord*. *Kaddery v. Portland*, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Bennett Trust Co. v. Sengstacken*, 58 Ore. 333, 113 Pac. 863. *Contra*, *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605. See also *State ex rel. Arkansas Tax Commissioners v. Moore*, 145 S. W. 199, 202, *contra*.

question, one of policy rather than law, then it is one which the legislature is best qualified to handle; it is outside the ordinary scope of the judiciary, and presumably was intended to be finally decided by the legislature.⁴ So if the question in the principal case were merely one of urgency it would clearly be political;⁵ but it involves more. It is rare to find a question which is entirely judicial or entirely political; there is no clearly defined line between the two. However desirable it may be, theoretically, to divide the question into its two elements, — leaving to the legislature the decision as to urgency and to the courts the interpretation of the clause to determine what bills fall within the exception,⁶ — in practice the two elements are so intermingled that it is necessary to leave the whole ultimate decision to one body or the other. The problem is to balance the conflicting elements and determine into which class each question was intended to fall from its nature and surrounding circumstances; the court's opinion of the advisability of one view or the other should not affect the answer except in so far as it has a bearing on determining the intent of the constitutional amendment. It is true that the policy of legislation and its necessity are primarily political questions, and as such should ordinarily be left to the legislature in the absence of strong opposing considerations. Legislation apparently unnecessary on its face may be of immediate necessity because of facts unknown to the courts. In any case, review by the courts will somewhat hinder the freedom of legislative action. But nevertheless the Washington court seems right in holding this a judicial question. The purpose of the referendum amendment was to give to the voters a more effective control over legislation, and to limit the powers of the legislature to the fullest extent consistent with the safety of the state. The adoption of the amendment indicated a distrust of the legislature. It does not seem reasonable to suppose the emergency exception was to be so construed as to give the legislature the power to nullify the amendment;⁷ but this is the effect of holding it a pure political question, for then there is no ground on which the court can interfere no matter how outrageous that decision may be. Without assuming that the legislature would deliberately abuse that power, the constant tendency would undoubtedly be toward an extension of the scope of the exception. The only check would be the accountability of the representatives at the polls, which the adoption of the referendum proves to have been deemed inadequate. But if the matter be held within the scope of judicial review, the natural tendency would be to construe narrowly this exception

⁴ See *United States v. Realty Co.*, 163 U. S. 427, 444; *Pacific State Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 142.

⁵ See *Day Co. v. State*, 68 Tex. 526, 543, 4 S. W. 865, 872. Under the constitution certain formalities of enactment might be suspended if there was an emergency. The court refused to review the decision of the legislature that such an emergency existed.

⁶ See the discussion of somewhat similar questions in regard to the police power, in *Mugier v. Kansas*, 123 U. S. 623, 661; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 195; *In re Morgan*, 26 Col. 415, 424.

⁷ "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." *Marbury v. Madison*, 1 Cranch 137, 176.

to reserved power in the people, since both branches of the government would have to be satisfied that a given act falls within the exception. Moreover, the judicial review should not prove unduly restrictive, since the legislative body must be deemed to have acted constitutionally in all doubtful cases.⁸ It may be presumed that the courts will act wisely and liberally here as they have done in the somewhat similar case of legislation under the police power; and that the purpose of the emergency clause will not be endangered. Whether even such restriction on the legislature is advisable or not is another matter; if it is not, that is a reason for attacking the referendum amendment, but not for indirectly weakening it by giving it an interpretation it was not meant to bear.

It is not possible to distinguish or discuss all the cases which present similar difficulties. But an excellent contrast is presented by the authorization given by Congress to the President to call out the militia whenever there shall be "imminent danger of invasion," the exercise of which power has been held not subject to review by the courts.⁹ There it may become a question of national life or death, and immediate unhampered action may be imperative. The whole purpose of the power, and the efficiency of the militia, would be lost if each militiaman could demand a judicial review of the President's orders. Further, it is a power which need rarely be exercised, and opinion as to the necessity for its exercise would seldom differ widely. Surely this is very different from the situation in the principal cases, where the frequent exercise of a broad power might well lead to its extended use as a device for avoiding a referendum.

ENFORCEMENT BY INJUNCTION OF A STATUTORY RIGHT OF PERSONALITY. — A recent case in New York, which has attracted some popular interest, raises issues of much importance in the common-law system of legal and equitable rights and remedies. *Woolcott v. Shubert*, 154 N. Y. Supp. 643. A statute provides that discrimination between persons on the part of theater managers shall be a misdemeanor, and further provides for a penalty recoverable in a private action by the person so injured. Plaintiff, a dramatic critic who had been excluded on the ground that his reviews were unfair, sought relief by injunction. Relief was refused on the ground that equity had no jurisdiction, and that in any case the remedy provided was adequate.

The ground given by the court for denying its jurisdiction was that where a statute creates a new right, and gives a specific remedy, such remedy is exclusive. As a general rule of statutory construction, this cannot, it is submitted, be sustained on principle. It necessarily involves the conclusion that what the legislature intended was not to confer a right, and a corresponding remedy, but merely an alternative right at the option of the wrongdoer, — that is, a right to admission or to the

⁸ *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267. See *McClure v. Nye*, 22 Cal. App. 248, 251, 133 Pac. 1145, 1147; *Attorney-General ex rel. Barbour v. Lindsay*, 178 Mich. 524, 540, 145 N. W. 98, 104.

⁹ *Martin v. Mott*, 12 Wheat. (U. S.) 19.

penalty. This involves the same confusion of ideas that led to the theory that the promisee in a contract has only an alternative right to performance or damages.¹ Just as the promisee's right is not measured by the relatively ineffectual common-law remedy of damages, so a statutory right must be considered as distinct from the remedy provided.² Nor is the matter less clear on authority, for the courts have repeatedly held that equitable relief is available to protect a newly created right, despite the existence of a statutory remedy at law.³ Unless the statutory remedy is clearly expressed to be exclusive, it seems that equity should apply its usual test of the adequacy of the legal remedy in the particular case.⁴

The more general question is, therefore, presented, whether, in view of the nature of the right here involved, equity could take jurisdiction to enforce it. It seems tolerably clear that the statute was designed, not to confer on each member of the public a property right to admission, but to protect individuals from the personal indignity of being discriminated against. True, this particular individual may be using his personal right in the furtherance of his business interests, but the nature of the right is not thereby altered. Hence the court might have rested on the narrow ground that equity will not protect mere rights of personality⁵ as distinguished from property interests. This point was entirely overlooked, however, and the inference seems to be that an injunction would have been granted if the statutory remedy had not been adequate and exclusive. Such a result would have been most commendable. Modern courts, troubled by the historical narrowness of equity jurisdiction, have sought to do justice by liberally broadening the conception of property rights to an extent that would have surprised the early chancellors.⁶ In England the situation has been remedied

¹ See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 202, n. (g). A short answer to this theory is, of course, that were it true, specific enforcement of a contract at equity would be impossible.

² See I LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION, 2 ed., 549. "A statutory right is to be distinguished from the remedy for its enforcement."

³ *Cory v. Yarmouth, etc. Ry. Co.*, 3 Hare 593; *Cooper v. Whittingham*, 15 Ch.D. 501; *Beckford v. Hood*, 7 Durn. & East 620; *Letton v. Goodden*, L. R. 2 Eq. 123; *Stevens v. Clark*, [1901] 1 Ch. 894; *Norwood v. Dickey*, 18 Ga. 528; *Hamilton & Milton Road Co. v. Raspberry*, 13 Ont. 466. And see *Dudley v. Mayhew*, 3 N. Y. 9, 15; *Board of Commissioners v. Dickinson*, 153 Ind. 682, 688, 53 N. E. 929, 931; *Fajder v. Village of Aitkin*, 87 Minn. 445, 447, 92 N. W. 332.

⁴ *Price v. Kramer*, 4 Colo. 546; *Board of Commissioners v. Dickinson*, *supra*; *Fajder v. Village of Aitkin*, *supra*. In these cases relief was refused merely on the ground that the statutory remedy was adequate. And see *Hickman v. City of Kansas*, 120 Mo. 110, 118, 25 S. W. 225, 226.

⁵ *BISPHAM, EQUITY*, 5 ed., 584, n. 2. "It is the rights of property, or rather, rights in property, that equity interferes to protect. A party is not entitled to a writ of injunction for a matter affecting his person." And see *KERR, INJUNCTIONS*, 1, 2.

The tendency of courts to consider this as going to the jurisdiction rather than to their discretion seems unfortunate. The whole distinction has been abolished in England by the Judicature Act of 1873, § 25, subsection 8; and it has been much criticised in this country. See *ABBOTT, JUSTICE AND THE MODERN LAW*, 32. Nevertheless, it must be considered as definitely settled in the American law to-day.

⁶ *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392 (use of name enjoined); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (publication of picture enjoined); *Woolsey v. Judd*, 4 Duer 379 (publication of private letters enjoined). For isolated *dicta* which seem to cut loose from the old rule entirely, see *Schuyler v.*

by statute, and it is high time that the preventive jurisdiction of equity be extended in this country.

If the jurisdictional difficulty be surmounted in the principal case, an injunction was clearly warranted. In the first place, the legal remedy was substantially inadequate. However reasonable the amount of the penalty might be in general as compensation, in the plaintiff's particular case, his business being impaired, no amount of money save an income approximating his loss in earning power would do practical justice. It is conceivable that a hostile theatrical corporation might, by a course of systematic exclusion, entirely ruin him professionally; and certainly the recovery of the statutory penalty would be a trifling recompense. Furthermore, a most important circumstance to be considered by a court in determining its discretion in such a case is the manner in which the public interest in free criticism is involved. That the public concern is always a strong element to be weighed by equity in coming to a decision⁷ is demonstrated by the positive manner in which decrees have been given⁸ and refused⁹ largely upon that ground. And surely there is scarcely a more pointed application of the principle than that here presented. For the wrongful coercion of free speech and opinion, even in such a relatively unimportant matter as theatrical reviews, strikes directly at the public's legitimate interest in unobstructed and unbiased dissemination of information.

If on the other hand the plaintiff was in fact wrongfully using his position to make malicious and unfair comment on the defendant, to the detriment of the latter's business, though he might not be liable for defamation at law, nevertheless his position might be so far from equitable that the court would be justified in washing its hands of the affair and remitting him to his remedy at law.

IS THE INCIDENCE OF THE BURDEN OF PROOF A MATTER OF SUBSTANTIVE OR PROCEDURAL LAW? — The Supreme Court of the United States has recently decided that the federal rule establishing contributory negligence as an affirmative defence must apply in suits arising under the Federal Employers' Liability Act, even though the *lex fori* requires the plaintiff to show his own freedom from fault. By virtue of the Conformity Act, federal courts would follow the local practice in matters of procedure,¹ though the action is brought under a federal statute. "But it is a misnomer," maintains the court, "to say that the question as to the burden of proof is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case." *Central Vermont Ry. Co. v. White*, 238 U. S. 507. The same question has arisen in another

Curtis, 147 N. Y. 434, 42 N. E. 22, 24; *Ex parte Warfield*, 40 Tex. Crim. R. 413, 421. 50 S. W. 933, 935; *Norwood v. Dickey*, 18 Ga. 528.

⁷ See *Union Pac. Ry. Co. v. Chicago, etc. Ry. Co.*, 163 U. S. 564, 603. "Considerations of the interest of the public must be given due weight by a court of equity."

⁸ *Parrott v. Atlantic & N. C. R. Co.*, 165 N. C. 295, 53 S. E. 432.

⁹ *Conger v. New York, W. S. & B. R. Co.*, 120 N. Y. 29, 23 N. E. 983.

¹ 1 U. S. COMP. STAT. 1913, § 1537, p. 657.

connection in New York, where it was decided that since the incidence of the burden of proof² is only a matter of procedure and statutes changing remedial law may act retrospectively,³ a legislative enactment shifting it shall apply in the trial of a cause of action that arose before the statute was passed. *Sackheim v. Piqueron*, 109 N. E. 109.⁴ Though the latter decision seems to represent the weight of authority,⁵ the important conflict of opinion illustrates the obscurity of the line between substantive and adjective law.

To define substantive rights in terms of all their component elements is impracticable, for such rights are acquired only when a number of conditions are satisfied. In an action for negligent injury, for example, the plaintiff ordinarily has a *prima facie* right to recover when he has pleaded and proved that the defendant acted carelessly toward him, thereby causing injury, but the defendant may show that despite these circumstances the alleged right never accrued, because of the presence of other conditions, such as the plaintiff's assumption of risk, or his own contributory negligence.⁶ Likewise, in a suit for breach of contract, proof of mutual promises and a breach by the defendant will make out a *prima facie* case, yet if the defendant can show the further elements of fraud, or coverture, there is no right of recovery.⁷ From this it is apparent that a change in the legal relationship between two parties, whereby one obtains a right against the other, can be defined completely only in terms of the interplay of many circumstances. What elements the plaintiff must allege and prove in an action to assert his right, and what are left to the defendant as affirmative defences, is solely a matter of fairness between the parties and of expediency in adjudicating rights.⁸ The number and importance of the factors that determine the rights of the parties remains the same, whether one or the other must prove the presence or absence of those factors.⁹ Clearly, if a retrospective statute enacted that contributory negligence should not bar recovery, the substantive rights would be affected, for a liability would thereby be imposed which did not before exist. But shifting the burden of proof, however important it may be to the parties in a particular case,¹⁰ simply

² Throughout this discussion the phrase "burden of proof" is used in the sense of establishing a preponderance of evidence. For a treatment of the different meanings, see THAYER, PRELIMINARY TREATISE ON EVIDENCE, ch. 9.

³ *Peace v. Wilson*, 186 N. Y. 493, 79 N. E. 329; *Edelstein v. Carlile*, 33 Colo. 54, 78 Pac. 680; *Willard v. Harvey*, 24 N. H. 344; *Lawrence Ry. Co. v. Commissioners of Mahoning Co.*, 35 Oh. St. 1; *De Cordova v. Galveston*, 4 Tex. 470; *Hubbard v. New York, N. H. & H. R. Co.*, 70 Conn. 563, 40 Atl. 533; *Chicago & Western Indiana Ry. Co. v. Guthrie*, 192 Ill. 579, 61 N. E. 658; *Lane v. White*, 140 Pa. St. 99, 21 Atl. 437. 2 LEWIS' SUTHERLAND, STATUTORY INTERPRETATION, 2 ed., §§ 674, 1225.

⁴ For a more complete statement of these cases, see RECENT CASES, p. 98.

⁵ *Wallace v. Western N. C. R. Co.*, 104 N. C. 442, 10 S. E. 552; *Southern Indiana Ry. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722. 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1107.

⁶ In jurisdictions where contributory negligence is an affirmative defence.

⁷ See LANGDELL, EQUITY PLEADING, § 109, pp. 123-126.

⁸ *Ibid.*, p. 124.

⁹ "The statute before us does not in any manner excuse or relieve the plaintiff from the consequences of contributory negligence long recognized by law, nor make the presence of concurrent fault less effective to the defendant in escaping liability." *Southern Indiana Ry. Co. v. Peyton*, 157 Ind. 690, 693, 61 N. E. 722, 723.

¹⁰ "The rule springing from such legislation seems to be that litigants must prose-

reapportions the evidential tasks involved in presenting the whole case. The substance of the controversy is unchanged. No doubt one source of confusion in this subject is the tendency to mistake for matters of substantive right certain methods of procedure which are guaranteed by the Constitution against the operation of retrospective legislation. Thus, for instance, retrospective legislation abolishing trial by jury¹¹ in criminal cases is held void under the *ex post facto* clause, because the change, it was said, "took from the accused a right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the crime charged against him."¹² Likewise, a similar statute diminishing the amount of proof necessary to convict can have no retroactive effect.¹³ It might erroneously be inferred from this that other rules of procedure — including those regarding the incidence of the burden of proof — are of the substance of a party's case. These decisions, however, do not rest on any distinction between substantive and procedural law, but depend merely on whether a change in procedure has undermined constitutional rights.

RECENT CASES

BANKRUPTCY — DISCHARGE — DEBTS NOT AFFECTED — DEBTS OMITTED FROM SCHEDULES — KNOWLEDGE OF PROCEEDINGS IN BANKRUPTCY. — The defendant, a bankrupt, failed to schedule a debt owed to the plaintiff. A stranger to both parties told the plaintiff that the defendant had gone into bankruptcy at a time when the former might have availed himself of the rights and privileges of other creditors. *Held*, that this knowledge is not sufficient, under § 17 *a*, of the Bankruptcy Act, to bar his claim. *Wheeler v. Newton*, 154 N. Y. Supp. 431 (Sup. Ct. App. Div.).

Under the Bankruptcy Act of 1867, the claim of a creditor was barred by the discharge of the bankrupt irrespective of the scheduling of his claim or of his receipt of notice or knowledge of the proceedings. *Platt v. Parker*, 13 N. B. R. 14; *Lamb v. Brown*, Fed. Cas., No. 8011. In the Act of 1898, the harshness of this rule was relieved by the exception of unscheduled debts from the operation of the discharge. 30 U. S. STAT. 550, § 17 *a* (3); COLLIER,

cut to defend in the manner prescribed at the time the suit is entered, without reference to when the cause of action accrued, or the character of previously existing forms of procedure, though it may turn out that present modes are less advantageous to one of the parties." *Southern Indiana Ry. Co. v. Peyton*, 157 Ind. 690, 693, 61 N. E. 722, 723.

¹¹ It is clear that the intrinsic elements of a legal controversy remain the same whether tried before a jury or before a judge, just as they remain unchanged whether the plaintiff or the defendant has the burden of proving a particular element.

¹² *State ex rel. Sherburne v. Baker*, 50 La. Ann. 1247, 24 So. 240.

"The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the crime charged against him." *Thompson v. Utah*, 170 U. S. 343, 352. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS, 6 ed., 326.

¹³ See *Duncan v. Missouri*, 152 U. S. 377, 382.

BANKRUPTCY, 3 ed., 197. Consequently, the interpretation of the section relating to the knowledge required to make the discharge operative does not depend, as the court in the principal case intimated, upon any question of the taking of property without due process of law. Courts have been liberal in their treatment of the knowledge sufficient to bar the claim. Neither need it be equivalent to the notice required by § 58 *a* of the Bankruptcy Act, nor is the source of the knowledge material, for knowledge gained through the reading of a newspaper or through conversation with the bankrupt has been held sufficient. *Morrison v. Vaughan*, 104 N. Y. Supp. 169; *Jones v. Walter*, 115 Ky. 560; *Kaufman v. Schreier*, 108 N. Y. App. Div. 298. It is well for the court to require knowledge upon which the creditor can reasonably rely. And the knowledge should be obtained in time to give the creditor opportunity to avail himself of the rights and privileges accorded to other creditors under the statute. *Birkett v. Columbia Bank*, 195 U. S. 345, 350. In the principal case the facts seem sufficient to have filled such requirements so as to bar the claim.

BURDEN OF PROOF — WHETHER A MATTER OF PROCEDURE OR SUBSTANTIVE LAW — STATUTORY SHIFT OF THE BURDEN AS TO CONTRIBUTORY NEGLIGENCE. — In a suit for the negligent killing of plaintiff's intestate, brought under the Federal Employers' Liability Act, the defendant contended that, under the Conformity Act, the state rule of procedure should be followed, thereby placing on the plaintiff the burden of proving that the intestate was not contributorily negligent. The court refused so to charge. *Held*, that the charge was properly refused. *Central Vermont Ry. v. White*, 238 U. S. 507.

In a suit for the negligent killing of the plaintiff's intestate the defendant contended that since the death of the intestate occurred before the enactment of the Code of Civil Procedure which placed the burden of proving the plaintiff's contributory negligence on the defendant, the new provision would not apply, although in force at the time of the trial. The trial court so ruled. *Held*, that the ruling was error. *Sackheim v. Piqueron*, 109 N. E. 109 (N. Y.)

See p. 95 in this issue of the REVIEW for a discussion of the principle involved in these cases.

CONFLICT OF LAWS — EXTENT OF GOVERNMENTAL POWER — LAW GOVERNING THE INTERPRETATION OF THE BY-LAWS OF A FOREIGN CORPORATION. — The plaintiff took out a policy of insurance in a Massachusetts beneficiary corporation, through a branch lodge in New York. He agreed to be bound by the by-laws as then in force or as changed. The by-laws were changed and this change upheld as valid by the Massachusetts Supreme Court. He now brings action on the policy in New York. *Held*, that the validity of the change must be governed by the Massachusetts decision. *Supreme Council of Royal Arcanum v. Green*, 35 Sup. Ct. Rep. 724.

The determination of the powers of a foreign corporation and the interpretation of its rules are controlled by the law of the domicile of the corporation. *Gaines v. Supreme Council of the Royal Arcanum*, 140 Fed. 978; *Larkin v. Knights of Columbus*, 188 Mass. 22, 73 N. E. 850; *Warner v. Delbridge Co.*, 110 Mich. 590, 68 N. W. 283. In accord with this principle, the nature and the extent of the shareholder's liability for the debts of the corporation are governed by the law of the incorporating state. *Selig v. Hamilton*, 234 U. S. 652; *Converse v. Hamilton*, 224 U. S. 243; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888. See 23 HARV. L. REV. 37. Again, liens may be declared on stock by valid regulations of the incorporating sovereign. *Hudson River Pulp & Paper Co. v. Warner & Co.*, 99 Fed. 187; *Warner v. Delbridge Co.*, *supra*. It has even been held that contracts made with a foreign corporation are subject to the legislation of the foreign government affecting that corporation's

obligations and powers. *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527. See 28 HARV. L. REV. 797. It follows that the validity of changes in the by-laws of the corporation should be governed by the laws of the state which incorporated it.

CONSIDERATION — WHAT CONSTITUTES CONSIDERATION — CONSIDERATION MOVING TO PROMISOR FROM THIRD PERSON. — The plaintiff, a manufacturer, sold goods to a jobber who agreed not to resell below fixed prices and to obtain similar price-maintenance agreements from those to whom he sold. The jobber obtained such an agreement from the defendant and gave the consideration therefor. The plaintiff now brings an action for breach of this agreement. For the purposes of the decision the House of Lords assumed that the promise ran direct to the plaintiff, as undisclosed principal, but that he gave no consideration for it. *Held*, that the plaintiff may not recover. *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A. C. 847.

From an early date English courts have consistently refused a right of action to the beneficiary in either the debtor-creditor or sole beneficiary type of contracts for the benefit of a third party. *Bourne v. Mason*, 1 Vent. 6; *Tweddle v. Atkinson*, 1 B. & S. 393. In these cases the real difficulty with the plaintiff's position is that no promise was made to him. See 22 HARV. L. REV. 223. However the courts almost invariably go on the ground that the plaintiff is a stranger to the consideration. This view is due to the influence of the history of the action of assumpsit, as it originated in an action of deceit in which the plaintiff recovered damages for the defendant's having caused him to part with value on a false promise. To-day the cause of action no longer consists in a tort but in the breach of a promise for which the defendant received consideration. Under this view there is no difficulty in letting a plaintiff sue on a promise made to him for which a third party furnished the consideration. *Hamilton v. Hamilton*, 127 N. Y. App. Div. 871, 112 N. Y. Supp. 10. See 25 HARV. L. REV. 187. This result is generally reached in America even in jurisdictions rejecting *Lawrence v. Fox*. *Palmer Savings Bank v. Insurance Co. of North America*, 166 Mass. 189, 44 N. E. 211: The same course would be open to English courts did they not fail to distinguish a plaintiff who is a true promisee though he gave no consideration, from the plaintiff who is a stranger to both consideration and promise. The decision of the House of Lords in the principal case has definitely closed the door upon this distinction in England.

CONSTITUTIONAL LAW — TRIAL BY JURY — CHANGE OF JUDGES DURING TRIAL — WAIVER OF USUAL PROCEDURE. — The defendant, Freeman, was indicted with others for conspiring to defraud by the use of the United States mails. After the trial had proceeded for eight weeks, Judge Hough, who was presiding, became critically ill, and by the consent of all parties, Judge Mayer took his place for the remainder of the trial, familiarizing himself with the proceedings by reading the record. The defendant was convicted, and appealed, on the ground that the change of judges was a violation of his constitutional rights. *Held*, that the judgment must be reversed. *Freeman v. United States* (not yet reported).

For a discussion of the principles, see NOTES, p. 83.

CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — NEGLIGENCE OF HUSBAND IN CHARGE OF CHILD IMPUTED TO WIFE IN RECOVERY UNDER DEATH STATUTE. — The child of the plaintiff was killed by the concurrent negligence of the defendant and the plaintiff's husband, who had charge of the child, and was killed at the same time. The plaintiff now sues for the death of her child under a death statute giving a direct right of action to parents. *Held*, that the marital relation imputes the negligence of the hus-

band to the plaintiff in bar of recovery. *Darbrinsky v. Pennsylvania Co.*, 94 Atl. 269 (Pa.).

It is disputed whether the contributory negligence of a beneficiary will defeat the recovery under a death statute by the administrator for the estate. *McKay v. Syracuse Rapid Transit Ry. Co.*, 208 N. Y. 359, 101 N. E. 885. *Contra, Richmond, etc. R. Co. v. Martin's Adm'r*, 102 Va. 201, 45 S. E. 894. It is clear, however, that a negligent beneficiary cannot recover in his own right. *Indianapolis Street Ry. Co. v. Antrobus*, 33 Ind. App. 663, 71 N. E. 971; *Johnson v. Reading City Ry. Co.*, 160 Pa. St. 647, 28 Atl. 1001. Therefore, if the negligence of the dead husband can be imputed to the plaintiff in the principal case, she is properly barred. But negligence can ordinarily be imputed only with agency or, as some courts add, such an identity of interest as certain family relations create. See *Little v. Hackett*, 116 U. S. 366, 371. Now the marital relation does not create an agency to take care of the children. *Macdonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753. Again, the wife's estate has become under the modern law so distinct from that of her husband that to-day the identity of interest on which the imputation was rested no longer exists. *Louisville, etc. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481. See *Phillips v. Denver City Tramway Co.*, 53 Col. 458, 468, 128 Pac. 460, 464. Hence, especially when, as in the principal case, all chance of the action being a roundabout recovery by the husband, is destroyed by his death, it seems unfortunate that his negligence should be imputed to his innocent wife.

CRIMINAL LAW — CONSPIRACY — PARTICIPATION OF DETECTIVES. — The defendant's were indicted under U. S. COMP. STATS. 1913, § 10201, for conspiring to bring Chinese into the United States unlawfully. Government detectives had suggested and urged the conspiracy, promising governmental protection, in order to place the principal defendant in a position where to avoid prosecution he could be forced to disclose the suspected criminal acts of other Chinese. *Held*, that a conviction is improper. *Woo Wai v. United States*, 223 Fed. 412 (C. C. A., 9th Circ.).

An attempt to commit a crime is indictable even though it was impossible to consummate the crime because of an unknown circumstance. *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003. See CLARK, CRIMINAL LAW, 2 ed., 130; Beale, "Criminal Attempts," 16 HARV. L. REV. 491, 496. In this respect a statutory conspiracy to commit a crime seems analogous to an attempt. Thus the acts of the defendant in the principal case are clearly an indictable offence. But the trend of authority seems to be toward allowing the defendant, in a case where the crime is first suggested and planned by a government agent, to set that fact up as a bar to conviction. *Woodworth v. State*, 20 Tex. App. 375. See *United States v. Adams*, 59 Fed. 674, 676. See 18 HARV. L. REV. 65. However, it is submitted that instigation and encouragement by a detective cannot excuse a defendant who has committed an offence against the state. If it is desired to put a wholesome check on the unfortunate practices of unscrupulous detectives, it is better to forbid such practices by statute rather than to entertain a doctrine that would permit a man to commit murder with impunity provided the act were suggested and encouraged by a detective.

DIVORCE — ALIMONY — RIGHT OF PERSONAL REPRESENTATIVE OF DECEASED WIFE TO RECOVER FOR ARREARS. — In an action for arrears of alimony against the estate of her deceased husband, the widow died at the determination of the appeal in the Appellate Division. *Held*, that her executor may be substituted in her place. *Van Ness v. Ransom*, 109 N. E. 593 (N. Y.).

Alimony represents in concrete form the husband's duty to support his wife. Originally it was allowed only in cases of divorce *a mensa et thoro*, since a divorce *a vinculis* was never granted except for causes arising before the

marriage. See *Miller v. Clark*, 23 Ind. 370, 376. As the marriage relation still exists after the wife's death, even arrears of alimony are not collectible, for they then belong to her husband. *Stones v. Cooke*, 8 Sim. 321 n. Cf. *Clark v. Clark*, 6 W. & S. (Pa.) 85. However, the wife's personal representative might recover for the benefit of her creditors for necessities. *Clark v. Clark*, *supra*; *Bouslough v. Bouslough*, 68 Pa. St. 495. Again, when the amount is settled by the court and is due, the wife has no longer merely a right to alimony but something very closely resembling a judgment debt. *Gerrein's Adm'r v. Michie*, 122 Ky. 250, 91 S. W. 252; *Howard v. Howard*, 15 Mass. 196. See *Coffman v. Finney*, 65 Oh. St. 61, 61 N. E. 155. Cf. *Carr v. Risher*, 119 N. Y. 117, 23 N. E. 296. Then, however, it is treated as a personal right in that it is neither assignable, attachable, nor subject to a lien. *Fournier v. Clutton*, 146 Mich. 298, 109 N. W. 425; *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694; *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826; *West v. Washburn*, 153 N. Y. App. Div. 460, 138 N. Y. Supp. 230; *Matter of Bolles*, 78 N. Y. App. Div. 180, 79 N. Y. Supp. 530. But the principal case is in accord with the weight of American authority in holding that a decree for alimony is personal only in the sense that the wife cannot divert it to other uses than for her maintenance. *Miller v. Clark*, *supra*; *Gerrein's Adm'r v. Michie*, *supra*. See *Dinet v. Eigemann*, 80 Ill. 274, 279; *Coffman v. Finney*, *supra*. *Contra*, *Faversham v. Faversham*, 161 N. Y. App. Div. 521, 146 N. Y. Supp. 569.

EQUITY — WASTE — RIGHT OF HOLDER OF *INTERESSE TERMINI* TO PROTECTION BY INJUNCTION. — The owner of an *interesse termini* brought a bill in equity to restrain the vacating tenant from removing a garage on the leased premises. *Held*, that an injunction will be granted. *Evans v. Prince's Bay Oyster Co.*, 154 N. Y. Supp. 279.

The common-law action of waste was available only to the immediate estate of inheritance, and an action on the case in the nature of waste might be brought by the reversioner or remainderman for life or years. Note to *Greene v. Cole*, 2 Wms. Saunders 252 a; but see AMES, CASES ON EQUITY, 468 n. 1. But relief by injunction is of much wider application, equity having protected such remote interests as contingent remainders, estates of trustees to preserve contingent interests, interests of infants *en ventre sa mère*, executory devises, and future charges on realty. *Watson v. Wolff-Goldman R. Co.*, 95 Ark. 18, 128 S. W. 581; *Gordon v. Lowther*, 75 N. C. 193; *Williams v. Duke of Bolton*, 3 P. Wms. 268 n.; *Lutterel's Case*, Prec. in Ch. 50; *Robinson v. Litton*, 3 Atk. 209; *Turner v. Wright*, 2 DeG. F. & J. 234; *Dawson v. Tremaine*, 93 Mich. 320. And even the inchoate right of dower has been protected. *Brown v. Brown*, 94 S. C. 492, 78 S. E. 447. *Contra*, *Rumsey v. Sullivan*, 150 N. Y. Supp. 287. See 28 HARV. L. REV. 615. Hence the court seems fully justified in protecting such a substantial interest as that held by an incoming tenant: *Palmer v. Young*, 108 Ill. App. 252.

EVIDENCE — LEGISLATIVE RECORDS — ADMISSIBILITY OF PAROL EVIDENCE TO CONTRADICT THE RECORD. — In a petition for a *mandamus* to compel the publication of a certain bill, among the acts of the legislature, the plaintiff offered oral evidence to prove that before the governor vetoed the bill, he signed it with intent to approve it. *Held*, that the evidence is not admissible. *Arkansas State Fair Association v. Hodges*, 178 S. W. 936 (Ark.).

As parol evidence as to legislative proceedings is untrustworthy, and as it is essential that the validity and wording of statutes be absolutely certain, it is a general rule that in an action concerning a statute, parol evidence is not admissible to contradict the record. *Attorney-General v. Rice*, 64 Mich. 385, 31 N. W. 203; *Wade v. Atlantic Lumber Co.*, 51 Fla. 638, 41 So. 72; *State v. Armour Packing Co.*, 135 N. C. 62, 47 S. E. 411. See 2 WIGMORE, EVIDENCE, § 1350 (3). However, when a bill has left the legislature, as it is dealt with

wholly in private and by individuals, the argument as to the untrustworthy nature of parol evidence fails. Again, there are not the safeguards against fraud and mistake which the very number of the legislature affords, while the chances of mishandling are greatly increased. Hence it is submitted that the public policy in favor of stability is overborne by the desirability of making it possible to remedy a negligent or fraudulent thwarting of the legislative will by individuals beyond the supervision of that body. Still the weight of authority supports the principal case. *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325. See *People v. McCullough*, 210 Ill. 488, 510, 71 N. E. 602, 609.

EVIDENCE — TESTIMONY GIVEN AT FORMER TRIAL — ADMISSIBILITY AFTER MARRIAGE OF WITNESS WITH DEFENDANT. — In a trial for manslaughter, the former testimony of a woman who since the first trial had been disqualified by marriage with the defendant, was excluded. *Held*, that the exclusion was correct. *Langham v. State*, 68 So. 504 (Ala.)

As a general rule, former testimony is admissible as an exception to the Hearsay Rule when it has become unfeasible to secure the presence in court of the witness. *People v. Elliott*, 172 N. Y. 146, 64 N. E. 837; *State v. Wheat*, 111 La. 860, 35 So. 955; *United States v. Reynolds*, 1 Utah 319, 98 U. S. 145. The principle of this exception would make former testimony admissible in all cases where the witness, although capable of attendance in court, has been rendered incompetent, unless the incompetence were of such a nature as to cast suspicion upon the former testimony, *e. g.*, conviction for an infamous crime. See 2 WIGMORE, EVIDENCE, § 1402. *Cf. Le Baron v. Crombie*, 14 Mass. 233. As yet, the principle has only been applied when the incompetence is for interest or mental incapacity. *Wafer v. Hemken*, 9 Rob. (La.) 203. See *Walkup v. Commonwealth*, 14 Ky. L. R. 337, 338, 20 S. W. 221, 222. See 2 WIGMORE, EVIDENCE, §§ 1408, 1409. *Cf. Gold v. Eddy*, 1 Mass. 1. Nevertheless, where the absence or incompetence has been caused by the proponent, the former testimony should be excluded on account of the danger of allowing the proponent to substitute it for direct evidence. When, however, the act of the proponent is as free from the suspicion of ulterior motives as marriage, this danger seems negligible and an inadequate ground for refusing the former testimony.

INJUNCTION — ACTS ENJOINED — INTEREST OF PERSONALITY CREATED BY STATUTE — EXCLUSIVENESS OF STATUTORY REMEDY. — Plaintiff, a dramatic critic in New York City, was excluded from defendant's theaters, and threatened with future exclusion, on the ground of unfair criticism. A New York statute provides that all persons are entitled to equal accommodations in theaters and other places of amusement, and makes discrimination by theater managers a misdemeanor, further providing that a party aggrieved may have a civil action to recover a penalty. Plaintiff asked that defendant be enjoined from violating this statute. *Held*, that an injunction will not be granted. *Woollcott v. Shubert*, 154 N. Y. Supp. 643.

For a discussion of this case, see NOTES, p. 93.

INSURANCE — RE-INSURANCE — LIABILITY OF RE-INSURER WHEN INSURER COMPROMISES. — The plaintiff, the insurer of a ship, re-insured the risk with the defendant. After loss, the plaintiff compromised with the shipowner for less than the insured value of the ship. He now sues the defendant for the full amount of the re-insurance policy. *Held*, that he can recover only the actual amount paid by him to the insured. *British, etc. Ins. Co. v. Duder*, 31 T. L. R. 361.

It is generally held that the re-insured can recover before any payment has been made to the insured, and that then subsequent events cannot alter his liability. *Hone v. Mutual, etc. Ins. Co.*, 1 Sandf. (N. Y.) 137. In the light of this, courts have generally said that re-insurance is indemnity against the

liability as distinct from the loss of the re-insured, and have allowed a recovery by the re-insured of an amount in excess of that paid by him to the insured. *Allemania Ins. Co. v. Fireman's Ins. Co.*, 209 U. S. 326, 332. See *British, etc. Ins. Co. v. Duder*, [1914] 3 K. B. 835, 839 (overruled by the principal case). This result is almost universally adopted in case the re-insured becomes insolvent. See 28 HARV. L. REV. '302. Many courts and writers, reasoning from these cases, support a recovery in excess of indemnity paid when the re-insured is solvent. *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Cass County v. Mercantile, etc. Ins. Co.*, 188 Mo. 1; *Grant v. American Central Ins. Co.*, 68 Mo. 503. See ARNOULD, MARINE INSURANCE, 9 ed., 323. Such a result enables the re-insured to make a profit, an idea abhorrent to the fundamental conception of insurance law that the contract is one of indemnity only, and in this respect re-insurance is the same as primitive insurance. See PORTER, INSURANCE, 3 ed., 259; ARNOULD, MARINE INSURANCE, 9 ed., 323. Nor is there, as in the case of insolvency, any danger of a multiplicity of suits. See 28 HARV. L. REV. 302; 15 *id.* 866; *Philadelphia, etc. Ins. Co. v. Fame Ins. Co.*, 9 Phila. 292. But even the courts which have adopted the result of the principal case have failed to observe the distinction created by insolvency and have apparently believed that the result was contrary to the great weight of authority. *Illinois, etc. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *Ins. Co. v. Ins. Co.*, 38 Oh. St. 11; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant (Pa.) 71.

JUDGES — DISQUALIFICATION — PECUNIARY INTEREST — SUBORDINATION OF THE RULE TO NECESSITY. — A judge of a state Supreme Court brings a writ in that court for a *mandamus* to compel the state auditor to issue a warrant for fifty dollars in pursuance of a state statute providing that where a judge of the Supreme Court changed his residence to the state capital, he should be paid fifty dollars per month additional, in consideration of increased expenses. The auditor objected that, as the judges of the Supreme Court were pecuniarily interested, they were disqualified from participating in the proceedings. *Held*, that the court had power to grant the writ. *McCoy v. Handlin*, 153 N. W. 361 (S. D.).

The power and efficiency of any judicial system depend upon its freedom from all suspicion of bias or partisanship. Thus in general a vested pecuniary interest disqualifies a judge from sitting on a case. *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759; *Ex parte Cornwell*, 144 Ala. 497, 39 So. 354; *City of Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21. But as a strong public policy demands that every cause should have a trial, when the interested judge alone has jurisdiction to try the case, if his pecuniary interest is slight it is clear that he may sit. *Matter of Ryers*, 72 N. Y. 1; *Hill v. Wells*, 6 Pick. (Mass.) 104; *Commonwealth v. Emery*, 11 Cush. (Mass.) 406. Even where the interest is large, if indirect it has been held that a judge may participate in the proceedings. *State v. Polley*, 34 S. D. 565, 138 N. W. 300. But where the interest is large and direct, there is no settled authority. Where the exclusive jurisdiction is given by the constitution, it is difficult to refuse jurisdiction. See *Matter of Leeffe*, 2 Barb. (N. Y.) 39, 40. But even if the exclusive jurisdiction is solely the result of statute, it is submitted that the character and extent of the interest should not affect the rule. In the conflict of policies which this situation involves, the considerations in favor of having someone to hear every cause outweigh in all cases the considerations against allowing an interested judge to act.

JURISPRUDENCE — REVERSAL OF JUDICIAL DECISION — CRIMINAL LIABILITY FOR ACT DECLARED INNOCENT BY DECISION SUBSEQUENTLY OVERRULED. — The defendant as officer of a bank received a deposit, having good reason to believe the bank insolvent. The highest court of the state had previously held that such an act did not fall within a criminal statute. The court

later overruled its former decision and decided that the act did fall within the statute. The defendant was then indicted under the statute. The trial court sustained a demurrer to the indictment and the state appealed. *Held*, that the judgment must be affirmed and the defendant discharged. *State v. Longino*, 67 So. 902 (Miss.).

For a discussion of how far an overruling decision may be retroactive, see NOTES, p. 80.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — AMOUNT OF COMPENSATION AWARDED WHERE THE WORKMAN HAD FORMERLY BEEN INJURED. — The plaintiff, having formerly lost one eye, lost the other in the defendant's employment and sued for the injury. The Michigan Workmen's Compensation Act provides different proportions of the employee's average wage where total and where partial disability results. In addition, some injuries, including the loss of both eyes, are expressly specified as total disabilities. The loss of one eye is a partial disability. *Held*, that the plaintiff was entitled only to compensation for partial disability. *Weaver v. Maxwell Motor Co.*, 152 N. W. 993 (Mich.).

Under a similar statute in New York, which specifies the loss of two hands and of one hand as total and partial disabilities respectively, the plaintiff, who had previously lost one hand, lost the other. He sued. *Held*, that he could recover for total disability. *Schwab v. Emporium Forestry Co.*, 153 N. Y. Supp. 234 (Sup. Ct. App. Div., 3d Dept.).

It is a well-established rule of common law that a person is liable for the damages which proximately result from his culpable act, no matter whether the condition of the injured person before that act caused the damages to be greater than they would otherwise have been. *Basham v. Hammond Packing Co.*, 107 Mo. App. 542, 81 S. W. 1227; *Jordan v. City of Seattle*, 30 Wash. 298, 70 Pac. 743. The Workmen's Compensation Acts, though they have done away with recovery in tort, clearly aim to supply relief to the injured employee regardless of the culpability of the employer. See Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129, 131. Again, the amount of compensation recoverable under the Acts is made proportional to the loss of earnings caused by the injury. *Sullivan's Case*, 218 Mass. 141, 105 N. E. 463. See 2 SEDGWICK, DAMAGES, 9 ed., § 675 a. Thus, they emphasize rather than alter the common-law principle of damages. *Lee v. William Baird & Co.*, 45 Scot. L. Rep. 717. As total disability certainly resulted from the accidents in the principal cases, it is submitted that the decision of the New York court is the more sound. Nor does this result work an injustice on the employer, since the wages earned by a previously disabled employee, and hence the compensation the employer must pay, are less than those he must pay to an able-bodied man.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — CHARACTER OF PAYMENTS — DUTY OF RECEIVER TO PAY PAST CLAIMS. — A receiver carrying on the business of an insolvent corporation petitions for instructions as to whether he need make workmen's compensation payments for injuries that happened before he was appointed. *Held*, that he must make the payments. *Wood v. Camden Iron Works*, 221 Fed. 1010 (Dist. Ct., D. N. J.).

At common law the workman's remedy would be in tort. Tort claims that arose prior to the receivership, the receiver is not commonly required to pay. *Easton v. Houston & T. C. Ry. Co.*, 38 Fed. 12. See 23 HARV. L. REV. 488. But receivers who carry on the business are required to pay in full antecedent debts of certain classes. *Fosdick v. Schall*, 99 U. S. 235. Chief of these are recent debts for operating expenses. *Drennen v. Mercantile Trust & Deposit Co.*, 115 Ala. 592, 23 So. 164. Payments under the Workmen's Compensation Acts are pretty fairly not tort payments. See *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N. J. L. 26, 28, 90 Atl. 1062; *Trim*

Joint District School Board v. Kelly, [1914] A. C. 667, 675; *BIRRELL, EMPLOYER'S LIABILITY*, 83; Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235. Their true nature is to be discovered only from an examination of the statutes. The intention of the statutes was to throw on industry the cost of personal injury to workmen, on the theory that this cost is properly a part of the cost of production. See *Borgnis v. Falk Co.*, 147 Wis. 327, 374, 133 N. W. 209, 224; Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129, 130. See also 28 HARV. L. REV. 307. This being so, the payments, although the liability is contingent, are nevertheless to be classed as operating expenses, whether they are further classed as wages, or insurance, or a combination of the two, or enforced pensions, or taxes, or something given in lieu of wages. They should, therefore, be continued by the receiver. In the actual case this result was the more easily reached because of an unusual provision in the statute, that the payments shall go on while the business is being conducted during bankruptcy or insolvency. See N. J. P. L. 1911, 136.

MORTGAGES — FORECLOSURE UNDER POWER OF SALE — BILL FOR REDEMPTION — SALE PENDING BILL. — During pendency of a bill in the alternative, asking for cancellation because full payment except for usurious interest had been made, or for redemption, the mortgagee foreclosed under a power of sale. *Held*, that the exercise of the power of sale is subject to the equity of the bill. *Carroll v. Henderson*, 68 So. 1 (Ala.).

It is often urged that the filing of a bill to redeem will not suspend the power of sale since it would be giving the mortgagor a power to suspend or qualify the contractual right he has vested in the mortgagee, without the mortgagee's consent. *Stevens v. Shannahan*, 160 Ill. 330, 43 N. E. 350; 2 JONES, MORTGAGES, § 1906. See dissent in the principal case. It is clear, however, that the jurisdiction of equity to relieve against forfeitures in mortgages is always in substance a question of varying the agreement of the parties. 1 POMEROY, EQUITY JURISPRUDENCE, § 162. The power of sale in mortgages is undoubtedly an attempt to avoid the interference of the chancellor. 2 JONES, MORTGAGES, § 1764. Equity, however, is not completely ousted of its jurisdiction and should prevent an inequitable exercise of the power. Thus in the principal case it is no hardship on the mortgagee to suspend his power of sale "subject to the equity of the bill" since the sale will be invalid only in case the bill shows that it would be inequitable for him to exercise the power. *Ryan v. Newcomb*, 125 Ill. 91, 16 N. E. 878. *National Building & Loan Ass'n v. Cheatham*, 137 Ala. 395, 34 So. 383.

NEGLIGENCE — PROOF OF NEGLIGENCE — RES IPSA LOQUITUR. — The plaintiff while passing along the sidewalk was hit by a board falling from the defendant's house. He showed by his evidence that the board had been loose a long time and just why it fell. *Held*, that it was reversible error to give him the benefit of the "presumption" arising from the doctrine of *res ipsa loquitur*. *McAnany v. Shipley*, 176 S. W. 1079 (Kansas City Ct. of App., Mo.).

The doctrine of *res ipsa loquitur* is generally spoken of as warranting a "presumption" of negligence. *Byrne v. Boadle*, 2 H. & C. 722; *Price v. Metropolitan St. Ry. Co.*, 220 Mo. 435, 456, 119 S. W. 932, 936; 4 WIGMORE, EVIDENCE, § 2509. By this is meant nothing more than that the facts of the injury are sufficient to warrant an inference of negligence, but not that the jury is required to draw one. *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 842, 47 S. E. 329, 330. See 2 CHAMBERLAYNE, EVIDENCE, §§ 1026, 1027. The doctrine is simply one of the quantity of circumstantial evidence required to enable the plaintiff to go to the jury. See 20 HARV. L. REV. 228, 229. The facts of the principal case clearly justify the application of the doctrine. *Kearney v. London, etc. Ry. Co.*, L. R. 5 Q. B. 411, L. R. 6 Q. B. 759. That the plaintiff showed

additional evidence of the defendant's negligence merely meant that he had more than enough evidence upon which to go to the jury. Under these circumstances an instruction giving him the benefit of the doctrine, even though unnecessary, was harmless. The real fault below seems to have been that the court instructed the jury that the doctrine of *res ipsa loquitur* warranted a "presumption of law" in favor of the plaintiff and from this the jury might well have thought that it was not free to draw any other inference than negligence.

PRESUMPTIONS — EXISTENCE AND EFFECT OF PRESUMPTIONS IN PARTICULAR CASES — OPERATIONS AGAINST STATE OF PRESUMPTION OF LOST GRANT. — In an action in equity to confirm title to real estate the plaintiff showed a 1907 patent from the state, the state having bought at a tax sale in 1872. The defendant claimed under deeds executed in 1884 and 1890, and showed he had been in undisturbed possession for over thirty years. The records prior to 1884 had been burned. *Held*, that the plaintiff's action be dismissed since a grant from the state to defendant would be presumed. *Caruth v. Gillespie*, 68 So. 927 (Miss.).

For a discussion of the principles involved in allowing such a presumption to operate against the state, see NOTES, p. 88.

PRESUMPTIONS — SIMILARITY OF LAW OF SISTER STATE — CONSTITUTION. — In a suit for the conversion of the proceeds of a carload of feed, the defendant alleged that he had received the money under a garnishment judgment of a Tennessee justice's court. He gave no evidence as to the law of Tennessee. Under both the Code and Constitution of Iowa, a justice's court could not have had jurisdiction to render such a judgment. *Held*, that the plaintiff cannot recover. *Droge Elevator Co. v. W. P. Brown Co.*, 151 N. W. 1048 (Ia.).

In the absence of evidence, most courts presume that the common law of a sister state is similar to that of the forum, provided that they are of common origin. *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456. *Cf. Peet v. Hatcher*, 112 Ala. 514, 21 So. 711. See 4 WIGMORE, EVIDENCE, § 2536. In some states, among them Iowa, this presumption has unfortunately been extended to statutory law. *McMillan v. American Express Co.*, 123 Ia. 236, 98 N. W. 629. See A. M. Kales, "Presumption of Foreign Law," 19 HARV. L. REV. 401, 410. In such states, when a statute of another state is proved, it should be presumed to be constitutional. *Fidelity Ins. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961. But where such a statute has not been proved, there is no ground upon which the presumption of an enactment should be refused merely because it happens to appear in the constitution rather than the statute book. *Cook v. Chicago, R. I. & P. Ry. Co.*, 78 Neb. 64, 110 N. W. 718. *A fortiori*, it is inconsistent to refuse to presume the uniformity of law when, as in the principal case, both the statutes and the constitution govern the subject. It is submitted that the better rule to be applied in such cases is for the court to take judicial notice of the laws of all the states. Such a rule could only be effected by legislation, but this has been done in a few jurisdictions. See W. VA. CODE, 1906, c. 13, § 4; MISS. CODE, 1906, § 1015.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — CHANGE IN CHARACTER OF LOCALITY AS GROUND FOR DECREE QUIETING TITLE. — A conveyance subject to the restriction that only dwelling houses should be erected on the property was made at a time when the property was in a choice residential district. Since then the neighborhood has been wholly given over to manufacturing of an offensive kind. *Held*, that the restriction is terminated, and that equity will remove it as a cloud on title. *McArthur v. Hood Rubber Co.*, 109 N. E. 162 (Mass.).

Courts of equity usually regard agreements restricting the use of land as contract rights. Thus, in the exercise of their discretion, they deny specific

performance and leave the plaintiff to his remedy at law whenever the character of the locality has so changed as to defeat the purpose of the agreement and render its enforcement inequitable. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *McClure v. Leaycraft*, 183 N. Y. 36; *Page v. Murray*, 46 N. J. Eq. 325. But these agreements are more properly regarded as creating equitable property rights. See 21 HARV. L. REV. 139. Where such rights exist, equity, having exclusive jurisdiction, has no discretion as to not enforcing them. Nevertheless, the Massachusetts court, in a previous case, denied specific performance and awarded damages. *Jackson v. Stevenson*, 156 Mass. 496. Cf. *Amerman v. Deane*, 132 N. Y. 355. Such a decree, although it might be explained on the theory that equity is thus protecting the right while exercising its discretion as to the form of the remedy, is in effect a judicial condemnation of an equitable property right. The principal case abandons this position and is the first decision definitely adopting the more logical view that, when the object of a restrictive agreement can no longer be attained, the restriction ceases to exist. Cf. *German v. Chapman*, 7 Ch. D. 271, 279; *Knight v. Simmonds*, [1896] 2 Ch. 294, 297.

TAXATION — PARTICULAR FORMS OF TAXATION — SUCCESSION TAX: REGISTERED BONDS OF THE TAXING STATE KEPT BY NON-RESIDENT AT HIS DOMICILE. — A registered bond of the Commonwealth of Massachusetts was kept by a non-resident at his domicile in New York. *Held*, that it is taxable under the Massachusetts Succession Tax. *Bliss v. Bliss*, 109 N. E. 148 (Mass.).

Succession taxes are regarded as taxes not on property, but on the privilege of succeeding to property. *Matter of Merriam*, 141 N. Y. 479, 36 N. E. 505; *Plummer v. Coler*, 178 U. S. 115. Accordingly it has been held that a state may tax the succession to negotiable bonds owned by residents, even when kept abroad, on the reasoning that the privilege of succession is derived from the law of the owner's domicile. *Frothingham v. Shaw*, 175 Mass. 50, 55 N. E. 623. On the other hand, it has been laid down that power over the person of the debtor, instead of the creditor, confers taxing jurisdiction over the transfer of the debt. *Blackstone v. Miller*, 188 U. S. 189. More accurately stated, the correct principle is, that jurisdiction depends upon control of the transfer. In the principal case, since the transfer must be completed by a change of registration, which could be enforced only by resort to the Massachusetts courts, the bond was properly held taxable under the Massachusetts statute. An earlier case has decided that a state cannot levy a succession tax on foreign-owned negotiable bonds of a domestic corporation when kept abroad, a question expressly left open in the principal case. *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707.

TROVER AND CONVERSION — EXCHANGE OF SECURITIES BY PLEDGEE — NEED IMPAIRMENT OF PLEDGOR'S SECURITY BE SHOWN? — The defendant loaned money to the plaintiff and took as security a third person's note protected by mortgage. This mortgage he exchanged with the mortgagor for one on another portion of the same premises. Though his security was not impaired by the change, the plaintiff sues for the conversion of the first mortgage. *Held*, that he cannot recover. *Madden v. Condon National Bank*, 149 Pac. 80 (Ore.).

That the defendant's dealing with the mortgage was unjustified is clear: holders of collateral security have no right to exchange it with the makers, nor to compromise it. *Garlick v. James*, 12 Johns. (N. Y.) 146; *Depuy v. Clark*, 12 Ind. 427; *Wood v. Mathews*, 73 Mo. 477. But cf. *Girard Fire Insurance Co. v. Marr*, 46 Pa. St. 504. See *contra*, COLEBROOKE, COLLATERAL SECURITIES, 2 ed., 26. This being so, what the defendant did amounted to a conversion of the mortgage. *Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177. See *Brown v.*

First National Bank of Newton, 132 Fed. 450, 453. In this country generally a pledgor can sue his pledgee for conversion without tender of the debt. *Austin v. Vanderbilt*, 48 Ore. 206, 85 Pac. 519; *Feige v. Burt*, 118 Mich. 243, 77 N. W. 928. See 13 HARV. L. REV. 55. The fact that the pledgee can recoup the pledge debt in damages relieves this rule of any harshness. See *Work v. Bennett*, 70 Pa. St. 484. But the substitution of something "just as good" for the property converted does not relieve the defendant; once there is a conversion he has not even the right to return the identical article converted. *Hamner v. Wilsey*, 17 Wend. (N. Y.) 91; *Baltimore & Ohio R. Co. v. O'Donnell*, 49 Oh. St. 489, 32 N. E. 476; *Post v. Union National Bank*, 159 Ill. 421, 42 N. E. 976. There should therefore be a right of action. If it be contended that the mortgage was an interest in real estate and hence not the subject of conversion, the fact remains that the defendant has, by destroying that interest without authority, caused the plaintiff serious damage. He cannot satisfy the plaintiff's rightful claim by offering another interest alleged to be as good. See 10 HARV. L. REV. 65.

WAR — CONTRACTS BETWEEN CITIZENS OF BELLIGERENT COUNTRIES — JURISDICTION OF NEUTRAL COURTS. — Before the declaration of war a German company contracted to sell certain patents to a French company and to construct in New Jersey for them a wireless station embodying these patents. Both countries have statutes forbidding commercial intercourse with alien enemies. *Held*, that the contract be specifically enforced. *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation*, 95 Atl. 187 (N. J.).

An English company sold and delivered coal in Algiers to an Austrian company. Drafts drawn on London were dishonored, because of proclamations forbidding commercial intercourse. Jurisdiction in the United States was obtained by foreign attachment of a ship of the defendant company. *Held*, that the court will not exercise its jurisdiction. *Watts, Watts & Co., Ltd. v. Unione Austriaca di Navigazione*, 224 Fed. 188.

At common law, or by statute in continental countries, citizens of belligerent nations are forbidden to engage in commercial intercourse. *The Hoop*, 1 Rob. 106; *Esposito v. Bowden*, 7 El. & Bl. 763. See 4 & 5 GEO. V., c. 87. The effect of this on preëxisting¹ contracts is to suspend the remedy; it does not put an end to the contract. *Mutual Benefit Life Insurance Co. v. Hillyard*, 37 N. J. L. 444; *Williams v. Paine*, 169 U. S. 55; *Ex parte Bousmaker*, 13 Ves. Jr. 71. The reason for this rule seems to be solely to prevent a possible advantage to the hostile country, since recovery will be allowed against an alien defendant if he has property which can be attached. *McVeigh v. United States*, 11 Wall. (U. S.) 259; *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K. B. 155. Such a reason has of course no weight in a neutral court. Clearly these statutes have no extraterritorial force so as to be effective in neutral countries. Consequently where the contract was to be performed in the neutral country, the court is justified in giving relief. But where the contract was to be performed outside the neutral country in which relief is sought only because the remedy in the belligerent countries is suspended, the court seems justified in refusing to exercise its jurisdiction. This is in accord with the usual disinclination of courts in admiralty to deal with such contracts between aliens where such a refusal will not cause an injury. See *Goldman v. Furness, Withy & Co., Ltd.*, 101 Fed. 467; *The Napoleon*, Olcott (U. S.) 208, 215.

WATER AND WATERCOURSES — PUBLIC RIGHTS — RIGHT OF CITY TO TAKE WATER FROM NAVIGABLE STREAM. — The plaintiff, a lower riparian proprietor on a navigable stream which flows through the defendant city, seeks to enjoin the taking of water from the stream by the city for the use of its inhabitants, and to recover damages for the taking. *Held*, that on the facts of the case the

plaintiff is not entitled to the injunction. On the question of damages the court was evenly divided. *Loranger v. City of Flint*, 152 N. W. 251 (Mich.).

A riparian proprietor has a right to appropriate, from the stream on which he is situated, only as much water as is reasonably necessary for his own domestic uses. *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Stockport v. Potter*, 3 H. & C. 300. See 3 KENT'S COMM., 12 ed., 440. The fact that the riparian proprietor on a non-navigable stream is a municipality does not make its inhabitants riparian owners. Consequently, the municipality may not take the water for the domestic use of its inhabitants without compensating lower riparian owners. *City of Emporia v. Soden*, 25 Kan. 588; *Stein v. Burden*, 24 Ala. 130; *Stock v. City of Hillsdale*, 155 Mich. 375, 119 N. W. 435. See GOULD, WATERS, § 245. And though the location of a municipality on a stream may increase the number of individual riparian proprietors, that does not give to the municipality the right to appropriate water for its non-riparian inhabitants. *City of Reading v. Althouse*, 93 Pa. St. 400; *Mannville Co. v. City of Worcester*, 138 Mass. 89; *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735. *Contra*, *Canton v. Shock Co.*, 66 Oh. St. 19, 63 N. E. 600; *Barre Water Co. v. Carnes*, 65 Vt. 626, 27 Atl. 609. Again, the navigability of the stream, which gives the public a right of way, does not alter riparian rights. *City of New Whatcom v. Fairhaven Land Co.*, *supra*; *Fulton Co. v. State*, 200 N. Y. 400, 94 N. E. 199; *Kaukauna Co. v. Green Bay Canal Co.*, 142 U. S. 254. *Contra*, *Minneapolis Mill Co. v. Board of St. Paul*, 56 Minn. 485, 58 N. W. 33. Nor does title to the bed of the stream increase the right to use of the water. *Sweet v. City of Syracuse*, 129 N. Y. 316, 29 N. E. 289; *Myers v. City of St. Louis*, 8 Mo. App. 266. See GOULD, WATERS, § 246. Consequently the appropriation of water for all its inhabitants is a taking of property for which the municipality must make compensation.

WILLS — CONSTRUCTION — EFFECT OF MAKING SAME PERSON SPECIAL AND RESIDUARY LEGATEE. — A legatee who was to receive a special bequest and also one-half of the residue, predeceased the testatrix. The will expressly directed that the residue should contain any lapsed bequests. *Held*, that the lapsed specific legacy became intestate property. *Dickinson v. Belden*, 268 Ill. 105, 108 N. E. 1011.

As a testator, by making a general residuary clause, shows an intent to bequeath all his property, it is a general rule that all the property owned by him at his death, and not specifically bequeathed, together with all lapsed legacies, shall fall into the residue. *Cambridge v. Rous*, 8 Ves. Jr. 12. See *English v. Cooper*, 183 Ill. 203, 208, 55 N. E. 687, 688. See 2 JARMAN, WILLS, 6 ed., 1046. Indeed this rule applies even if the legacy which has lapsed was described as an exception from the residue. *Evans v. Jones*, 2 Collyer 516. Since a lapsed residuary legacy cannot swell the residue, it necessarily becomes intestate property. *Ketchum v. Corse*, 65 Conn. 85, 31 Atl. 486. But a lapsed specific legacy to the residuary legatee does increase the residue and should come within the residuary bequest. *In re Fassig's Estate*, 82 N. Y. Misc. 234, 143 N. Y. Supp. 494. Since there is intestacy as to the deceased legatee's share of the residue, this does not involve taking property from him in one guise, to return it in another. Any other rule is contrary to the intent of the testator in making the residuary clause. Hence it is submitted that the principal case is wrong, though it is in accord with the trend of authority. See *Dorsey v. Dodson*, 203 Ill. 32, 67 N. E. 395; *Craighead v. Given*, 10 Serg. & R. (Pa.) 351. It the more clearly defeats the intent of the testatrix in the principal case, since the will expressly stated that lapsed legacies should fall into the residue.

WITNESSES — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT — PRIVILEGE OF ATTORNEY NOT TO DISCLOSE CLIENT'S IDENTITY. — Certain

clients employed an attorney to represent them in matters connected with the investigation of election frauds, and in addition to act as counsel for three men who had been indicted for such frauds. Later before the grand jury, the attorney refused to disclose the identity of the clients who employed him to represent the three indicted men, asserting his privilege. He was sentenced for contempt of court and now applies for a writ of *habeas corpus* for his discharge. *Held*, that the petitioner be discharged. *Ex parte McDonough*, 149 Pac. 566 (Cal.).

That the privilege of an attorney not to disclose communications of his client extends only to communications made in confidence as a part of the purpose of the client to obtain legal advice, is well established. *Halton v. Robinson*, 14 Pick. (Mass.) 416. See *Hager v. Shindler*, 29 Cal. 47, 64. Still, the mere fact of the relationship should be considered a communication. See 4 WIGMORE, EVIDENCE, § 2313. Hence, if the client's name is given in confidence, it is within the application of the rule. However, if the attorney purports to represent one of the parties at bar, since each party to a suit has a right to know with whom he is dealing, the public policy in favor of preserving the sacredness of communications between client and attorney is overborne. Hence the attorney must, upon examination, disclose the name of his client. *Levy v. Pope, Moody & Mal.* 410. Cf. *White v. State*, 86 Ala. 69, 5 So. 674. See 4 WIGMORE, EVIDENCE, § 2313. But where it is undisputed that the attorney neither represents a party, nor has previously represented a party concerning the case at bar, there seems little reason why it should be made an exception to the established rule of privilege. *Foote v. Hayne*, 1 C. & P. 545, 546; *In re Shawmut Mining Co.*, 94 N. Y. App. Div. 156, 87 N. Y. Supp. 1059. See *In re Malcolm*, 129 N. Y. App. Div. 226, 113 N. Y. Supp. 666, 668. But the weight of authority is *contra*. *Satterlee v. Bliss*, 36 Cal. 489; *Mobile & Montgomery Ry. Co. v. Yeates*, 67 Ala. 164; *United States v. Lee*, 107 Fed. 702.

BOOK REVIEWS

PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH. Volumes I and II. By Richard T. Ely. New York: The Macmillan Company. 1914. pp. xlvii, 474; vii, 521.

Dr. Ely's work contains an enormous amount of material, the result of many years of study and reflection; it is the production of mature moderation, with a confident hope in the possibilities of collective social purpose. Property is to be regarded as derivative in the modern social state; it has no inherent indefeasible claims and is not antecedent to the society which produced and protects it. Its enjoyment is therefore subject throughout to such control as may be necessary for the accomplishment of social purposes. It may be taken or limited or used as the community finds necessity, subject only to so much tenderness as is possible. How much is in fact possible, what uses demand compensation, cannot be stated in advance. We have certain regulative principles, nothing more; we must not forget that men will build only when they know the foundation is secure. Every sudden revolutionary invasion of the individual's customary expectations shakes a little the whole of society, puts some doubt of the future into the hearts of the living. Custom, therefore, creates a genuine obligation on society to respect what it has created.

As to right of contract, the same applies, though we need not be so fearful of vested rights. Liberty has no significance except in society; it is the right to do what society finds best for itself and for the actor to let him do. Society may indeed go so far as to forbid one from contracting while under economic

pressure, though it has done nothing to relieve the pressure itself. If one must take unhealthy work or starve, society may forbid the contract, while it leaves no alternative but starvation. This may be necessary as a condition of preventing such pressure from arising; it will remove the possibility of successfully exploiting the victims. Indeed the law has always recognized limits of the power to contract; the question is of the application of the principle. In practice we may safely be radical; more radical than in respect of property, in which we have vested rights to protect.

Throughout the book there are interesting suggestions in detail, always moderate, never pungent, seldom novel. One reads with assent and without surprise; one is seldom irritated or stimulated to the "intolerable labor of thought," but one is conscious of company with a writer of capacious mind, sound intelligence and the utmost good faith. The book is most useful for reference and might be the means of conversion to conscientious Bourbons, but it can hardly be said to contribute fundamentally to the difficulties which are now in the front of discussion. Perhaps no such book can do so; discussion is concerned in more partisan spirit with more specific problems. A book like Taussig's *Economics*, being a general compendium and designed as a restatement of the science as it stands, may afford to be removed from contention; but this is scarcely such a work. It would gain in interest and effect by a more decided and positive method.

Of chief interest to lawyers is that part which concerns the relation of the constitutions to property and contract. In these the author sides, definitely enough, with the liberal construction of the Bill of Rights. However, the vague clauses which have formed the basis for so much dispute are in his opinion amply flexible for all necessary adaptations. Social purposes more directly regulative of the individual than any we have known find no hindrance in these, if properly understood. It is true that hitherto we have had disappointments, especially in the state courts, but the Supreme Court has been wise and moderate, saving the Bakers' Case, and we have good reason to hope that the judges will in the future adopt a more understanding posture toward legislative experiments. They may be safely trusted in their interpretation of the Constitution to allow for the realization of all reasonable collective purposes. Indeed it may be asked whether they might not safely be given in form a power they possess in fact and become recognized as a kind of legislative chamber whose concurrence is necessary for radical legislation.

The last suggestion, if it be meant seriously, is much too naïve for such a work; it scarcely requires comment. The whole treatment of the relation of the Bill of Rights to the regulation of contract is inadequate. Experience does not justify any optimism in this respect either as to the Supreme Court or elsewhere; conservative changes in public opinion are readily reflected by the courts and radical changes get tardy response. If the Bill of Rights is to continue to give to courts the power to impose upon legislation their own views of public policy, it can only be at the expense of their present exemption from genuine responsiveness to public opinion. If, on the other hand, the Bill of Rights does not do this, it accomplishes practically nothing, because if it means no more than that no legislation shall be valid which does not represent a reasonably disputable position in policy, such legislation seldom arises. It is of course true that an uncompromising but powerful minority may force its will upon the legislature, but in most cases they must press their claims, at least avowedly, as part of a plan of general utility, and support themselves with a show of reason, before they can succeed. It is extremely doubtful whether the rare cases, in which they cannot appeal to a reasonable theory, justify the dangers of irritation and political strain which experience shows to result from the function as it exists. A mild optimism as to the future conversion of judges to the writer's own views seems hardly a sufficient faith for practical purposes. The

issues generally concern class conflicts in which men cannot be depended upon to be sympathetic with other class purposes; not even judges, though their record is much more creditable than many suppose. If the fight in the legislature, where all are represented, is to be transferred at its conclusion to a tribunal which is drawn from one class only, and properly so drawn, the strain upon government becomes greater than one ought lightly to accept. In any case we are entitled to more of what Dr. Ely likes to call a "realistic" treatment of so momentous a problem.

LEARNED HAND.

THE HAGUE ARBITRATION CASES. By George Grafton Wilson. Boston: Ginn and Company. 1915. pp. x, 525.

This is a collection of the preliminary and final documents in the cases submitted to the Hague tribunal. The preliminary documents are the agreements — technically termed *compromis* — under which the cases have been submitted, and the final documents are the formal awards. Heretofore these papers have been difficult to find. This volume collects them, and presents an English translation of such as have no authoritative English text. No commentary is given; and it is obvious that the editor's purpose has been simply to furnish a text for the use of students and other investigators, — a fruitful basis for historical and legal dissertations. The editor has added maps, the arbitration conventions of the two Hague conferences, and an index. The result is a useful book, and indeed an indispensable one.

A short preface says that "the fifteen cases upon which the court has acted show that the resort to arbitration as a means of settlement of international disputes has become common in the early days of the twentieth century," that "financial claims have been passed upon frequently, but such questions as the right to fly the flag, the violation of territory, the delimitation of boundaries, and other questions involving the fundamental rights of states have likewise been considered," that "in about one-half the cases no nationals of the parties to the controversy have sat as arbitrators," that "nearly one-half the cases have been before three judges, and all but one of the remaining cases before five judges," that "of the six arbitrators sitting in the cases decided in 1913 and 1914, each arbitrator had previously sat upon at least one case," that "France has been a party in six cases, Great Britain in five, the United States in four, Germany and Italy in three each, and several states in two or only in one," and that "seventeen states in all have been parties." These extracts from the preface indicate, as the editor says, "an established confidence in the tribunal."

Reasons for the growth of confidence in the Hague system of settling disputes can be found in the awards. As the system does not exclude nationals from a tribunal, and as arbitral tribunals, even when not partly composed of nationals, have often made awards that were obviously the result of compromise, the Hague system has not always been looked upon with the highest hope. Yet the actual awards have not justified the fears so naturally felt. The awards cannot fairly be called compromises. Further, the lack of permanence in the court — a defect suggesting that an evanescent body of judges might have the same irresponsibility as jurors — has been somewhat overcome by the growing practice of selecting arbitrators who have already served. Thus there may arise in time an approximately permanent court and a systematic body of judicial decisions.

In order that the Hague awards may become authoritative precedents after the fashion of decisions rendered where the Anglo-American system of law prevails, or even in order that they may have the merely persuasive force

which is conceded to decisions in the Civil Law countries, there must be reports. In no other way can the investigator learn upon what proposition of law the tribunal relied for the solution of the dispute submitted to it. By careful study the *ratio decidendi* can be extracted from the *compromis* and the award. Yet this is seldom easy. The *compromis*, save when the dispute is merely on the construction of a treaty, usually submits the problem in terms not indicating the agreed facts; and although the award invariably concludes with a clear judgment giving money, fixing a boundary, or otherwise determining the rights of the parties, the award does not always state briefly either the facts embodying the problem or the proposition of law relied upon as the major premise sustaining the decision. Thus this collection of *compromis* and awards incidentally raises many interesting questions as to the framing of headnotes embodying the doctrines to which these cases will be cited in future arguments and textbooks.

Perhaps the case of *The Carthage* (p. 352) is the one in which the award is so framed as most easily to enable the reader to extract the *ratio decidendi*; and perhaps the case of *The Manuba* (p. 326) is next to it in resemblance to an English or American reported case. Those two cases ought to be read by any one wishing to learn something about Hague procedure; for their *compromis* and awards, though brief, give an adequate picture of the sort of formality which is customary in such documents, and, besides, they deal with questions just now of practical interest, — questions of neutral commerce, contraband, right of search.

It only remains to add that, although thus far the awards at the Hague have seldom cited authorities, — as is natural enough, since they have dealt frequently with mere questions of fact and have almost never required any but the most elementary propositions of law, — and although, for the same reasons, they do not yet materially add to international law as a science, nevertheless they cannot be read without great respect for [the learning and spirit underlying them, nor without a timely appreciation of these proofs that nations do recognize some rules and do submit some disputes to the test of reason.

EUGENE WAMBAUGH.

REPORT UPON UNIFORMITY OF LAWS GOVERNING THE ESTABLISHING AND REGULATION OF CORPORATIONS AND JOINT STOCK COMPANIES IN THE AMERICAN REPUBLICS. By Roscoe Pound. Pan-American Financial Conference. 1915. pp. 13.

There is need in every business community of some legal method by which associates may carry on a business undertaking with a simple method of suing and being sued, and of receiving and conveying property; without interruption to the undertaking through the death of an associate or the sale of his interest; with some provision for concentration of management and, above all, with a limitation of their liability. There is at present no uniformity in the American Republics as to this method. Commerce, says Professor Pound, is universal, but the laws regulating the instruments of commerce are local.

He outlines different systems of law, showing that the Latin-American law gives recognition to commercial partnerships as legal entities, contrary to the orthodox conception in the Anglo-American law, and stating that the Anglo-American view of incorporation as a grant by the state of an important privilege has led to regulation by the state which would be regarded as excessive in Latin America, where it is recognized that the law has simply confirmed the lay conception of a business composite unit. He further points out that in Latin America administrative bodies, rather than the courts, largely supervise such units.

He mentions five obstacles (all on the part of the United States) to the unification of the law: (1) the jealousy with which each jurisdiction guards its own legal products; (2) the increasing tendency to make law through legislators rather than judges or jurists, as legislators are even more apt than judges to restrict themselves to local considerations; (3) the sluggish progress made in obtaining uniform commercial law on other matters, such as warehouse receipts, sales, and even negotiable instruments; (4) the division of jurisdiction which commits the regulation of commerce to the federal government and the regulation of the instruments of commerce to the states; and (5) the tendency of the American business public to sneer at jurisprudence.

He mentions three conditions favorable to unification: (1) that American jurists and teachers of law are turning from the welter of decisions, and seeking unity in law; (2) that Latin-American jurists have inherited a tradition of universal law, and incline to the universal treatment of law; and (3) that the sociological movement in America is gaining strength, and that this must make for universality since it breaks from purely legal reasoning and turns to general considerations of utility, of justice, and of adaptation to human activities.

Professor Pound concludes by saying that we must not expect to move rapidly. The first step would seem to be the promotion of uniformity from within, both in Latin America and in Anglo-America. The second step must be education through scientific discussions in congresses and conventions, out of which may arise in the near future a Pan-American Conference on Uniform Commercial Legislation composed of jurists, practicing commercial lawyers, and men of affairs, which will gradually produce a scheme of Pan-American legislation on the subject.

The report is terse. The learned author has simply sketched the situation.

The reviewer ventures to suggest that, while it is improbable that the laws relating to composite business units, even in the United States, will be made uniform in the near future, if ever, it seems, on the other hand, probable that a law may be evolved regulating *one* type of a composite business unit, which could be readily understood by lawyers and business men in all the American Republics, and that at least the great commercial states would permit its citizens, at their option, to do business by such method.

EDWARD H. WARREN.

THE DOCTRINE OF CONSIDERATION. Treated historically and comparatively. By Pherozechah N. Daruvala, LL.D. Calcutta, 1914. pp. lxvii, 622.

The scope of this book on consideration is remarkable. It includes all questions relating to the necessity of consideration in order to make valid either a promise or a transfer of property. Though it deals primarily with the law of England and her colonies, the law of all other civilized countries is in separate chapters compared with the English doctrine. It is unfortunate that the execution of the work is not equal to the scope. The author seems to have read an astonishing number of books, and he quotes liberally from them; but there is little attempt to coördinate in accurate statements of principle the author's conclusions from the many authorities which he cites. Such attempts as he makes in this direction are not very helpful. On pages 118-120 he collects more than twenty different definitions of consideration, all of which he criticises as defective "because instead of laying down a principle they try to give instances." This criticism, however, seems inapplicable to many of the definitions which not only "give instances" but profess to include all the instances where the author of the definition thinks consideration may be found. There is a confusion of terminology, however, in the definitions which Dr. Daruvala

quotes — a confusion which he does nothing to clear up, between consideration which is in fact given for a promise, and such consideration as the law regards as essential to make a promise binding. The lack of discriminating thought which is evident in this matter [is typical] of the book. Thus in treating the crucial question of the validity as consideration of the promise, or the performance, of an act due under a previous contract with a third person, the author carefully states the conclusions of all writers on that subject, but he gives little of their reasoning, and says nothing himself which sheds light upon the subject. His final conclusion (p. 155) that either performance or promise of an act due to a third person may suffice to support a promise is logically at variance with his earlier statement (p. 121) made in attempting a definition of the requisite of valid consideration that "there must be a detriment by the promisee." But he does not observe the inconsistency. There is much valuable material in the book, but the author has not been equal to dealing with his material. In mechanical execution, though the print and form of the volume are pleasing, it is defaced by numerous misprints.

SAMUEL WILLISTON.

PALAEOGRAPHY, AND THE PRACTICAL STUDY OF COURT HAND. Parts I and II.

By Charles Johnson and Hilary Jenkinson. Oxford: Clarendon Press. 1915. pp. xlviii, 250.

The object of this sumptuous monograph is to prove that, at least in England where medieval manuscripts are numerous and men of all classes wrote them, it is not possible to decipher or even to date a manuscript by internal evidence; "that Court Hand documents can generally be read with certainty, but only in the light of their meaning, and that they can nearly always be dated with accuracy, but not by their handwriting." The author's thesis is proved in a novel way. He reproduces thirteen documents, written in widely different hands, and gives comments on the peculiarities of each hand; and then announces that the documents "are all of one date — 1225; they all relate to the same small piece of business; they actually form separate membranes of a single roll; and they come all from one small part of Lincolnshire not more than a few miles square."

The facsimiles are beautiful; the comments enlightening; the surprise complete; the demonstration convincing.

J. H. BEALE.

THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS (In England and Wales). By G. Glover Alexander. Cambridge: Cambridge University Press. 1915. pp. x, 235.

THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD. By Edwin M. Borchard. New York: The Banks Law Publishing Company. 1915. pp. xxxvii, 988.

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VOTING TRUSTS. By Harry A. Cushing. New York: The Macmillan Company. 1915. pp. 226.

THE CRIMINAL IMBECILE. By Henry Herbert Goddard. New York: The Macmillan Company. 1915. pp. ix, 157.

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- James Brown Scott. *Carnegie Endowment for International Peace*. New York: Oxford University Press. 1915. pp. xxx, 303.
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- THE DIPLOMACY OF THE WAR OF 1812. By Frank A. Updyke. *The Albert Shaw Lectures on Diplomatic History, 1914*. Baltimore: The Johns Hopkins Press. 1915. pp. x, 494.
- EQUITY PRACTICE. State and Federal. Volumes I, II and III. By Robert Treat Whitehouse. Chicago: Callaghan and Company. 1915. pp. cxiv, lxxvii, xxxiv, 3296.

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PENALTIES AND FORFEITURES

BEFORE PEACHY *v.* THE DUKE OF SOMERSET

ON the jurisdiction of chancery to relieve against penalties and forfeitures, *Peachy v. The Duke of Somerset*¹ is usually cited as the leading case. Simple enough on the facts, the parties concerned were sufficiently important to insist on a very thorough discussion of the law. We are told that it "held three days" and was "solemnly debated"; hence the arguments of counsel and the judgment of the chancellor took a wider range than will be found in previously reported decisions. It discloses just how far equity jurisdiction had developed in this class of cases by the first quarter of the eighteenth century, forming a convenient stopping point for a review of the earlier law.

The penal obligation, as known to-day, is a product of Roman law. Probably, in the earliest period of contract, stipulations (*stipulatio*) for the payment of money were alone valid, so that the practical mode of stipulating for a collateral act was to make the payment of a sum of money conditional on the non-performance of the act desired. The amount of the *poena* had no measure except the will of the parties, and it might be recovered in full, although exceeding the value of the act or forbearance stipulated for.² Later, an equity in favor of actual damages was recognized

¹ 1 Strange 447 (1720), S. C. Prec. Ch. 568, 2 Eq. Ca. Abr. 227; 2 WHITE AND TUDOR, LEADING CASES IN EQUITY, 8 ed., 255.

² JUSTINIAN, INSTITUTES, 3, 15, 7 (Moyle's 5 ed.); DIG. 4, 8, 32; 21, 2, 56.

in some cases although not in all;³ indeed, there were many debatable points on this subject still unsettled at the close of the Classical period, as is reflected in modern continental jurisprudence. The French civil code provides: "When the contract stipulates that the party who fails to execute his obligation shall pay a certain sum as damages, neither a greater nor a less sum can be granted the other party." But elsewhere it is said: "The penalty may be modified by the judge whenever the principal obligation has been executed in part."⁴ The German civil code provides: "If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by judicial decree obtained by the debtor. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred."⁵

Stipulations for the performance of collateral acts were uncommon in the early period of the Roman law. We are told that they were used chiefly in the creation of servitudes upon provincial lands. The older modes of constituting servitudes by *in jure cessio*, or by *mancipatio*, could not be applied to *praedia provincialia*; hence the occupiers of land in the provinces resorted to the solemn contract, *stipulatio*, by which the owner bound himself to allow its enjoyment or in default to pay a penal sum.⁶ The stipulation, it is needless to say, was the formal contract of the Roman law entered into by question and answer (*dari spondes? spondeo*), having distinct procedural advantages; a written memorandum of the act was merely a convenient means of proof. But, as time went on, practice gave increasing importance to the writing,⁷

³ HUNTER, ROMAN LAW, 652, citing DIG. 44, 4, 4, 3. Cornelius compromised a claim against Maevius for 60 aurei, but Maevius inconsiderately agreed to a penalty of 100 aurei if he did not keep the terms of the compromise. Cornelius could not recover more than was really due — namely, 60 aurei; and if he demanded more, could be defeated on the ground of bad faith (*exceptio doli mali*).

⁴ CODE CIVIL, arts. 1152, 1231. So also the ITALIAN CIVIL CODE, art. 1214, and the SPANISH CIVIL CODE, art. 1154. See SWISS FED. CODE OF OBLIGATIONS, arts. 179 to 182; POTHIER, OBLIGATIONS, pt. 2, ch. 5, and, for Scotland, Lord Elphinstone v. Monkland Iron Co., 11 App. Cas. 332, at p. 436 (1886); Forrest v. Henderson, 8 M. 187 (1869).

⁵ GERMAN CIVIL CODE, art. 343. See notes to Official French Edition (1904).

⁶ GAIUS, II, 31; INSTITUTES, II, 3, 3 and 4 (Moyle's 5 ed.); SOHM, INSTITUTES, § 80, 2.

⁷ INSTITUTES, III, 19, 12. Hence the *cautio fide jussoria*.

and the stipulation, the very essence of the contract, passed to the stage of a formal recital "*M rogavit T promisit*" and was finally absorbed by the very instrument upon which it conferred its efficaciousness. The *cartae* of the Frankish period resembled their imperial predecessors, and, Roman and Barbarian uniting in a common practice, the surety and the pledge were replaced in charters by penal clauses,⁸ developing a form of written obligation useful to the money lender and destined to a permanent place in books of precedents. So, when Britannia had grown sufficiently cosmopolitan to become a borrower, it was the mediæval Italian banker who seems to have brought into common use in England the penal bond, where, we are told, documents of a purely obligatory character were rare before the latter part of the thirteenth century.⁹

The rapid spread of this form of obligation is explained by the fact that it was well adapted to evade the canonical prohibition of interest on loans, regarded as usury and therefore unlawful for a Christian,¹⁰ and that by the time interest was made lawful¹¹ it had become firmly established as a common form of conveyancing. The early cases show a close scrutiny of such transactions. In *Umfraville v. Lonstede*,¹² in 1308, debt was brought on a bond conditioned to deliver a writing on a certain day. The defendant pleaded that he was in the East that day but had left the writing at home for delivery and that the plaintiff had not been damaged by the failure to deliver on the day named. The plaintiff insisted that the condition had not been fulfilled, whereupon Bereford, J., said: "You demand this debt because the writing was not delivered and he says that before now he has tendered it, and that

⁸ BRISSAUD, HISTORY OF FRENCH PRIVATE LAW, Amer. ed., 489, and authorities cited in note. The penalty at one time served the purpose of indemnifying the successful party for costs which were not awarded in the early lay courts.

⁹ "Occasionally there was an agreement for a penal sum which was to go to the king, or to the sheriff, to the fabric fund of Westminster Abbey, or to the relief of the Holy Land." 2 POLLOCK & MAITLAND, 224. See John of Oxford's form book, 7 LAW QUART. REV. 65, for a penal bond of the year 1274.

¹⁰ GRATIAN, II, 14, 4, 7; DEC. GREG. 5, 19, *de usuris*; KAMES, III, ch. 11, p. 279; 3 BL. COMM. 434; HAWKINS, P. C., bk. 1, ch. 29, § 7; VINER'S ABR., USURY; BACON'S ABR., USURY; FONBLANQUE, EQ., bk. 1, ch. 4, § 7; GLANVILLE, bk. 7, ch. 16; bk. 10, ch. 3; DIALOGUE DE SACCARIO, bk. 2, § 10.

¹¹ 37 HEN. VIII, ch. 9. See, however, the Money-lender's Act of 1900 (63 & 64 VICT., ch. 5).

¹² Year Book, 2 & 3 EDW. II (Selden Society), p. 58.

he tenders it now, Therefore it is well that you receive it. Moreover, this is not, properly speaking, a debt; it is a penalty, and with what equity (look you!) can you demand this penalty?" No judgment is recorded, and while it cannot be assumed that the court would have gone so far as to give judgment against the letter of the bond, there is evidently a very marked disinclination to enforce it.

In 1313-14 there is another glimpse of the attitude of the royal judges toward such contracts.¹³ Thomas Scott, at the Eyre of Kent, brought debt against Hamon of Beracre for thirty pounds, averring that by an indenture the parties had submitted certain matters in dispute between them to arbitration and had bound themselves in thirty pounds to perform the award; that the arbitrators had awarded fifteen pounds to Thomas, which Hamon had refused to pay, whereby action accrued. Passeley, of counsel for Hamon, said: "This action of debt is based upon a penalty and savors of usury, of which the law will not permit you to have recovery. For example, if I say that I hold myself bound to you to pay you ten pounds upon such a day, and that if I do not pay them to you upon that day, I am then bound to you in forty pounds; and if I fail to pay the ten pounds upon the appointed day, the law will not allow you to recover, by way of usury, the forty pounds." To which Staunton, J., replied: "Penalty and usury are only irrecoverable where they grow out of the sum in which the obligee is primarily bound, but what is claimed here is claimed as a debt arising out of covenant as appears from what has gone before." The court, it is evident, is prepared to distinguish a primary from a collateral covenant. On the other hand, if the illustration put by counsel represented current opinion, such opinion must have undergone a change, for in 1352¹⁴ a case was before the Court of Common Pleas where debt had been brought on a bond in which the obligor bound himself to pay nine marks at a certain day, and, if not paid at the day, to pay seventeen marks. Skip. (Skipwith?) argued that the action sounded in usury, but the court gave judgment for the seventeen marks and six marks damages.

¹³ Eyre of Kent, 6 & 7 Edw. II, vol. II (Selden Society), pp. 24 *et seq.* There are two reports of this case. Hamon, after failing on the plea of usury, denied the award, but before the jury trial the case was settled.

¹⁴ Year Book, 26 Edw. III, 17.

It is unnecessary to go further into the abundant material on the subject of usury to be found in the early reports and abridgments. The canonical rule, based on the old economic conditions under which borrowing was merely the last resort of the improvident or the necessitous, could not survive the new capitalism founded on credit and the productive employment of surplus earnings. There are modern critics of this newer economy, and time's irony may revive the prejudice of antiquity against interest; but we need not concern ourselves with that at present. It may, however, be noted, in passing, that ingenuity in the invention of devices to evade the law, especially where that law is doctrinal and externally imposed, is not the modern phenomenon that some would imagine. The efforts of the courts during this period were principally directed to distinguishing between agreements where the penalty was truly conditional, where the borrower could wholly discharge himself by repayment within a given time, and where the written condition was but a subterfuge, and the real intent of the parties was that the loan should not be repaid without the added sum, by whatever name called.¹⁵

With mediæval subtlety the careful conveyancer endeavors to avoid the perils of the defense of usury by unscrupulous debtors. A contingency is essential; the single bill under seal is, for procedural reasons, if no other, the most efficacious instrument of the day; so let the obligation be drawn for a round sum — say twice the amount of the loan — with a clause of defeasance, or perhaps a defeasance in a separate instrument, declaring the obligation void on payment of the loan on a particular day; then the condition or defeasance will be collateral to the bond, and, being in favor of the obligor, must be strictly performed to discharge the major obligation which otherwise will remain single.¹⁶ So, also (to this day, in fact, in such instruments), the suspicious

¹⁵ *Burton's Case*, 3 Co. 139 (1591); *Button v. Downham*, Cro. Eliz. 643 (1598); *Fountain v. Grymes*, Cro. Jac. 252 (1610); *Roberts v. Trenayne*, Cro. Jac. 507 (1616); *Oliver v. Oliver*, 2 Rolle Rep. 469 (1624); COMYN, DIGEST, USURY.

¹⁶ *Fowell v. Forrest*, 2 Saund. 475 (1670), n.; *Bond v. Richardson*, Cro. Eliz. 142 (1588); *Abbot v. Rookwood*, Cro. Jac. 594 (1620); *Kniveton v. Latham*, Cro. Car. 490 (1637). In the case of a separate defeasance it was perilous, also, for the obligee to decline payment when tendered, as it might discharge the obligation if rightly made. Co. LITT. 207; *Year Book*, 33 HEN. VI, 2; *Year Book*, 7 EDW. IV, 3 & 4; *Panel v. Nevel*, Dyer 150 a (1556); *Cotton v. Clifton*, Cro. Eliz. 755 (1599); *Peytoe's Case*, 5 Co. 14 (1611); *Trevett v. Aggas*, Willes 107 (1738).

word "penalty" will be avoided by the scrivener; the obligation will be for "lawful money" and the condition for the payment of a "just sum" or "full sum," as local practice dictates,¹⁷ although court and counsel, long assured of the validity of the transaction, have not hesitated to call the instrument by its true name — a penal obligation.

Nevertheless, the penal bond would not have won its way to legal favor had it not met an economic need of the time, a time, it may be noted, that did not look with disfavor on the strict enforcement of forfeitures of estates and interests in land for condition broken.¹⁸ In fact, the writers of the period group together, as of one genera, problems connected with conditions annexed to personal obligations and those connected with conditions annexed to interests in land,¹⁹ although many of the latter may be regarded as rational developments of feudal law, by which the services of the vassal are incidents of the fief. Contract and property law were swept along together, bound by ever tightening chains of precedent, in the development of doctrines, harsh and narrow perhaps, but capable of being understood and applied, a point not altogether to be despised in times of disorder and low credit.²⁰ If the law bore heavily upon the individual, at least there was a known law, the certainty of which had become the "safety of all."

But a doctrine predicated wholly on the principle that he who has promised shall not be able, under any pretext, to free himself from literal performance and the consequences of non-performance, must, sooner or later, come into conflict with those humanitarian ideals, due to an awakening consciousness of the claims of the individual, that would take into account the exceptional in the law. Casuistry is the first avenue of escape from this moral dilemma, as may be detected in that very ancient and widespread tale of the

¹⁷ The Young Clark's Guide (1670); Select Cases in Court of Requests (Selden Society), 13. Compare any modern form book. There was no hesitation in using the word "*poena*" in recognizances in criminal procedure. Dalton's Justice (1666), Ch. 134.

¹⁸ II BL. COMM. 153; II STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 1304-1311.

¹⁹ CO. LITT. 206; FULBECKE, PARALLEL, pt. 2, 59; PERKINS, PROFITABLE BOOK, §§ 783 *et seq.*; SHEPPARD, TOUCHSTONE, ch. 21, and the title "Conditions" in the abridgments.

²⁰ Compare 3 ANCIENT LAWS OF IRELAND, 13, Senchus Mor: "There are three periods at which the world is worthless: the time of plague; the time of general war; the dissolution of express contracts."

bond for a pound of flesh, immortalized in "The Merchant of Venice."²¹ There craft meets craft and the usurer is circumvented by what Von Ihering plainly described as pettifoggery,²² but the popularity of the story, in spite of a *dénouement* that offends a nicely balanced sense of justice, clearly indicates that the mediæval mind was already, perhaps unconsciously, in revolt against the harshness, the excessive literalism of the law, of which the merchant's bond was but a symbol.

To the court of chancery fell the task of moulding the law of penalties and forfeitures into harmony with more humane standards of conduct, a task slowly performed and still uncompleted.²³ There was a precedent for relief against forfeitures at the canon law in the case of the *emphyteuta* who, if he had forfeited his interest by Roman law through failure to pay the rent and taxes,²⁴ could, under the canon law, avoid the loss by *celeri satisfactione* if the proprietor had not acted or resorted to law.²⁵ But this interest in land was unknown in England and the doctrines of the canonists were not welcomed in property law. It would seem, also, that at one time it was at least debatable in a court of law whether relief should not be given in case of accident. In 1366²⁶ it was said in the course of argument by Chelr. (Chellery?): "If you are bound to pay me a certain sum of money, and you are robbed on the way, you are not excused and absolved by this." To which Kirton. (Kirketon?) replied: "Certainly you will be." Brooke thought the colloquy of sufficient importance to note it in his abridgment.²⁷ But the doubt could not have been for long, as Sir Edward Coke gives just such an incident as the typical case for equitable relief only.²⁸

²¹ The various sources will be found in the appendix to Dr. Furness' *Variorum* edition.

²² *Der Kampf ums Recht*. But see on the other side Kohler's *Shakespeare von der Forum der Jurisprudenz*; Shylock v. Antonio, judgment affirmed, by George Wharton Pepper, Esq., 40 AMER. LAW REG. 224 (1892). The ethical weakness of the plot lies, not in the judgment, which is quite in the spirit of mediæval reasoning, but in the way in which Shylock is tricked by hints of a decision in his favor into agreeing to the substitution of Portia for the juriconsult previously appointed and then is overwhelmed.

²³ For example, neither law nor equity has dealt adequately with oppressive installment contracts.

²⁴ CODE 4, 66, 2; NOVELS, 7, 32.

²⁵ DEC. GREG. 3, 18, 4.

²⁶ Year Book, 40 EDW. III, 6.

²⁷ BROOKE'S ABR., OBLIGATION, 9.

²⁸ "Accident, as when a servant of an obligor, mortgagor, etc., is sent to pay the

There was hesitation, at first, in granting relief where the complainant had lost his remedy at law through his own negligent conduct. In 1482²⁹ one bound by statute merchant paid the debt without taking a release. When execution was issued the conusor complained to the chancellor, Rotterham Archbishop of York, who took the opinion of the judges, in the exchequer chamber, as to whether he should grant a *subpæna*. Fairfax, J., said the record would be contradicted. The chancellor interposed that such was the common course in trusts, but Hussey, C. J., assured him that in this case the conusor, who through his own negligence had failed to take an acquittance, was really seeking to disprove matter of record, to which the chancellor agreed, as it was the case of a statute merchant, a debt of record. But in 1491³⁰ the chancellor, Archbishop Morton, remarked in the course of argument: "If one pays a debt on obligation and does not take a receipt, it is good conscience and yet no bar at law." Which Chief Justice Hussey did not dispute. Upon this very point a sergeant at law took issue with St. Germain who, in the "Doctor and Student," had stated that in such a case the party might be aided by *subpæna* in chancery.³¹ "It is not reasonable," said the sergeant, "that for a particular manne's cause, whith hath hurte himselfe by his owne folly, that the good common lawe of the realme (which is this, that the matter in writinge with or without condition cannot be answered but by matter in writing or by matter of recorde) should be made voyd or be set at nought by the suite of any particular person made in the chauncerie or any other place."³² Nevertheless the "good common law," or rather the common

money on the day, and he is robbed, etc., the remedy is to be had in this court against the forfeiture." 4 CO. INST. 84. So, Cary's Reports, 1, "The like favor is extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default." In SPENCE, EQUITY, 629 n., a case in 1579 is cited where relief was given to a person prevented from performance by an extraordinary flood. See also Lawrence v. Brasier, 1 Ch. Ca. 72 (1666).

²⁹ Year Book, 22 EDW. IV, 6.

³⁰ Year Book, 7 HEN. VII, 11 & 12. *Accord*, Strong's Case, Bulst. 158 (1611). Compare Vincent v. Beverlye, Noy 82; Brightman's Case, Latch 148. Archbishop Morton, the chancellor, had taken the degree of doctor of laws at Oxford and had practised as an advocate in the court of arches, 5 FOSS, JUDGES, 60.

³¹ DOCTOR AND STUDENT, DIALOGUE 1, ch. 12.

³² 1 HARGREAVE, LAW TRACTS, 324. See reply to this tract, p. 332, in the same volume.

lawyers, had to yield the point, for by the beginning of the seventeenth century a penalty incurred through negligence, if trifling and unintentional, would be relieved.³³

The next step was to formulate a general policy of relief against penalties where compensation could be made, a step said by Lord Mansfield³⁴ to have been vainly urged upon the courts by Sir Thomas Moore during his chancellorship. The meagreness of the early equity reports makes it difficult to fix accurately the time when this policy was finally adopted (Spence says³⁵ in the reign of Charles I), and, logically, it could not long be delayed when the mortgagor's right to redeem was established. Certainly by the time of the Restoration it could be said: "It is a common case to give relief against the penalty of such bonds to perform covenants, etc., and to send it to a trial at law to ascertain the damages in a *quantum damnificatus*."³⁶ So, also, it became the common course to relieve against forfeitures for non-payment of rent, and upon payment of arrears to compel the landlord to make a new lease.³⁷ Richard Francis summarizes the principle in his twelfth maxim: "Equity suffers not advantage to be taken of a penalty or forfeiture where compensation can be made." While text-writers have shown an inclination to consider this as a branch of equity jurisdiction to relieve against accidents, the decisions cannot be so limited, the facts, in many instances, showing default pure and simple. Relief was given in chancery as the principal agency of law reform and was justified by public opinion, hostile to catching

³³ *Cook v. Orrell*, Choyce Cases in Chancery, 136 (1579); *Owen v. Jones*, Cary 75 (1579); *Earl of Oxford's Case*, 1 Ch. Rep. 1, 8 (1615) *semble*; *Saunders v. Churchill*, Toth. 180 (1634-5).

³⁴ *Wyllie v. Wilkes*, Dougl. 519 (1780).

³⁵ SPENCE, EQUITY, 630. See *Malton v. Pennell*, Toth. 29 (1636-7).

³⁶ 1 EQUITY CASES, ABR.; 91. See *Hall v. Higham*, 3 Ch. Rep. 3 (1663); *Wilson v. Barton*, Nelson 148 (1671); *Friend v. Burgh*, Finch 437 (1679); *Varnee's Case*, 2 Freem. 63 (1680); *Cage v. Russel*, 2 Vent. 352 (1681); *Hele v. Hele*, 2 Ch. Ca. 87 (1682); *Hayward v. Angell*, 1 Vern. 222 (1683); *Hale v. Thomas*, 1 Vern. 349 (1685); *Grimston v. Bruce*, 1 Salk. 156 (1707); *Aylet v. Dodd*, 2 Atk. 238 (1741).

³⁷ *Baker v. Orlibeare*, 2 Freem. 92 (1685); *Anonymous*, 2 Freem. 116 (1690); *Bowen v. Whitmore*, 2 Freem. 192 (1693). See *Poore v. Oxenbridge*, Toth. 104 (1602). The Act of 4 GEO. II, ch. 28, limited the time within which the tenant might file a bill to six months after ejectment and dispensed with the necessity for a new lease. See Common Law Procedure A of 1852 (15 & 16 VICT.), ch. 76, §§ 210-12. *Bowser v. Colby*, 1 Hare 109 (1841), at p. 130; *Howard v. Fanshawe*, [1895] 2 Ch. 581; *Dendy v. Evans*, [1910] 1 K. B. 263.

bargains, which had become proportionately odious as wealth had become more widely distributed and capital more secure. Lord Eldon, characteristically, took pains to express his disapproval of the doctrine of equitable relief against penalties and forfeitures—"a principle," he said, "long acknowledged in this court but utterly without foundation."³⁸ But, as Mr. Justice Story put it: "There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of the parties which are constantly interfered with by courts of equity upon the broad grounds of public policy on the pure principles of natural justice."³⁹ And, having adopted the rule, it was only common sense to permit it to be administered at law, as was accomplished by the acts of 8 & 9 William III and 4 Anne, which, in effect, provided that the plaintiff in actions on penal bonds should state the breaches of the condition, and, although entitled to judgment for the amount of the penalty, should be limited in his recovery to the damages proved, the judgment merely remaining as security for further breaches. Payment, also, of principal and interest due by the condition might be pleaded at law, although not made in strict accordance with the terms of the obligation, thus bringing law and equity into accord, at least as to bonds intended to secure money payments.⁴⁰

In the American colonies the problem of relieving against penalties and forfeitures was complicated by the disputes concerning the establishment of courts of chancery,⁴¹ but whatever differences of opinion may have existed as to how and by whom chancery powers should be exercised, it was taken for granted that

³⁸ *Hill v. Barclay*, 18 Ves. 56 (1811). So also Jessel, M. R., said, in *Wallis v. Smith*, 21 Ch. D. 243, 257 (1882): "It has always appeared to me that the doctrine of the English law as to non-payment of money—the general rule being that you cannot recover damages because it is not paid by a certain day—is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, it were not our law the absurdity would be apparent."

³⁹ 2 STORY, EQUITY JURISPRUDENCE, 13 ed., § 1316. See also the remarks of Lord Mansfield in *Bonafous v. Rybot*, 3 Burr. 1370 (1763).

⁴⁰ 8 & 9 WM. III (1697), ch. 11, § 8; 4 ANNE (1705), ch. 16, §§ 12, 13; 1 Wms. Saunders, 58, n.; *Roles v. Rosewell*, 5 T. R. 538 (1794); *Hardy v. Bern*, 5 T. R. 636 (1794); *Mackworth v. Thomas*, 5 Ves. 329 (1800); *Walcot v. Goulding*, 8 T. R. 126 (1799); *Keating v. Peddrick*, 240 Pa. St. 590, 88 Atl. 11 (1913); *Jennings v. Wall*, 217 Mass. 278, 104 N. E. 738 (1914).

⁴¹ "Courts of Chancery in the American Colonies," by S. D. Wilson, 18 AMER. L. REV. 226, reprinted 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 779.

equity jurisdiction ought to rest somewhere. In the province of Massachusetts, where courts of chancery were not favored, an Act of 1698 provided that "where the forfeiture or penalty annexed unto any articles, agreement, covenant, contract, charter-party, or other specialties, or forfeiture of estates on condition, executed by deed or mortgage, or bargain and sale with defeasance, shall be found by verdict of jury or confession of the obligor, mortgagor or vendor; the justices of the said courts respectively where the tryal is had, are hereby impowred and authorized to moderate the rigour of the law, and on consideration of such cases' according to equity and good conscience, to chancer the forfeiture, and enter up judgment for the just debt and damages, and to award execution accordingly."⁴² So, also, in Pennsylvania the Court Act of 1710, repealed by the Queen in Council, contained this clause: "Where a penalty is declared for, the plaintiff shall have judgment but for his real debt, interest and charges with such damages as the court shall adjudge,"⁴³ and the Court Act of 1715, also rejected by the Crown, directed that in actions "on bond or penalty for non-performance of covenants" the proceedings should be in conformity with the statute of 8 & 9 William III.⁴⁴ While these acts met the fate that befell so much of the early legislation in this province, nevertheless the statutes of William and of Anne were followed in practice and were included in the report of the judges as in force in Pennsylvania.⁴⁵

But by the time the philosophy of natural justice had thoroughly worked itself into the law, interest had shifted to a newer philosophy of freedom of contract, which in this class of cases finds unconscious expression in the doctrine of liquidated, or stipulated,

⁴² Charter and laws of the province of Massachusetts Bay (1742), p. 102. See also ACT of 1734, *id.*, p. 301; Laws of Colony of New Plymouth (1836), p. 260, GEN. LAWS REV. 1671, ch. 5, 2, § 5: "That the bench shall have power to determine all such matters of equity as cannot be relieved by the common law, — as the forfeiture of an obligation, breach of covenants without great damage or like matters of apparent equity."

⁴³ PA. STAT. AT L., vol. 2, p. 301, § 15.

⁴⁴ PA. STAT. AT L., vol. 3, p. 73, § 4. As early as 1677 Governor Andros sent this instruction to the justices of the court at New Castle, Delaware: "As to penal bonds or such like cases of equity, it is the custom and practice of courts here, to hear and judge thereof according to equity, which you may also observe as allowed by law." 5 PENN. ARCH. (2 series), 697. See DUKE OF YORK'S LAWS, 35, 61.

⁴⁵ ROBERTS, DIGEST OF BRITISH STATUTES IN FORCE IN PA., pp. 46, 142; ACT of June 14, 1836, P. L. 637, § 1.

damages; that is to say, where the contract is for the performance or non-performance of some act other than the payment of money, and the parties have agreed upon a just and appropriate amount as the damages that will be sustained by the violation of such agreement, equity will not interfere. An early case is *Tall v. Ryland*.⁴⁶ Two fishmongers with contiguous shops having settled certain differences that had arisen between them, a bond in £20 was given by one to the other conditioned not to disparage his goods. In the words of the reporter: "The plaintiff (the obligor) afterwards asked the defendant's customer whilst cheapening a parcel of flounders, why he would buy of the defendant, and told him those fish stunk, and so the defendant lost that customer," and, very naturally, sued on the bond. The obligor filed a bill in equity to be relieved of a verdict for the penalty, to which the obligee demurred on the ground that "the bond being to preserve amity and neighbourly friendship for the breach of which the plaintiff did submit to pay that penalty, and there can be no trial had to measure the damages for breach of the condition, other than the parties have submitted to." The lord keeper, Sir Orlando Bridgeman, sustained the demurrer, but declared this was "not to be a precedent in the case of a bond of £100 or the like." The smallness of the amount involved unquestionably influenced the lord keeper, yet the case is typical;⁴⁷ indeed it is, on the facts, curiously like one recently decided.⁴⁸ The reasoning, however, by which the courts have discriminated between penalties and liquidated damages is difficult to follow; some cases may be successfully disposed of as contracts in the alternative, but difficulty in estimating damages can hardly be accepted as a safe criterion. Unliquidated damages are always difficult to determine. The difficulty in a case like *Tall v. Ryland* would be no greater on an issue framed by the chancellor than in an action on the case for slander at law.

It would seem as if, when the principle of relief against penalties

⁴⁶ 1 Cases in Chancery, 183 (1670), s. c. 1 Eq. Ca. Abr. 91.

⁴⁷ See also *Woodward v. Gyles*, 2 Vern. 119 (1690); *Small v. Lord Fitzwilliams*, Prec. Ch. 102 (1699); *Lowe v. Peers*, 4 Burr. 2224 (1768); *Rolfe v. Peterson*, 2 Bro. P. C. 436 (1772); *Barton v. Glover*, Holt N. P. 43 (1815); *Tayloe v. Sandiford*, 7 Wheat. 13 (1822).

⁴⁸ *Emery v. Boyle*, 200 Pa. St. 249, 49 Atl. 779 (1901).

was finally accepted, the courts must have realized that to carry the principle to its logical conclusion would prevent the parties to a contract from defining in advance the extent of their rights and liabilities, in case of breach. One school of thought, which, to borrow a phrase from the late Professor William James, might be described as "tough-minded," would urge that, as Sir George Jessel put it, courts "should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves."⁴⁹ To which the "tender-minded" school would reply that bargaining is not always on equal terms, that the necessities of one party or the superior cunning of the other will frequently upset the balance of risk germane to an executory contract. An excessive sum may be named through overconfidence in the outcome or stipulated *in terrorem* and not as a genuine preëstimate of the obligee's probable or possible interest in the full performance of the obligation. Under such conditions, why should the state, through its courts, lend its aid to secure the fruits of a harsh bargain? In equity both views have had influence, but neither has wholly triumphed. Where the payment of a smaller sum is secured by a larger, the stipulation will be relieved against as penal, but where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to the probable loss, may be upheld, the difficult cases turning mainly upon the interpretation of the language of the particular contract.⁵⁰

Although classed by text-writers with penalties, forfeitures for acts *in pais* have never stood on exactly the same ground as the former. Where the forfeiture was incurred through accident or mistake and compensation could be made, equity would relieve

⁴⁹ *Wallis v. Smith*, 21 Ch. D. 243 (1882), at p. 266.

⁵⁰ *Blake v. East India Co.*, 2 Ch. Cas. 198 (1674); *East India Co. v. Mainston*, 2 Ch. Cas. 218 (1676); *Taylor v. Rudd*, 2 Ch. Cas. 241 (1677); *Astley v. Weldon*, 2 B. & P. 346 (1801); *Kemble v. Farren*, 6 Bingh. 141 (1829); *Thompson v. Hudson*, L. R. 4 E. & I. App. 1 (1869); *Ward v. Hudson Co.*, 125 N. Y. 230, 26 N. E. 256 (1891); *Sun Co. v. Moore*, 183 U. S. 642 (1901). Equity does not relieve where a penalty or forfeiture is imposed by statute, *Keating v. Sparrow*, 1 Ball & Beat. 367 (1810); *Clark v. Barnard*, 108 U. S. 436 (1883), nor where a forfeiture of shares of stock has been incurred through failure to pay calls, *Sparks v. Liverpool Water Works*, 13 Ves. 428 (1807).

on principles common to all agreements. But in the absence of special circumstances, or statutory authority, equitable relief is now usually confined to cases where the forfeiture is incurred in the failure to meet what is substantially a pecuniary obligation.⁵¹ There was some fluctuation of opinion in arriving at this conclusion. As stated above, it became, before the end of the seventeenth century, the "usual equity" for chancery to relieve a tenant from the forfeiture of his lease for non-payment of rent, upon payment of arrears with interest and costs.⁵² This accorded with the tendency of the time to open the doors widely to equitable relief against forfeitures for breach of conditions for money payments not punctually made, and, although the distinction between conditions precedent and subsequent is often mentioned, and some diversity of opinion is indicated, the tendency was to give relief on the basis of compensation, if it could be made, without much regard to the qualities of the condition.⁵³ On the other hand, equity, in this respect following the law, would not relieve a tenant for years from a forfeiture incurred by assigning the term without the assent of the lessor,⁵⁴ nor a copyholder who had forfeited his estate by alienation.⁵⁵ Similarly Sir Joseph Jekyll, master of the rolls,

⁵¹ *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641 (1888); *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

⁵² *Anonymous*, 2 Freem. 116 (1690), and cases in note 37. Copyholders had been relieved as early as the reign of Elizabeth, *Poore v. Oxenbridge*, Toth. 104 (1602); *Whistler v. Cage*, Toth. 104 (1631). See *Gravenor v. Rake*, Toth. 3 (1588).

⁵³ 1 FONBLANQUE, EQUITY, bk. 1, ch. 4, § 1; ch. 6, § 4. In *Popham v. Bampfied*, 1 Vern. 79 (1682), it was said by the chancellor, "precedent conditions must be literally performed." *Accord*, *Feversham v. Watson*, 2 Freem. 35 (1677); *Falkland v. Bertie*, 2 Vern. 333 (1696); *Maston v. Willoughby*, 5 Viner's Abr. 93, 12 (1705). But in *Hayward v. Angell*, 1 Vern. 222 (1683), the lord keeper said that in all cases where the matter lay in compensation, be the condition precedent or subsequent, there ought to be relief. *Accord*, *Wallis v. Crimes*, 1 Ch. Ca. 89 (1667); *Bland v. Middleton*, 2 Ch. Ca. 1 (1679); *Woodman v. Blake*, 2 Vern. 222 (1691); *Cage v. Russell*, 2 Vent. 352 (1681); *Barnardiston v. Fane*, 2 Vern. 366 (1699); *Grimston v. Bruce*, 2 Vern. 594 (1707), s. c. 1 Salk. 156; *Taylor v. Popham*, 1 Br. Ch. 168 (1782); *Chipman v. Thompson*, Walk. Mich. 405 (1844). Compare where there is a gift over, *Anonymous*, 2 Freem. 206 (1695); *Willis v. Fineux*, Prec. Ch. 108 (1699); *Hollinrake v. Lister*, 1 Russ. Ch. 500 (1826), and see *Davis v. Gray*, 16 Wall. (U. S.) 203 (1872).

⁵⁴ *Wafer v. Mocato*, 9 Mod. 112 (1724). See *Dumpor's Case*, 2 Co. 558 (1602); *Northcote v. Duke*, Amb. 511 (1765); *Williams v. Cheney*, 3 Ves. 59 (1796). Compare *Cox v. Brown*, 1 Ch. Rep. 90 (1656), where the executor sold the lease for payment of debts.

⁵⁵ *Brown's Case*, 2 Co. 318 (1581); *East v. Harding*, Cro. Eliz. 498 (1596).

in *Descarlett a. Denmett*,⁵⁶ declined to relieve a lessee who had violated a covenant not to permit passage over a way. "The breach," he said, "tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close."

There were other cases where equitable relief was sought against the enforcement of collateral covenants, where the proper amount of compensation could have been determined without difficulty, certainly with no more difficulty than in the case of many penal obligations relieved as of course. Here conflicting views were presented. In *Thomas v. Porter and the Bishop of Worcester*,⁵⁷ in 1668, the bill was by a copyholder to be relieved from a forfeiture for felling trees. There was a wide difference of opinion as to the value of the timber cut, and the lord keeper directed a trial at law upon the issue whether the waste was intentional. The issue was found for the copyholder and relief was granted, but Sir Orlando Bridgeman said, "in case of a wilful forfeiture he would not relieve." Some twenty-five years later,⁵⁸ upon a bill by a lessee to be relieved from a forfeiture incurred on several grounds, it was insisted by defendant's counsel, truly enough, that, "Where waste was committed by cutting down great trees, there it was impossible to set them up again." Notwithstanding, the plaintiff was relieved and a reference made to a master to inquire as to the damage by the felling of the trees. In *Cox v. Higford*,⁵⁹ the plaintiff, a copyholder who asked for relief, had been, according to the reporter, "guilty of the greatest disobedience possible to his lord," had failed to repair after six presentments and had refused to do fealty either upon oath, or, being a Quaker, upon affirmance. The lord keeper, Sir Simon Harcourt, declared that he ought to have no relief, and, even if he were relieved, the cost of putting the estate in repair would be more than the plaintiff's interest was worth, but he further declared, "that though this were a voluntary waste and for-

⁵⁶ 9 Mod. 22 (1722). See also as to prejudicing the inheritance, *Willis v. Fineux*, Prec. Ch. 108 (1699); *Whetstone v. Sainsbury*, Prec. Ch. 591 (1722).

⁵⁷ 1 Ch. Ca. 95 (1668). *Bishop of Worcester v. One of his Copyholders*, 2 Freem. 137, s. c. 2 Eq. Ca. Abr. 225.

⁵⁸ *Bowen v. Whitmore*, 2 Freem. 193 (1693). So, in *Nash v. Derby*, 2 Vern. 537 (1705), a copyholder was relieved, who had cut timber on one copyhold for repairs on another, the timber being of small value and all employed in repairs.

⁵⁹ 1 Eq. Ca. Abr. 121, pl. 20 (1710), s. c. 2 Vern. 664.

feiture (against which it was objected this court never gave relief); yet he thought the rules of equity not so strict, but that relief might even be given against voluntary waste and forfeiture." A few years later⁶⁰ ejectment was brought on a lease, and the lessor, on proving a breach of covenant for not keeping a barn well thatched, had a verdict. On bill by the lessee to be relieved, Lord Macclesfield said he could not see what damage the lessor would sustain "if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term," and referred the case to a master to see what damage was done, if any. These cases were certainly precedents in favor of Lord Erskine's judgment in *Sanders v. Pope*.⁶¹ But by that time a reaction had set in against the exercise of a discretion so unlimited in relieving against forfeitures of estates,⁶² and the influence of Lord Eldon, who, as already stated, strongly disapproved of the principle of equitable relief against penalties and forfeitures, was decisive in confining such relief to money covenants.⁶³ Ultimately Parliament conferred upon the courts jurisdiction to grant relief in cases of forfeiture,⁶⁴ to which Lord Eldon and his contemporaries turned a deaf ear, but their judgments have influenced American opinion, although Mr. Justice Story seriously questioned whether this narrow limitation of the doctrine was defensible upon the original principles which guided courts of equity in interfering in cases of penalties and forfeitures.⁶⁵

There were, therefore, currents and cross currents of opinion when in 1721 Sir Harry Peachy brought his bill against the Duke

⁶⁰ *Hack v. Leonard*, 9 Mod. 91 (1724). See also *Webber v. Smith*, 2 Vern. 103 (1698).

⁶¹ 12 Ves. 282 (1806). *Accord*, *Davis v. West*, 12 Ves. 475 (1806).

⁶² *Eaton v. Lyon*, 3 Ves. 690 (1798), at p. 693; *Wadman v. Calcraft*, 10 Ves. 67 (1804).

⁶³ *Hill v. Barclay*, 16 Ves. 402 (1810), 18 Ves. 56 (1811); *Reynolds v. Pitt*, 19 Ves. 134 (1812); *Bracebridge v. Buckley*, 2 Price 200 (1816).

⁶⁴ Power to relieve against breach of covenants to insure was given by the ACT of 22 & 23 VICT. (1859), ch. 35, § 4, and against forfeitures under stipulations in leases by the Conveyancing Acts of 1881, ch. 41, § 14, and 1892, ch. 13, § 2. *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Dendy v. Evans*, [1910] 1 K. B. 263.

⁶⁵ 1 STORY, EQUITY JURISPRUDENCE, 13 ed., § 1323; *cf.* *Baxter v. Lansing*, 7 Paige (N. Y.) 350 (1838); *Munroe v. Armstrong*, 96 Pa. St. 307 (1880); *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544 (1892), with *Grigg v. Landis*, 21 N. J. Eq. 494 (1870); *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933 (1897).

of Somerset to be relieved from a forfeiture of a copyhold estate upon making recompense.⁶⁶ It would appear that Sir Harry, and his father before him, owning freehold land adjoining the copyhold, had not observed the limitations upon their rights as copyholders; that a stone quarry had been worked from the adjoining land; that trees had been topped, hedges moved and part of the land let for seven years without the lord's license. There was some dispute as to whether all these acts were, under the circumstances, forfeitures at law, and the bill was retained until this could be decided in ejectment; the lease was admittedly a forfeiture. For the complainant it was urged that "it was a sort of maxim that all forfeitures were odious," that in copyhold cases they were intended as security and the court would relieve where satisfaction could be made. If it was difficult to ascertain damages, that was because there really was no damage. The defendant insisted that "in cases of forfeitures on conditions in law this court seldom relieves" and that all the acts in the present case were "voluntary acts." Lord Chancellor Macclesfield said that the forfeiture resulted from the "imbecility of the copyholder's estate," his tenure was upon the conditions established by the custom of the manor. Non-payment of rent or fines had been relieved, for the forfeiture in that case was only by way of security. "Cases of agreements and conditions of the party and of the law are certainly to be distinguished." It was not sufficient to say that there was no damage in this case, "for it is recompense that gives this court a handle to grant relief. *The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all he expected or desired;* but it is quite otherwise in the present case, these penalties or forfeitures were never intended by way of compensation, for there can be none." The chancellor would have dismissed the bill if the

⁶⁶ There are three reports of the case, a summary in 2 Eq. Ca. Abr. 228, a longer one in Prec. Ch. 568, and the most complete in 1 Strange 447, which is reprinted in the various editions of WHITE & TUDOR, LEADING CASES IN EQUITY. It would almost seem as if the reporters derived their facts from opposing counsel. According to Strange the steward's deputy engrossed and witnessed the lease and there were other extenuating circumstances. According to the editor of the Precedents, the plaintiff encouraged other copyholders "to take the same liberty, and expressed great contempt for the lord of the manor, with respect to his authority over his copyholders."

lease had involved all of the land and the other facts had been undisputed. If all were forfeitures at law, as the lease was, equity, he said, would not relieve.

It has been said that in the sentence italicized the chancellor put the jurisdiction in such cases on the only foundation upon which it could be maintained, but the jurisdiction is understated. As Lord Thurlow put it, in *Sloman v. Walter*,⁶⁷ "Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessorial, and therefore only to secure the damage really incurred." A penalty might be security for other acts than money payments; but as to forfeitures, the failure of Sir Harry's bill indicated that relief would not be given merely because compensation could be made; Sir George Jessel could truthfully say: "At all events, long before his (Lord Eldon's) time it had been well settled that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times from nothing else."⁶⁸ Looking at the arguments of counsel we can appreciate their cogency: "This court would not relieve against the forfeiture, as it could not alter the terms on which the lessor himself thought proper to part with his lands, *or force a tenant upon him in spite of his teeth*. . . . That it would be of the utmost consequence to lords, if the plaintiff should be relieved in this case; for then it would be but endeavoring to keep these things secret for a considerable while, and in time they would grow into an evidence of freehold; or, if the tenant should be found out, it would be only bringing his bill here and all would be safe."⁶⁹ To be sure, this was in the court that had established the doctrine "once a mortgage always a mortgage,"⁷⁰ but that principle was beneficial to the landowner. So to this day, in the absence of special equities, chancery will view with none too favorable an eye a bill for relief against a forfeiture resulting from breach of covenant, although there may be no intrinsic difficulty in fixing compensation, if the true object of the covenant is to uphold

⁶⁷ 1 Bro. Ch. 418 (1784).

⁶⁸ Wallis v. Smith, 21 Ch. D. 243 (1882), at p. 260.

⁶⁹ Prec. Ch., p. 571.

⁷⁰ Tothill 134; Noakes v. Rice, [1902] A. C. 24.

the owner in having his own way with his own land.⁷¹ Acquiescence, however, in the principle is not to be accounted for solely as a feudal survival. The American of urban antecedents, who may almost be classed as a nomad, shows greater resentment toward an injury to his real estate than at a proportionate loss through bad debts. At least it has seemed so to the writer in the instances brought to his attention. The problem no doubt has a psychological element; tangible property — real property in particular — calls for personal care and interest in its management, a not uncommon source of affection.

The larger question is the converse of the problem presented in suits for the specific performance of contracts. There the chancellor must decide whether absolute compliance with the agreement will be ordered, and the judgment, although stated in terms of adequacy of damages, will in reality rest on conceptions, general or local,⁷² of what a promisor ought literally to be made to do. Here the effort is to avoid literal performance, and the judgment, although put upon the formula of compensation, will rest on the prevailing view of what a promisor ought positively to be relieved from doing. There is then what the economist would call a conflict of interests, one that must arise from time to time in various forms as society grows and changes and the issue of which must be decided, like many other questions of law, by the economist, or rather by society expressing its economic will. To habitually remake agreements on the strength of circumstances that have subsequently transpired would add an element of uncertainty to bargaining dangerous to freedom of contract and the extension of credit. To refuse to take account of the disproportion between the stipulated consequences of breach and the actual risk of loss would turn such transactions into a speculation. The function of jurisprudence, in the furtherance of progress, is to reduce to a

⁷¹ *Macher v. Hospital*, 1 V. & B. 188 (1813); *Baxter v. Lansing*, 7 Paige (N. Y.) 350 (1838); *Hills v. Rowland*, 4 DeG. M. & G. 430 (1853); *Nokes v. Gibbon*, 3 Drew. 681 (1856); *Brown v. Vandergrift*, 80 Pa. St. 142 (1875); *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702 (1893); *Gordon v. Richardson*, 185 Mass. 492, 70 N. E. 1027 (1904); *Willmott v. London R. Co.*, [1910] 2 Ch. 525; *United States v. Oregon R. Co.*, 189 U. S. 116 (1903).

⁷² Professor Holland notes (*JURISPRUDENCE*, 11 ed., p. 323) that specific performance of promises to marry were, by Roman-Dutch law, enforced at the Cape until 1838 and in the Transvaal until 1871.

minimum the purely fortuitous elements in the law of obligations, whether from the viewpoint of promisor or promisee, until through economic invention, perhaps insurance,⁷³ perhaps the development of ideas still unknown to us, the problem itself becomes obsolete.

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⁷³ KOHLER, PHILOSOPHY OF LAW, ch. 7, § 16 (3).

MINGLING OF WATERS

RIVERS are sometimes artificially joined by building a conduit near the head of one of them and conducting its flow across the divide into the other. A mill situated upon the divide and run by water power will serve as an illustration, although the situation arises more commonly in irrigation projects, mining enterprises, and the establishment of electric power plants. The water is received by a conduit from the first river, and, after passing over the mill wheels or being used at the mine or draining from irrigated hillsides or leaving the power plant, discharges into the second river, possibly increasing the second river to several times its former volume. The rights and obligations of the party bringing this about, and his relations to lower parties on the second river, involve questions whose difficulty has been more than once referred to, and it is not supposed that this paper says all that can be said, but only that it offers an analysis which may be somewhere near right.

I

A natural stream such as First River is a natural body of water. A water-right therein such as this party's is a right to the continued existence of First River as a natural watercourse at the intake of his conduit. It is not an ownership of the actual water in First River; that "moveable, wandering thing," uncontrolled and unconfined, is subject to the principle "recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control."¹ This mill-owner's water-right in First River is the intangible right to have the stream continue to exist as a whole at the intake of his conduit, and not an ownership of any individual water.

The place where he first begins actually to own water as such is possibly where water has entered his conduits on its way over the

¹ Sweet v. City of Syracuse, 129 N. Y. 316, 335, 27 N. E. 1081, 1084 (1891).

divide to the mill. After entering, it is no longer moving at large as it did while in the stream; it is moving in his conduits as he directs and governs it, continuing so while passing through the conduit over the divide and through the mill. But under ordinary circumstances, when the water leaves the mill wheels, the mill-owner's rights extend no further down. His right of flow has been completed by receiving the water at his place of use, and at the same time his hold upon the specific water in his structures has come to an end as the water leaves the tail-race into Second River. "If a body of water runs out of my pond into another man's, I have no right to reclaim it."²

He still has the ownership of the right to the flow of First River to the intake of his conduit, and, it may be, the ownership of such specific water as is actually passing through his works, but the water that has left the mill and has gone down Second River is again neither his property nor anyone's. It is, however, affected by the important consideration that its continued going is not of natural but is of artificial cause; it is not a natural body of water, nor a natural formation; its existence as a whole depends upon the action of this man.

II

It is from this consideration, and not from ownership of any water as such, that a question first arises between him and lower claimants upon Second River. As a result he is, for the most part, under no obligation to them to continue to maintain the flow.

At any time or in any manner he pleases he may act upon the water at a point above where it leaves his control, although the result is to stop the flow into Second River. He may be in the situation in this respect of having a right as to lower parties to have the water drain down Second River, without right in them to have him continue exercising his right, just as a right-of-way over another's land is no evidence that the party entitled thereto is under duty to walk. Receiving a Christmas present of a thousand dollars for twenty years gives the recipient no vested right to a thousand dollars every Christmas forever, even if he has learned to live in expectation of it. (However harsh it may be from a moral

² 2 BL. COM. 14-18.

point of view to cut him off after long continuance, yet the law and morals are different forums.) Maintaining for years a pump which leaked water onto a neighbor's land, creates no duty that the pump must go on leaking. The mill-owner may cease to operate his conduit across the divide, or may cease to operate his mill, or his water wheels, or may change his location, or otherwise take away or alter, in whatever way he pleases, the artificial source of the flow into Second River. This principle is well settled in the decisions. In discussing them, the restricted point so far considered must be carried in mind, *viz.*, the negative act of ceasing to keep up the addition to Second River. The discussion has not yet reached the affirmative act of maintaining the flow and then interfering with it, but only the negative act of no longer maintaining any flow at all; and it will be found that the authorities confine their rulings in the same way. They are cases where the creator of the additional flow acted upon the addition at its source, or while still within his land, and at a point above where it leaves his control.

Among the authorities there is a general proposition that use at a lower point of flow can give rise to no prescriptive right against upper parties. Where, for example, for many years a riparian owner has allowed water to flow by unused, and thereafter he begins to take it upon his own riparian land, the courts permit him at common law, although it stops the flow to others who had been taking it out of the watershed for non-riparian use; the ground being that if such lower parties have used the water in the meantime, it was no invasion of any right of his, and as he could not have sued those below him for using it nor make them stop using it, the latter can acquire no right by prescription against him.³ The act is done by him at the source or *situs* of his right, before the water gets by him, and is permitted.

With still more strength is this ruled where the flow has an artificial origin (as in the case of the mill now considered). The leading cases are English decisions, the best known being *Arkwright v.*

³ *Stockport W. W. Co. v. Potter*, 3 Hurl. & C. 300 (1864); *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76 (1889); *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18 (1895); *Cave v. Tyler*, 133 Cal. 566, 65 Pac. 1089 (1901); *Perry v. Calkins*, 159 Cal. 175, 113 Pac. 136 (1911); *Miller v. Enterprise, etc. Co.*, 147 Pac. 567 (Cal.) (1915).

Gell.⁴ In this case a tunnel had been built to drain a mine, and water from the tunnel came to plaintiffs for over a century and was used by them to work some mills. The mine-owners, in order to drain their mine deeper, now dug a lower tunnel which dried up the former one. No right of plaintiffs, it was held, was infringed thereby. The court held:

"But the use of the water [by plaintiffs] in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Slough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not 'of right'; they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel." ⁵

In this case the stoppage was done at the source upon defendants' lands — a new tunnel in their own mines; there was no such question as their going a mile below their mines and taking water flowing out of the old tunnel. They did not touch any flow coming from the old tunnel; on the contrary, there ceased to be any flow coming from the old tunnel. This case was followed by a similar English mine-drainage decision.⁶ In another English case ⁷ mine-water was emptied through a launder, to which launder plaintiff connected his ditch just below the boundary of the mine-owner's land. Later the mine-owner on his own land removed his launder and diverted the mine-water so that it no longer entered the ditch of plaintiff, and it was held that plaintiff had no cause of action against the mine-owner, as the mine-owner was acting upon the water on his own land while still within his control. In an early Scotch case, Mr. E. owned a mill receiving water from some lakes. The water from the mill descended to a river on which there were many other mills, being the only water to enter that river from those lakes. This had lasted a long time, when Mr. E. began a project to turn the water of the lakes into a different river. Although Lord Kames, in reporting the case, says that the proprietors of

⁴ 5 Mee. & W. 203 (1839).

⁵ *Ibid.*, p. 233.

⁶ *Wood v. Waud*, 3 Exch. 748 (1849).

⁷ *Gaved v. Martyn*, 19 C. B. N. S. 732 (1865).

many mills who would thus lose the water "took the alarm," his report of the case shows that Mr. E. took the judgment.⁸

Elsewhere similar rulings have been made. In one case⁹ the Blue Point Mining Company brought water in a flume to its mines. After it was discharged there, other parties caught it in lower flumes (Cheek and Ackley and Side Hill flumes). Several years later the Blue Point Mining Company extended its own flume, cutting out the other parties. This was a change of flow while still within its control, and the lower parties had no cause of action. The court said:

"If those owning and working the mining ground elected to abandon their property at a particular point and for a particular length of time, it did not therefore become obligatory upon them to continue to do so, even though the flume companies, encouraged by the circumstances of abandonment for a time, had incurred the expense of constructing the flumes for the purpose of obtaining a profit from the water and earth so abandoned. When the Cheek and Ackley and the Side Hill flumes were constructed, their owners assumed the risk of loss by the miners ceasing to abandon the water and tailings from their mining grounds, and they cannot justly complain because the Blue Point Mining Company adopts means by which it may obtain the full benefit of its mining enterprise."¹⁰

In a more recent case,¹¹ for thirty years a riparian owner, after using water for irrigation, had allowed the waste to flow into a ditch of his neighbor, who had no right in the stream itself and got only this waste-water; and it was held that the upper party, the riparian owner, could change the course of his ditch on his own land, although no water thereafter went into plaintiff's ditch.

In other courts similar rulings have been made; and, to sum up the decisions, it may be said that: (1) the ruling is especially well settled in mine-drainage cases, where the mine-owner changes the drain-flow in the mine, or at the mouth of the tunnel, or at some other place within his own boundary;¹² (2) it is also applied to

⁸ Magistrates of Linlithgow, *contra* Elphinstone of Cumbernauld, 3 Kames (Scotch) 331 (1768).

⁹ Dougherty v. Creary, 30 Cal. 290 (1866).

¹⁰ *Ibid.*, p. 299. Correa v. Frietas, 42 Cal. 339 (1871) is a similar case.

¹¹ Davis v. Martin, 157 Cal. 657, 108 Pac. 866 (1910). See Dannenbrink v. Burger, 23 Cal. App. 587, 138 Pac. 751 (1913), setting forth the general doctrine.

¹² Arkwright v. Gell, 5 Mee. & W. 203 (1839) (flow stopped underground); Wood v.

water draining from an irrigated field by seepage, where the owner of the field changes the drain-flow on his own land, or above where the water passes his boundary line;¹³ and (3) it is applied to water brought from a stream and discharged in a foreign locality at the end of a canal or flume, where the canal-owner stops or changes the location of his canal above the point where it leaves his control.¹⁴

III

The authorities thus far are clear that the party and his privies having the conduit over the divide, as the creator of the artificial flow into Second River, may ordinarily stop it or take away the source of the flow, if he does so at a point above where the water leaves his land or his mill or the end of his tail-race.

But these authorities did not go further than that; and, moreover, there are decisions under which even the above limited extent of the rule has possible exceptions. One is where he stops it only wantonly to harm some lower party on Second River without other object¹⁵ (whereby the law is beginning to infringe upon the distinction between law and morals). The other possible excep-

Waud, 3 Exch. 748 (1849); *Gaved v. Martyn*, 19 C. B. N. S. 732 (1865) (flow stopped below tunnel, but before it left mine-owner's flume, and while still on his land); *Broadbent v. Ramsbotham*, 11 Exch. 602 (1856) (water overflowing from a well); *Burrows v. Lang*, L. R. [1901] 2 Ch. 502; *Crescent, etc. Co. v. Silver King, etc. Co.*, 17 Utah 444, 54 Pac. 244 (1898) (flow diverted by tunnel-owner at the tunnel-mouth on his own land); *Cardelli v. Comstock T. Co.*, 26 Nev. 284, 66 Pac. 950 (1901) (place and manner of stopping flow not stated, except that the tunnel company "owns land from the mouth of the tunnel to the Carson River, over which the waters from the tunnel flow into said river," and appears to have retaken it before it reached the river). See *Chandler v. Utah Copper Co.*, 43 Utah 479, 135 Pac. 106 (1913).

¹³ *Burkart v. Meiberg*, 37 Colo. 187, 86 Pac. 98 (1906); *Roberts v. Gribble*, 43 Utah 411, 134 Pac. 1014 (1913); *Garns v. Rollins*, 41 Utah 260, 272, 125 Pac. 867, 872 (1912). In this case the court says: "The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow." See also 43 Land Dec. 321.

¹⁴ *Dougherty v. Creary*, 30 Cal. 290 (1866); *Correa v. Frietas*, 42 Cal. 339 (1871); *Davis v. Martin*, 157 Cal. 657, 108 Pac. 866 (1910); *Green Valley Co. v. Schneider*, 50 Colo. 606, 115 Pac. 705 (1911); *Staffordshire, etc. Canal v. Birmingham Canal*, L. R. 1 H. L. 254 (1866).

¹⁵ *Green Valley Co. v. Schneider*, 50 Colo. 606, 115 Pac. 706 (1911); especially where the water originates in drainage, *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903).

tion is where the artificial flow has continued for a very long time. In the English cases, and occasionally elsewhere, artificial flows of water are found whose beginning is buried so deep in the past that all evidence is lost of the circumstances under which they arose, and it is held that parties creating them are presumed to have agreed that they shall not be stopped.¹⁶ This is sometimes extended to cases where the lapse of time has not been so extreme, but has exceeded the period of the Statute of Limitations.¹⁷

Yet the authorities are not decisive, either, that the period of the Statute of Limitations need be covered. Although that period is taken as a general guide, yet the demands of justice in the individual case may be looked to as in any case of dedication of property to the public, and application of the principle withheld though the prescriptive period has been exceeded (as in the cases previously considered), or applied though that period has not yet been reached. In the chief case usually cited in this connection,¹⁸ a new channel was artificially cut by defendant for an existing stream. Plaintiff built a saw-mill on the new channel. After eight years defendant attempted to return the water to the old channel, but his acquiescence in use of the new channel by other parties was declared to

¹⁶ *Whitmores v. Stanford*, [1909] 1 Ch. 427 (250 years); *Baily v. Clark*, [1902] 1 Ch. 649; *City of Reading v. Althouse*, 93 Pa. St. 400, 405 (1880). In this case the court says: "Its origin is literally buried in the shades of the past; hence, for all practical purposes, it is a natural watercourse."

¹⁷ (When) "the use of the (artificially, from a foreign source) augmented volume of water has been enjoyed beyond the prescriptive period by an inferior owner, the right to redivert will be lost, and the inferior heritor can insist on the continuance of the flow to which he has been accustomed." FERGUSON, *THE LAW OF WATER IN SCOTLAND*, 232.

A decision in the state of Washington was as follows: Defendant diverted the water from a spring and carried it into another watershed (Gilmore Creek) in order to drain the land at the spring. Plaintiff, a riparian owner on Gilmore Creek, used the water and became dependent thereon for domestic use. After thirty years, the defendant on his own land at the spring diverted the water elsewhere for his own use, and was enjoined. The court said that the proprietor of a stream, by diverting it into an artificial channel and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped, as against a person making a beneficial use of the water, from returning it to its natural channel to that person's loss and injury; that the user does not have to show a prescriptive right in himself to secure this relief. *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 426 (1909). See also *Hough v. Porter*, 51 Ore. 318, 412-16, 98 Pac. 1083, 1100-1101 (1909); *Pacific Livestock Co. v. Davis*, 60 Ore. 258, 119 Pac. 147 (1911); *Falcon v. Boyer*, 157 Ia. 745, 142 N. W. 427 (1913); *Cloyes v. Middlebury, etc. Co.*, 80 Vt. 109, 66 Atl. 1039 (1907).

¹⁸ *Ford v. Whitlock*, 27 Vt. 265 (1855) per Redfield, C. J.

amount to a public dedication of it. Judge Redfield said that defendant "is bound to the same extent and in as short a period, as if he alters the fence upon a highway or common, and thereby gives privileges to the public. He cannot often recall them after the shortest period. Any time is sufficient which satisfies the jury that the public were justified in treating it as a permanent dedication."¹⁹

The cases laying down this limitation were of water with a natural flow, only the new channel being artificial; a winding stream was shortened by a cut between the bends, or the like; the nature and purpose of the new flow were inherently permanent. Where both the new channel and the source of the additional flow into Second River are artificial and inherently temporary in nature and purpose, as in the case of mine-drainage, the authorities cited in the beginning establish that this limitation is inapplicable.

It appears, from the above, that this limitation is not a broad one. The general rule is certainly with the owner stopping his power house and ending the flow into Second River. The restriction upon the ground of "dedication" applies only to minglings inherently permanent in nature and purpose. That a given case is of that kind will usually be hard to say in practice; moreover the authorities have not settled upon the length of time required to bring the dedication about.

IV

Passing on, we come to where he allows the artificial flow into Second River to continue beyond his borders, and then reenters upon Second River at a lower point, claiming that as he brought the water in he may go below and take it out again, and to this we shall now proceed. It is distinguished from the former discussion in that it assumes continuance of the flow from the power house

¹⁹ *Ibid.*, p. 268. Similar cases have held that, under such circumstances, defendant could not restore the stream to its old channel any more where it would flood those who had gone upon the old dry channel and cultivated it, just as the other cases held that the flow could not be stopped to the detriment of those on the new channel who had come to use it. *Woodbury v. Short*, 17 Vt. 387 (1845); *Shepardson v. Perkins*, 58 N. H. 354 (1878); *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520 (1901); *Stimson v. Inhabitants of Brookline*, 197 Mass. 568, 83 N. E. 893 (1908); *Ranney v. St. Louis, etc. R. R. Co.* 137 Mo. App. 537, 119 S. W. 484 (1909).

into Second River, whereas the former involved the cessation of any flow from there.

His rights at the mill are already noted to be an interest in the actual water, as such, confined in his conduits, and a "water-right" in First River to have that river flow as the source of supply for his mill. As the actual water, as such, passes out of confinement at his tail-race, and discharges from his mill into Second River, any property he may possibly have had in individual particles of water ceases because his hold thereon ceases. If, therefore, he has any right to retake the water at a lower point on Second River, it cannot be as an owner of any specific water itself; and it is equally well settled that under ordinary circumstances it cannot be as owner of a water-right in First River, for his "water-right" (right of flow) stops at the outlet from the mill, where it has been enjoyed and completed. It does not extend for him down into Second River; he cannot under ordinary circumstances claim that because he had the right to have water come to his mill, therefore he has the right to have it flow from his mill on to the sea and prevent everyone from taking it. He may stop it above the point where it gets out of his control, but he cannot ordinarily let it get away from him and then go below that point and retake it from others.

The law of this under ordinary circumstances is illustrated by a case ²⁰ where defendants brought water from foreign sources (Grizzly Canyon and Bloody Run) to supply miners in another watershed (Cherokee Corral), and, after use at the mines, the waste-water ran down and found its way into Shady Creek, where plaintiffs were located and used it. Some time later defendants, having found a use for their waste-water, went upon Shady Creek and withdrew it above plaintiffs.

"The defence was based upon the fact, that defendants having by their works added to the quantity of water in Shady Creek, they had a right to withdraw a like quantity of water for their own use; and this was the question in issue." ²¹

In ruling against them the court says:

"When the water of Grizzly Canyon and Bloody Run left the possession of defendants at Cherokee Corral, all right to, and interest in, that

²⁰ Eddy v. Simpson, 3 Cal. 249 (1853).

²¹ *Ibid.*, p. 250.

water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady Creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.”²²

The situation was a common one in the pioneer mining operations in California, and this case was soon followed by another to the same effect. Defendants, having brought foreign water into Alder Creek, built a dam there by which they used it in mining. From this dam there was a large escape of water, to catch which they built a second dam below. This also leaked, and they meant to build a third dam still lower down to catch the leakage from the second dam, so that none of the water brought in should get by them; but before they had it started other miners (plaintiffs) built a dam half a mile below. A year later, defendants built their third dam between their second one and plaintiffs’, cutting off the waste which plaintiffs had been getting from the second dam. (It was water originally from a foreign source in another watershed.) In enjoining defendants’ third dam the court held:

“The principle, as laid down in *Eddy v. Simpson* [*supra*], must govern this case. The design of the defendants, two years before, to appropriate Alder Creek as a connecting link of their enterprise, could not give them exclusive rights until it was executed, because it is not the intention to possess, but the actual possession, which gives the right. . . . Until they built a dam below, in order to make a further appropriation, any one else had the right to do so.”²³

These cases were followed by another giving a very clear and excellent illustration of the principle. A water company, at the end of its system of conduits, discharged its waste into a gulch where the plaintiffs, unconnected with the company, took it and used it. Some years later the water company “leased” to defendants the right to go to the gulch and take out the water above the plaintiffs. (The “lease” made the case the same as though the water company had gone there to take it out itself.) The defendants were enjoined in a decision in which the law is stated with exceptional clearness.²⁴

²² *Eddy v. Simpson*, 3 Cal. 252, 349 (1853).

²³ *Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856).

²⁴ *Schulz v. Sweeny*, 19 Nev. 359, 11 Pac. 253 (1886).

In another case²⁵ after defendant had been discharging foreign water into a creek for several years, he tapped the creek between the point of discharge and plaintiff's point of diversion, and it was held that, there being nothing to take the case out of the general rule, the injunction would be granted.²⁶

More authorities could be cited,²⁷ and the general rule is clear that while the person bringing the water from First River may stop the water above the point where it leaves his control, yet he cannot ordinarily let it go by and then retake it below that point from parties on Second River, so long as the going by continues. There is an exception to the rule also, however, to which attention may now be given.

V

The exception is where the recapture of the water by the person bringing it from First River is a part of his original project, and the foreign water was from the beginning turned by him into Second River not simply to get rid of a discharge, but for the express purpose of taking it out again below. If the enrichment by him of Second River and his retaking water from it at a lower point can be shown to be one entire project at the beginning, he had the privilege of so doing at that time, and this privilege of retaking the water below the point where it is let go is, in such case, in addition to his right always existing of stopping the water above that point.

The exception is a privilege of the party bringing the water in, to be exercised by him at such lower point as his original plan contemplated. While the actual water immediately upon leaving the power house has been lost to his possession, yet, by this exception, the right of flow which existed from First River to the power house is extended to a lower point; not a preservation of any right in the water itself, but a privilege, in recognition of bringing the additional water there with such intent, of reclaiming an equivalent, indistinguishable amount. In this exceptional case, where the water was brought from First River with that intent, the party so bringing it into Second River may, after his lower

²⁵ *Davis v. Gale*, 32 Cal. 26 (1867).

²⁶ See also *Dannenbrink v. Burger*, 23 Cal. App. 587, 138 Pac. 751 (1913); *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107 (1913).

²⁷ See the present writer's *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., § 37.

works are built, either enjoin other claimants from taking it out of Second River between his power house and his lower works, or may successfully defend an action for taking it out at his lower works against others still further down.

The following authorities establish and illustrate the principle. In one case,²⁸ the first case in its jurisdiction recognizing the privilege, the jury found as a fact that the foreign water turned into Second River by defendants was not abandoned by them, but was turned in for the purpose of being conveyed to their dam at a lower point on Second River, from whence it was afterwards diverted and sold by them, and upon this finding the court upheld the defendants. (The facts upon which the jury based this finding are not stated.) This was followed in a decision²⁹ lucidly explaining the law involved, and it has since been a leading case thereon. Here a water company was in the business of supplying miners, and made an arrangement with a miner on a certain creek to bring water to the head of the creek and let it run down to him in the creek bed. The turning in and taking out began together; the acts were performed jointly; no time had elapsed in which the water ran there before the lower party began taking it out, but they began concurrently. As described by Judge Field:

"In the case at bar the channel of the South Fork of Jackson Creek is used as a connecting link between Amador County Canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch."³⁰

In upholding the defendants, the court recognizes that the identity of the water was lost, but compares the case to commingling of goods of equal value with no wrong intent, and holds that defendants may retake the equivalent of their contribution.³¹ In another case thereafter the same court ruled "that if the defendants had brought water from foreign sources, and emptied it into the stream *with the intention of taking it out again*, they had the right to divert

²⁸ Hoffman v. Stone, 7 Cal. 46, 49 (1857).

²⁹ Butte, etc. Co. v. Vaughn, 11 Cal. 143 (1858).

³⁰ *Ibid.*, p. 151.

³¹ The court distinguishes Eddy v. Simpson upon the ground that in that case there was no intent to retake the water when the discharge began, but it had been an afterthought.

the quantity thus emptied in, 'less such amount as might be lost by evaporation, and other like causes.'"³² In another similar case, water was turned into a channel for the sole purpose of taking it out again, and only as a link in a ditch line, and it was upheld.³³ In a similar way the rule has been applied where salvage water was created by the upper party for the express purpose of carrying it away as soon as created. The court held:

"The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by the absorption and evaporation."³⁴

Similar rulings are made in other states. In a Colorado case,³⁵ water from a tunnel was appropriated by a grantee of the tunnel-

³² *Burnett v. Whitesides*, 15 Cal. 35, 37 (1860).

³³ "At best the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed, unaided by artificial means with which he [the plaintiff] is not connected. If there was a natural water-course from Deep Creek to Bates' Slough, through which water flowed, say for two months in the year, and say to the amount of one hundred inches, and if the defendant uses the channel of Deep Creek as a portion of its ditch, it will not be restrained from taking its water out of the channel of Deep Creek, unless such taking out diminishes the quantity which would otherwise have flowed by a natural channel into Bates' Slough, and shortens the period of the natural flow; and it will be restrained only as to such quantity and period." *Creighton v. Kaweah, etc. Co.*, 67 Cal. 221, 222, 7 Pac. 658, 659 (1885).

³⁴ *Wiggins v. Muscupiabe L. & W. Co.*, 113 Cal. 182, 196, 45 Pac. 160, 164 (1896). This is quoted with approval in a later case (*Pomona, etc. Co. v. San Antonio, etc. Co.*, 152 Cal. 618, 93 Pac. 881 (1908) where the salvage was part of the plan from the beginning of the defendants' work and was carried out contemporaneously therewith, no period of non-use having existed. The rule has been enacted in the Civil Code of California, as follows: "The water appropriated may be turned into the channel of another stream and mingled with its water and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished." CIVIL CODE, § 1413. For similar statutes in other jurisdictions, see the present writer's *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., §§ 38-40.

³⁵ *Ripley v. Park, etc. Co.*, 40 Colo. 129, 90 Pac. 75 (1907). See also *Ironstone Ditch Co. v. Ashenfelter*, 57 Colo. 31, 140 Pac. 177 (1914); *Sorenson v. Norell*, 24 Colo. App. 470, 135 Pac. 119 (1913).

owner at the mouth of the tunnel as a part of the original tunnel project, and the grantee took the water at the tunnel mouth as soon as completed. He was held to have a better right thereto than other lower appropriators. In a Utah case³⁶ mine-tunnel water was allowed to enter a stream. A grantee of the mine-owner took it out again at a lower point on the stream for irrigation. Under a finding that this was according to the original intent and that there had been no intent to abandon, the plaintiffs still lower down were held to have no cause of action.³⁷ In a recent Washington case permitting such recapture,³⁸ the plan to retake the foreign water was prepared in 1894, even before the foreign water was brought in (in 1897).³⁹

The burden appears from the foregoing to be upon the producer of the mingling to prove this intent of recapture as part of his original plan. The proof will depend upon what took place at the organization of the project, — upon whether he can convince the trial judge or jury that retaking the water from a lower point on Second River was part of his original plan. And further, he must prove that he has been diligent in putting his plan of recapture into effect; the additional privilege may be lost by delay. If the privilege were unlimited as to time, it would enable him to shut-out use of augmented Second River by others forever without himself using it, since the privilege is unlimited as to location until exercised and a location selected. An illustration of the necessity of executing the intention within a reasonable time appears in one case⁴⁰ already considered, where the parties bringing in this foreign water proved their original intention to retake it all, and yet were held to have lost the right, under the circumstances shown there, in two years. As stated in another early case,⁴¹ the right can be held only "if such intention had existed and been avowed, and afterwards carried out in good faith within a reasonable time, considering all the circumstances." And this principle that the

³⁶ *Herriman Irr. Co. v. Keel*, 25 Utah 96, 69 Pac. 719 (1902).

³⁷ The tunnel was built in 1893 (p. 728), and the recapture was begun in 1894, under preparations that had been made when the tunnel was begun in 1892 (p. 727).

³⁸ *Miller v. Wheeler*, 54 Wash. 429, 103 Pac. 641 (1909).

³⁹ See also *Spaulding v. Stone*, 46 Mont. 483, 129 Pac. 327 (1912); *In re Willow Creek*, 144 Pac. 505 (Ore.) (1914).

⁴⁰ *Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856).

⁴¹ *Maeris v. Bicknell*, 7 Cal. 261, 263 (1857).

privilege must be executed within a reasonable time is part of the familiar doctrine for acquiring water-rights by priority of appropriation in jurisdictions where that system prevails.⁴²

What is a reasonable time depends upon the circumstances and the difficulties with which he had to contend in completing this part of his project; what can be presented to judge or jury, in whose discretion the decision always lies wherever "reasonableness" is in question. Some basis for comparison may be had by turning back to the decided cases already cited where recapture was involved, and noting the circumstances upon which they were based. In the cases permitting the recapture, it appears that in all but one the turning in and taking out of the water began almost simultaneously. The exception is the Utah case,⁴³ where less than a year had elapsed (and preparations had begun in advance of the turning-in). In the cases ruling against the recapture, one⁴⁴ does not state the time which elapsed, but it could not have been more than a year, in view of the early date of the case; in the next⁴⁵ it was two years; in another⁴⁶ the length of time is not given but appears to have been several years, and likewise in another.⁴⁷

In the general doctrine of loss of water-rights by non-use (where the law of prior appropriation prevails), the time has sometimes been extended over ten years in special cases, but usually a definite period of time is laid down,⁴⁸ it being held in the case just cited that a water-right once acquired by priority of appropriation will cease by non-use for any unreasonable time within five years, but that more than five years is *per se* an unreasonable time. Within five years the burden of proving an abandonment is upon the party asserting it.⁴⁹ But after five years the lapse of time is of itself con-

⁴² CAL. CIVIL CODE, §§ 1411, 1416; *Merritt v. Los Angeles*, 162 Cal. 47, 120 Pac. 1064 (1912).

⁴³ *Herriman Irr. Co. v. Keel*, 25 Utah 96, 69 Pac. 719 (1902).

⁴⁴ *Eddy v. Simpson*, 3 Cal. 249 (1853).

⁴⁵ *Kelly v. Natoma Water Co.*, 6 Cal. 105 (1856).

⁴⁶ *Davis v. Gale*, 32 Cal. 26 (1867).

⁴⁷ *Schulz v. Sweeny*, 19 Nev. 359, 11 Pac. 253 (1886).

⁴⁸ *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453 (1895). See the present writer's *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., §§ 575-576.

⁴⁹ See *Partridge v. McKinney*, 10 Cal. 181, 183 (1858); *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807 (1895); *Senior v. Anderson*, 115 Cal. 496, 503, 504, 47 Pac. 454, 456 (1896); *Wood v. Etiwanda W. Co.*, 147 Cal. 228, 81 Pac. 512 (1905); *Land v. Johnston*, 156 Cal. 253, 104 Pac. 449 (1909).

clusive.⁵⁰ There is no actual decision applying the limit of five years to loss of the right of recapture, this case having dealt only with completed appropriations later disused; but the courts are likely to apply it to recapture also unless the facts are shown to be exceptional.

This right of recapture below the point of mingling as part of the original project (in the case where the producer of the additional flow intended such recapture from the beginning) is, as already said, exceptional. Such intention usually does not exist, or is an afterthought, or has not been diligently carried out, and the general rule certainly is that while the producer may stop the water above the point of mingling, he cannot let it go by and then retake it, below the mingling point, from other parties on Second River, so long as the mingling continues.

VI

Since (leaving this exception aside) even its producer cannot, below the point of mingling, divert the added water from other parties there, still less can a stranger to him. Among all the rest of the world on Second River the mingled flow follows the usual law of watercourses as a single flow, and it is immaterial between them how that flow came to be. The various persons may be farmers, householders, landowners, irrigators, manufacturers, or the like. When the mingled flow came down, they put it to use. Controversies over it among themselves do not concern the party (or his privies) bringing the water in, who may look on, sure that neither contestant below him will get any when he chooses to stop his mill or remove his conduit, provided he acts above the point of mingling; but no one else can gain anything by asserting the artificial origin of the additional flow.

For riparian proprietors upon lower Second River the mingled flow follows, at common law, the riparian doctrine against all the world except its producer and his privies. Subject to the producer's right to stop the increment above the point of mingling, a riparian proprietor may, at common law, restrain non-riparian use (or excessive riparian use), by any third person, of any of the united flow. No third person will be heard to put himself into the shoes

⁵⁰ *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453 (1895).

of its producer and say part of it is foreign water; such defendant is but a volunteer, trying to set up what he has had nothing to do with, and what, if done below the point of mingling, could not avail even the producer himself. A frequently cited opinion of Chief Baron Pollock declared with reference to riparian owners on Second River:

"It appears to us to be clear, that, as they have a right to the use of Bowling Beck, as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works; and if the proprietors of the drained lands or of the colliery *augmented the stream by pouring water into it*, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it."⁵¹

In a previous English case it was likewise ruled that "although those who formed the channel might have a superior right to the plaintiffs," yet between all the rest of the world the law for natural and artificial flows was the same.⁵² Goddard lays down the law

⁵¹ Wood v. Waud, 3 Exch. 748, 779 (1849). (Italics ours.)

⁵² Magor v. Chadwich, 11 Ad. & E. 571, 586 (1840), criticised in Wood v. Waud for insufficient stress upon the exception saving the producer, and for omitting the further exception that landowners intermediate between the point of discharge and the point of mingling are bound to no servitude of passage for the foreign water down their lands to the point of junction, and may divert it at that stage of its journey before it has mingled. The analogy immediately suggests itself of the law of diffused surface water and of water percolating diffused underground. Just as Chief Baron Pollock ruled in Wood v. Waud that until the foreign water actually entered Second River, the intermediate land need not remain a conduit for its passage any more than the power house or mine need remain a water works for its production, so the English rule called diffused surface water a "common enemy" for which lower land need not remain a drain for another's land on which it gathered; and, as to percolating water, any landowner might interfere as he chose, not being obliged to have his land remain a filter to transmit ground water to any neighbor; all of which matters are discussed together in the English cases. In America this law of percolating water is being modified by discountenancing interference with a percolating supply unless for the reasonable use of the interferer's land; the same modification is appearing in the law of diffused surface water; and by analogy it would appear also in this matter and deny either to its producer (see the second paragraph of part III, above) or to any intermediate landowner between the mill discharge and Second River junction, any right to prevent the artificial flow from going into Second River, unless the diversion of it

accordingly, upon the authority of Chief Baron Pollock's opinion in *Wood v. Waud*,⁵³ and this in turn is quoted, for example, in an Illinois case, saying:

"It is quite true the owner of the mill and the other riparian proprietors have no legal right to exact that this water shall be discharged into the river; but when it is discharged into the river, by virtue of the character it then assumes as running water in a natural stream, and their position as lower riparian proprietors, they are lawfully entitled to the same use and benefit to result from it that they are from any other water of the stream."⁵⁴

In the same way, between the various claimants on lower Second River the law of prior appropriation (when it would apply to natural streams) will apply to the mingled flow, giving to the prior appropriator a prior right against all the world except the producer of the artificial addition stopping it above the point of mingling. To natural streams the law of prior appropriation would apply where the riparian law has either been abrogated as a whole (as in Colorado, Wyoming and some other states), or where the contestants voluntarily do not rely upon it (as often occurs in California, although the riparian doctrine is there recognized), or are so circumstanced that they cannot (as where both contestants are carrying the water off of their own riparian lands for use on distant non-riparian lands). In such cases the law of priority would be

is in the reasonable use of its producer or of such intermediate land. If some lower claimant on Second River may so restrict such intermediate landowner to the reasonable use of his own land, it is the same as a riparian right in respect to such artificial flow, even before its mingling with Second River, against even the intermediate landowners and all the world except the producer of the flow. But be this as it may, after the artificial addition has entered Second River, Lord Campbell's opinion is authority that lower claims on Second River, as riparian rights, then extend to the united flow against all the world except only the producer's (and his privies') right to stop it above the point of mingling.

⁵³ "When a stream is natural, there can be no doubt that all water which flows into it becomes a part of that stream, and subject to the same natural rights as the rest of the water, and that it makes no difference that the water so flowing to the natural stream was sent down by artificial means." GODDARD, EASEMENTS, 7 ed., 87, citing *Wood v. Waud*. He adds the exception of the producer, saying that "those natural rights cannot attach till the water reaches and becomes part of the natural stream, nor can they hinder the person who gives the supply from stopping it."

⁵⁴ *Druley v. Adam*, 102 Ill. 177, 203 (1882); see also p. 197, citing *Eddy v. Simpson*, 3 Cal. 249 (1853). See also *Dannenbrink v. Burger*, 23 Cal. App. 587, 138 Pac. 751 (1913); *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107 (1913).

applied to natural streams, and in such cases it will likewise govern the contestants upon the mingled flow in Second River among themselves (subject to the paramount right of its producer and his privies to stop the increment above the point of mingling). For example, in a case where someone on Second River sought, on the ground of its artificial origin, to defend an action for diverting part of the mingled flow from another there who was a prior user of it, the court ruled:

"If it should be conceded upon the facts proved that the water stopped and diverted by defendant was the overflow from the People's Ditch into a channel of Outside Creek, and that the People's Ditch Company might have diverted the overflow, this would not authorize defendant to divert it, unless it appeared defendant had acquired the right from the People's Ditch Company."⁵⁵

That priorities (whenever they would be applied to natural streams) may be acquired likewise between various claimants in the use of the mingled flow, valid against all the world except its producer (and subject only to his paramount right to cease supplying it above the point of mingling) follows also from the rulings above given, that the producer himself could not go below the point of mingling to divert it from anyone who has it in use,⁵⁶ and is not infrequently laid down by statute.⁵⁷

Claims of such kind between adversaries both subject to a paramount title in a third person frequently occur in the law of waters. They are not freehold rights in the full sense, being at the mercy of the paramount owner — in this case the producer of the artificial part of the flow. Other instances of claims subject to a paramount title are where, on natural streams, two non-riparian owners contend for the water, subject to the right of third persons

⁵⁵ *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502, 4 Pac. 507 (1884). Similarly, *Farmers, etc. Co. v. Rio Grande C. Co.*, 37 Colo. 512, 86 Pac. 1042 (1906), as to water coming into Second River from a mine-tunnel. In *Arkwright v. Gell*, 5 Mee. & W. 203, 233 (1839), laying down that no one on Second River has a right against the producer of the artificial flow, Baron Parke added that "as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired."

⁵⁶ *Eddy v. Simpson*, 3 Cal. 249 (1853); *Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856); *Davis v. Gale*, 32 Cal. 26 (1867); *Schulz v. Sweeny*, 19 Nev. 359, 11 Pac. 253 (1886).

⁵⁷ For example, CAL. STAT. 1913, p. 1012, §§ 15 and 17; LORD'S ORE. LAWS, § 6673. See the present writer's WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 55.

(the riparian owners) to prevent both from taking any; or where two parties seek to store the same flood water, subject to the paramount right of a third person (the landowner upon whose land they occur) to prevent floods gathering there; or where two rival appropriators contend over a ditch upon a third person's land, subject to a paramount right of the third person (the landowner whose land is crossed) to oust both of them. Between the adversaries (subject to the paramount right of the third person, should he assert it) there exists in this way a "possessory right," resting upon the principle, expressed in various ways, that *jus tertii* cannot be set up, or that possession is nine points of the law, or that possession is presumptive title against everyone but the paramount owner. In the mingled flow each riparian owner (except as against the producer of the artificial part of it stopping it above the point of mingling) is possessed, as incident to his riparian estate, of the whole flow, subject to a further exception in every other riparian owner to make a reasonable riparian use of it; in the case where the adversaries claim as rival appropriators by priority, each appropriator is in the same way possessed of so much as he appropriates, subject to no second exception, but only to the exception of the artificial flow's producer. While all receive it as a gratuity, that it is a gratuity can be set up only by him who gives it; among those receiving it, none can invalidate another's interest in it on the ground of its gratuitous existence without in the same breath invalidating any claim he might set up to it himself.

VII

The following would seem to result from the foregoing discussion concerning the rights of the party (and his privies) who brings water from First River, and, after passing it through his works, discharges it into Second River:

(1) He may change the flow of water from his works into Second River or stop it entirely, if he does so above the point where the water leaves his works or the boundary of his land, or above the point of mingling,⁵⁸ unless the new condition is inherently permanent and has been suffered by him to continue long enough to

⁵⁸ No attempt has been made in this paper to examine into the distinction, if any there be, between the places thus indicated.

raise a dedication thereof to the community (if any) using it below.⁵⁹

(2) He may also in exceptional cases let the water go down Second River and then retake it from others below his works if the intention so to recapture it was part of his original project, and has not been lost by unreasonable delay; but usually such intention does not exist, or is an afterthought or has been lost by delay, so that usually he will have no such right.

(3) While the paramount consideration is that the producer owns and controls the source of supply, yet among all the rest of the world except him and his privies, the mingled flow follows the usual law of watercourses as a single flow, and it is immaterial between them how that flow came to be. Subject to the producer's paramount title, riparian owners on Second River have riparian rights in the mingled flow, and successive appropriators have relative priorities therein, upon the same rules of law that apply for riparian owners or successive appropriators of natural water supplies.

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⁵⁹ This is doubtful, and the chance of its application would be still less if he should notify the parties below that no dedication is intended.

THE UNIFORM PARTNERSHIP ACT—A REPLY TO MR. CRANE'S CRITICISM¹

MR. JUDSON A. CRANE has written in the June number of the *HARVARD LAW REVIEW* an article entitled "The Uniform Partnership Act—A Criticism."² This Act was approved by the Conference of Commissioners on Uniform State Laws on October 14, 1914. It has already been adopted in Pennsylvania and Wisconsin. Mr. Crane makes the following criticisms of the Act:

First. That it is not drawn on the theory that a partnership is a legal person.

Second. That though the intention of the draftsmen was apparently to proceed on the aggregate theory, the Act does not explicitly adopt either the entity or the aggregate theory of the nature of a partnership.

Third. That there is no section on Fraudulent Conveyances.

Fourth. That certain sections of the Act, which he indicates, are defective.

The writer will here discuss these criticisms in the order given; and first:

THE NATURE OF A PARTNERSHIP

Sec. 6 (1) of the Act defines a partnership as "An association of two or more persons to carry on as co-owners a business for profit." This definition is not in accord with the idea of those who believe that a partnership should be regarded as an entity endowed with a legal personality distinct from the legal personalities of the partners. Mr. Crane admits that the theory which makes the partnership a legal person is not the theory of our common law.³ Though he strongly condemns the commissioners for not drafting the Act on the theory that a partnership is a legal person, he does not state in his article his reasons for believing in the theory, nor

¹ Limitation of space has made it impossible to treat in this article of the advantages resulting from the general adoption of the Act. I have set forth these "advantages" as they appear to me in an article in the *Yale Law Journal* for last June, entitled "The Uniform Partnership Act," 24 *YALE L. J.* 617.

² 28 *HARV. L. REV.* 762.

³ 28 *HARV. L. REV.* 766, n. 35.

tell us why they should have discarded the aggregate theory which is the one on which our courts have generally proceeded. He does, however, make three statements, which he supports either by the citation of authorities or legal rules, from which he concludes that courts have been consciously or unconsciously tending toward the legal-person theory, while legislators, dealing with a partnership incidentally, treat it as a legal person.

The fundamental importance of a correct theory of the nature of a partnership to all partnership law warrants, before specifically discussing these statements and conclusion, as full a discussion of the subject as the necessary limits of space allotted to this article will permit.

In the first place the reader anxious to determine for himself whether the Uniform Law Commissioners made a mistake in not incorporating in the Act the theory that a partnership is a legal person, should see clearly the question at issue. He is also entitled to have called to his attention the reasons which induced the commissioners, after first directing their Committee on Commercial Law to draft the Act on the theory that a partnership is a legal person, to return to the dominant theory of our common law; a final determination made on the unanimous advice of the group of writers, teachers, and other experts on partnership law called by the Committee on Commercial Law to discuss the very question raised by Mr. Crane — the legal theory of the nature of a partnership to be adopted by the draftsmen of the Act.

It will perhaps tend to clarify the question at issue if reference is made to certain things on which there can be general agreement.

A business is a series of acts directed in a certain manner toward a definite end. We say that A. and B. are in partnership as dry goods commission merchants, by which we mean that they have associated themselves together to obtain a profit by selling the goods of a certain class of manufacturers on commission. As with any other partnership, A. and B. in association have a group of activities distinct from their other activities. A. may also be engaged in other businesses by himself or with others; so also may B.; while in any event each carries on activities which form no part of their mutual business as dry goods commission merchants. Or one man may, without associating himself with others, carry on by himself one or several distinct businesses. Engaged, for in-

stance, in running a hotel and livery stable, he may run them as one business or two. It is largely a question of how he wants to keep his books, and how he organizes his force of employees.

The way in which men's activities are grouped when they act by themselves or with others is a question of fact, not law. When two or more persons join in carrying on a business, as a matter of practical necessity they are obliged to keep their activities in the business distinct from those activities which are not intended to further their mutual enterprise. Their mutual activities they may keep as one or divide into two or more groups. Thus A. and B. may form a partnership to run a hotel and a partnership to conduct, as a separate business, a steamboat line; or two partners in the retail grocery business may use their delivery wagon on Sunday to take their families on a pleasure excursion, or may, apart from their business, mutually engage in a real estate speculation.

The reasons which induce a man to group his activities are infinite. Often the grouping is imperative. A man engaged in the hotel and garage business may, as his real or supposed convenience dictates, run them as one business or two. On the other hand, the trustee of an estate must, if he obeys the law, group apart from all his other activities his activities as trustee.

Once a man so far separates his activities in a given direction as to think and speak of them as being performed in a distinct business, he can regard himself as having relations with that business, and he can think of the "business" as possessing rights and having obligations. Thus he can and does speak of property as belonging to his business, or charge himself on the books of the business when he draws money for his personal use. Or the trustee, dealing with his business as trustee as distinct from all his other activities, may speak of the "property of the trust estate" or of the "estate" as owing him money for advances. In the same way, when two or more persons associate themselves in business as partners, they may properly speak of the partnership property, and of themselves as indebted to or as being owed by the partnership. The language is appropriate, because the separate grouping of the activities mutually carried on toward a definite end is a fact, just as the separate grouping of the activities of a man as a trustee of an estate is a fact.

The illustrations just given show that any group of activities,

whether carried on by one person or many, by the very fact that the activities are grouped becomes an entity. For the best, indeed perhaps the only practical definition of an entity, is — phenomena grouped in the mind as possessing a common attribute not had by other phenomena. Thus a business regarded by the owner or owners as distinct from all their other activities is an entity, because all the acts done in it — that is, all the phenomena of the group — have this in common, that they are performed or directed by the owner or owners of the business to obtain, in a given manner, a profit.

Just as it is true that man can and does as a matter of fact create entities by dividing his activities into groups, so it is also true that one man — barring certain rare abnormal instances of dual personality — has but one personality. Indeed this concept of the oneness of personality is bound up in our concept of a man. The trustee and the same man conducting his private business has one and the same personality. Because he carries on two businesses he does not thereby become two persons. Men who associate themselves to carry on a business in partnership, and who so carry it on, do not create a personality distinct from their own separate personalities.

That man groups his activities — must indeed group them — and that normally one man has one personality, and that a group personality distinct from the personalities of the individuals forming the group is a figment of the imagination, are facts, not legal theories.⁴ On the other hand, it is necessary that the law should have a theory of legal personality. The law may take the position that one person in fact can have but one legal personality, or that he may have many: a separate legal personality for every separate group of his activities, for each business he conducts as a distinct business, for domestic concerns, and for each separate trust. The legal theory that a man is one legal person, even though he may engage in several distinct lines of activity, has this in its

⁴ Dr. Otto Gierke, the eminent German jurist, affirms that group consciousness, or group personality distinct from the separate consciousness or personalities of the individual members of the group, does in fact exist. See *Die Genossenschaftstheorie und die Deutsche Rechtsprechung*, Kapitel II, 141. In this country, as far as the writer is aware, all advocates of the legal-person theory of partnership admit that a group personality is no more a reality than a composite picture is a picture of a real person.

favor — the theory corresponds to the facts. The theory that one person may possess a dual legal personality, or the theory that a group of persons may possess a legal personality distinct from the legal personalities of the members of the group, are based on the assumption that one man acting in two capacities is two persons, not one person. This assumption does not correspond to fact. It is a legal fiction and, like other legal fictions, should not be resorted to unless it can be shown that justice cannot be done without the adoption of the fiction.

From what has been said it will be seen that the issue between Mr. Crane and the Commissioners on Uniform State Laws is not whether a partnership is or is not an entity. It is an entity, because the activities of the partners as partners are separate from their other activities. The issue is whether the group of activities carried on by the partners should be regarded as being carried on by them — which is the actual fact — or as being carried on by a legal personality distinct from the legal personalities of the partners. Thus under the aggregate theory the partners own in common the partnership property, and they are all joint principals in partnership transactions. Under the legal-person theory the partnership legal person owns the partnership property, and the partners are merely its agents.

This being the issue, the reasons which led the commissioners to decide in favor of the theory on which the present Uniform Partnership Act is drawn will be briefly stated.

When the commissioners first decided to draft a Partnership Act they directed their Committee on Commercial Law to draft the act on the theory that a partnership is a legal person. The main reason for this direction is not mentioned by Mr. Crane, though at the time it apparently formed an overwhelming argument in favor of the theory. There exists in the common law an almost hopeless confusion, both in theory and practice, on all questions connected with the rights of a partner and the separate creditors of a partner in partnership property.⁵ The common law started

⁵ Compare, for instance, the following cases: *Heydon v. Heydon*, 1 Salk. 392 (1693); *Eddie v. Davidson*, Douglas 627 (1781); *Taylor v. Fields*, 4 Ves. Jr. 396 (1799); *Doner v. Stauffer*, 1 P. & W. (Pa.) 198 (1829); *Phillips v. Cook*, 24 Wend. (N. Y.) 388 (1840); *Washburn v. Bank of Bellows Falls*, 19 Vt. 278 (1847); *Nixon v. Nash*, 12 Oh. St. 647 (1861); *Menagh v. Whitwell*, 52 N. Y. 146 (1873); *Case v. Beauregard*, 99 U. S. 119 (1878); *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221 (1894).

with the proposition, in substance enunciated by Lord Holt in the celebrated case of *Heydon v. Heydon*,⁶ that partners are co-owners of partnership property holding as joint tenants. If the partners are joint tenants, then all the legal incidents of joint tenancy apply. The separate creditor of the partner can levy on partnership property. The sheriff can sell the partner's interest and deliver the goods to the purchaser. The purchaser becomes tenant in common with the remaining partners. While the purchaser cannot dispose of the interests of the remaining partners in the property, he can retain possession of the property. All this is what happened in the case referred to. Now each partner, by recognizing the existence of a common fund for the purposes of the business, impliedly agrees with his partners not to touch that fund for his own separate purposes until all obligations incurred in their mutual enterprise are satisfied. Therefore, the results of regarding the partners as co-owners of partnership property holding as joint tenants are that the separate creditor of the partner has rights over partnership property which his judgment debtor does not have; he can take possession of the property for a non-partnership purpose, and he can assign the partner's right in the specific partnership property for a non-partnership purpose. These results are manifestly unfair to the other partners, and various devices have been resorted to in different jurisdictions to avoid them. All these devices have one object: to keep the partnership property intact until the partnership creditors are paid and the other partners receive their shares in the partnership property. In spite of the efforts of the courts of equity and common law toward this end, as well as much tinkering with the subject by the legislature, the confusion of theory and practice is still so great as to produce in many states real injustice.⁷

⁶ 1 Salk. 392 (1693).

⁷ Thus, in Pennsylvania, prior to the adoption of the Uniform Act, the sheriff, at the instance of the separate judgment creditor of the partner, would levy on the debtor partner's interest in the specific partnership property attached, and sell this "interest," the purchaser having a right to a bill in equity to obtain, not what the sheriff had sold, which was the debtor partner's interest in specific partnership property, but the debtor partner's interest in the business of the partnership. See ACT of April 8, 1873, PEPPER & LEWIS DIG. OF LAWS, 5620. Besides its inconsistency, the practical injustice resulting from this procedure was that it required a sale of the debtor partner's interest in the partnership before an account was had to ascertain the value of the interest. Possible purchasers, being offered something whose value

While the majority of the recorded cases discuss the rights of the creditor of the separate partner, or in other words the involuntary assignment of the partner's rights in specific partnership property, a similar confusion exists in the language employed by the courts in the comparatively few cases to be found in the books, which discuss the right of the assignee of the partner where the assignment has been a voluntary act on the part of the partner.⁸ A Partnership Act which did not end these confusions, and provide the law with a clear and practically satisfactory statement of the rights of a partner in specific partnership property, would fail in its main purpose.

In 1902, when the commissioners determined to draft a Partnership Act, the confusion which exists in our case law in respect to the rights of a partner in specific partnership property was manifest. It was also equally manifest that the legal-person theory of a partnership avoids this confusion, besides giving to the assignee of a partner, and the separate creditor of a partner, the rights, and no more than the rights, to which they are respectively entitled. If a partnership is a legal person, a separate creditor of a partner cannot levy on partnership property. He may, however, by a bill in equity, or by garnishee proceedings, attach the interest of the partner in the partnership. Again, under that theory, while the assignee of a partner's interest in the partnership does not obtain any right to partnership property, he does secure the beneficial interest of the assigning partner in the partnership business. Since avoiding the confusion in respect to the rights of the partners in specific partnership property was the chief concern of the commissioners, it is not to be wondered at that it was not difficult to convince them that they should instruct their committee and its draftsman, the late Dean Ames, to draw the Act on the theory that a partnership is a legal person.

In the two drafts submitted by Dean Ames, he defined a part-

was highly speculative, usually refused to bid, with the result that the interest was bought in by the judgment creditor.

⁸ Compare *Cayton v. Hardy*, 27 Mo. 536 (1858); *Drake v. Thyng*, 37 Ark. 228 (1881); *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966 (1884); *Osborne v. Barge*, 29 Fed. 725 (Circ. Ct. N. D. Ia. 1887); *McNair v. Wilcox*, 121 Pa. St. 437, 15 Atl. 575 (1888); *Freeman v. Abramson*, 30 Misc. 101, 61 N. Y. Supp. 839 (1899), with *Blaker v. Sands*, 29 Kan. 551 (1883); *Arnold v. Stevenson*, 2 Nev. 234 (1866); *Sutlive v. Jones*, 61 Ga. 676 (1878).

nership as "a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit."⁹ These drafts were not fully discussed, because of the objection that the constitutions of some states made a legal but non-natural person a corporation. The commissioners, however, finally determined to proceed with the attempt to draft the Act on the legal-person theory, apparently taking the position that this constitutional objection could be overcome, or at least would not prevent the adoption of the Act in more than a few states.

On Dean Ames' death the task of preparing a draft act on the legal-person theory of partnership devolved on the writer. He found that his first problem was to determine the relation of the partners and the persons having claims on the partnership. For instance, in a partnership contract, are the partners parties to that contract or are they sureties or guarantors, or have they only a contract with the partnership to supply the partnership with sufficient funds to meet any obligation arising out of the contract? Again, suppose one of the partners in carrying on the partnership business injures a third person, have the other partners any direct liability to the person injured, or is the only obligation of the partners an obligation to the partnership to supply it with sufficient funds to meet the liability arising out of the injury?

In preparing the draft the writer was obliged to discard the idea that the partners were co-principals with the partnership in all partnership transactions. The whole idea leading to the adoption of the theory is that the partnership, not the partners, is carrying on the business. If the partners must still be regarded as co-principals it may well be asked: are not the problems of partnership sufficiently complicated without creating another person who must be regarded as participating in all partnership acts, and be made with the partners a party in all actions arising out of partnership transactions? It was also impracticable to regard the partners as merely sureties on all partnership contracts, declaring their liability with the partnership to be joint or joint and several, or to regard the partners as guarantors, because either of these solutions left the liability of the partners for partnership torts still to be provided. He was impelled, therefore, to conclude

⁹ First and Second Draft, Sec. 1.

that the only practical solution under the legal-person theory was the one to which all of the advocates of that theory to whom he has talked adhere — namely, that the partner should be regarded as a contributor to the partnership and as having an obligation to the partnership to furnish it with the necessary funds to meet its obligations to third persons, but that those having claims against the partnership have, as such claimants, no claims against the partners. In these conclusions he followed Dean Ames, who, in his two drafts, also regarded the partners as “contributors to the firm” and apparently without direct liability for partnership obligations.¹⁰ No sooner had the relations, under the legal-person theory, of the legal person, the partners, and the partnership creditors been made plain, than the practical difficulties of the theory became apparent. Under the legal-person theory, unless we are willing without apparent object to still further complicate all questions by making the fictitious legal person a co-principal with the partners in all partnership transactions, creditors of the partnership are not creditors of the partners. A judgment against the partnership is not a judgment against any partner, and the judgment creditor cannot levy on the separate property of a partner; he must first exhaust partnership property, and then attach the claims of the partnership against the partners as contributors by new legal or equitable proceedings. And it is proper to emphasize here that to adopt the legal-person theory changes existing law in a matter of vital importance, because the theory itself is based on an assumption false in fact, namely, that third persons dealing with a partnership do not deal directly with the partners as principals. They do. Partnership creditors are not persons who have trusted primarily a partnership fund of the sufficiency of which the partners are guarantors; they have trusted the partners as individuals with the reputation of possessing property and conducting a successful business. The relative amount of the property held in joint or separate ownership is not taken into consideration. To say that business men dealing with a partnership trust primarily the joint property of the partners, and secondarily their separate

¹⁰ In both his drafts he required the firm to be sued in the firm name. (See First Draft, Sec. 5 (4); Second Draft, Sec. 4 (4)). The judgment creditor had to exhaust firm assets before obtaining the right by legal or equitable process to levy on separate property.

property, is to make a statement which every person who has ever been called upon to advise in transactions with partnerships knows to be false.

When the writer perceived these inevitable results of the legal-person theory and recognized that the theory was, in last analysis, based on an assumption which did not accord with business practice, he felt, as he still feels, that the Commissioners on Uniform Laws would never adopt a partnership act on the legal-person theory of partnership and that they should not do so. He believes that if the difficulties and confusions of our existing partnership law cannot be solved without the adoption of a theory which leads to such results, it would be better not to have any act.

Another, though minor difficulty, encountered in drafting an act on the legal-person theory of partnership was the necessity, or rather great desirability, under that theory, of some efficient system for the registration of all partnerships. If a partnership is a legal person it should only be sued under its name.¹¹ To ascertain beyond possibility of dispute what that name is, every partnership doing business in the state should register its name in a public office.¹² To enforce this requirement some penalty for its violation is necessary. The only practical penalty is the provision that until registration the partnership cannot maintain any action. Entirely apart from the fact that the sanction is only partly effective, as an unregistered partnership could nevertheless maintain a suit in the federal courts,¹³ and also apart from the practical difficulty arising out of the dislike in this country of registration systems for business associations, unless the necessity is clearly demonstrated, the whole idea that all common-law partnerships should be registered is based on the assumption that partners always know, or ought to know, that they have formed a partnership. This is another assumption that does not correspond to fact. Persons who form a business association in which they are co-owners of the business form a partnership, unless they organize under a statute providing for a special kind of association. Ownership involves control. It is impossible to state that this or that

¹¹ Dean Ames' drafts contain an express provision to this effect. First Draft, Sec. 5 (4); Second Draft, Sec. 4 (4).

¹² First Draft, Sec. 6; Second Draft, Sec. 5.

¹³ *In re Farmers' Supply Co.*, 170 Fed. 502 (1909).

power makes the man who possesses it an owner or co-owner of a business. Any one of an infinite variety of combinations of fact shows an ownership of a business. Again, no matter how many times courts pass on the question of whether under the facts presented a partnership has been formed, new cases will constantly arise in which, though the contract between persons alleged to be partners is known, it will nevertheless be impossible to say positively whether the courts will or will not declare that the contract makes the parties to it partners. A hundred and fifty years of recorded litigation in our courts should be sufficient to convince anyone that in many cases it is not practicable to determine without a court decision whether a partnership has been formed or not.¹⁴ A. may make a contract with B. which will give A. so much control over B.'s business as to make the business A. and B.'s, and A. and B. partners, although neither A. nor B. intended A. to become unlimitedly liable for the debts of the business or knew that he was a partner until a court so decide. Again, two or more persons may form a common-law partnership, though they believe they have formed another kind of business association because they have failed to comply with the requirements of the statute under which the other kind of association must be organized.¹⁵

At present the cases in which the question of partnership or no partnership is presented, are those in which the person who has dealt with what he alleges to be a partnership is trying to hold someone liable for the debts of a business who denies that he is a partner. The question is raised in order that justice may be done to the creditors of a business. If, however, we should adopt the legal-person theory of partnership, and as a consequence require all partnerships to be registered and each partner to sign the registration certificate, the question whether a partnership did or

¹⁴ The interested reader who desires to convince himself of the practical difficulty of determining in many cases whether a partnership does or does not exist should read: *Grace v. Smith*, 2 Wm. Bl. 998 (1776); *Waugh v. Carver*, 2 H. Bl. 235 (1793); *Wilkinson v. Frasier*, 4 Esp. 182 (1802); *Dunham v. Rogers*, 1 Pa. St. 255 (1845); *Holmes v. Old Colony R. R. Co.*, 5 Gray (Mass.) 58 (1855); *Mollwo, March & Co. v. Court of Wards*, L. R. 4 P. C. 419 (1872); *Eastman v. Clark*, 53 N. H. 276 (1872); *Pooley v. Driver*, L. R. 5 Ch. Div. 458 (1876); *Hart v. Kelley*, 83 Pa. St. 286 (1877); *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785 (1881); *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745 (1889); *Estabrook v. Woods*, 192 Mass. 499, 78 N. E. 538 (1906).

¹⁵ *Fourth Street Nat. Bank v. Whitaker*, 170 Pa. St. 297, 33 Atl. 100 (1895); *McLennan v. Hopkins*, 2 Kan. App. 260, 41 Pac. 1061 (1895).

did not exist could be raised by many defendants to delay just claims. For example: A. and B. have a contract in regard to what both regard as A.'s business. Under this contract it is doubtful whether they are or are not partners. A., in carrying on the business, enters into a contract with C. by which C. is obligated to pay a certain sum. C. refuses to pay and A. brings suit. C. could defend on the technical ground that A. and B. are partners carrying on business under the name of A., that the obligation is a partnership obligation, and that the partnership is not registered. The case could not proceed until this doubtful and often most difficult question is determined, and if it is determined that a partnership exists, there will be still further delay, at least until the formalities of registration are complied with.¹⁶

Again, to require the names of all partners to be registered before the partnership is allowed to begin or maintain an action, as is done by the advocates of the legal-person theory,¹⁷ assumes that partners who allow one of their number to be secret and inactive — that is dormant — are acting wrongfully and should be punished. To regard the dormant partner as a wrongdoer and his partners as wrongdoers, makes a radical change in the law. So far is existing law from regarding the dormant partner as a wrongdoer that an exception is made in his favor; he is not held liable for contracts made in the partnership name after his retirement, although no notice of dissolution has been published. It is submitted that the attitude of our common law toward the undisclosed principal generally, of which its attitude toward the dormant partner is an example, is sound. By remaining dormant he has not deceived others to their disadvantage. The active partner or partners have declared that they will be liable for the performance of the contracts, and they are liable. If another principal is discovered, he also can be held liable; not because he has deceived anyone by remaining dormant, but because he is an

¹⁶ In the drafts submitted to the Commissioners on Uniform State Laws by Dean Ames, he provided that no suit could be "begun or maintained" until the registration requirements were complied with. This apparently would require a new suit to be brought in the supposititious case given in the text if the court should hold that A. and B. were partners. Had the word "begun" been omitted, thus prohibiting merely the maintaining of a suit by an unregistered partnership, registration would apparently remove the bar to the continuance of the suit.

¹⁷ First Draft, Sec. 6 (5); Second Draft, Sec. 5 (5).

owner of the business in the carrying on of which the contract was made.

In view of the impractical and unjust effect on the rights of partnership creditors to which the legal-person theory inevitably leads us, as well as the minor difficulties in respect to the establishment of an efficient system of partnership registration to which reference has been made, the writer tried to ascertain if the difficulties and confusions which all admit exist in our present law could not be overcome without adopting that theory. These difficulties and confusions, as has been pointed out, largely center around the nature of a partner's rights in specific property. As we have seen, Lord Holt held in effect that partners were co-owners of partnership property, holding as joint tenants. It is evident that the first assumption is a fact. Partners are co-owners of partnership property. But why the legal theory that the incidents of this co-ownership are the incidents of joint tenancy? Joint tenancy is not the only form of co-ownership known to our law. Even at the time of Lord Holt, tenancy in common, joint tenancy, and co-parcenary, each with different legal incidents, were recognized forms of co-ownership. To use Hearn's definition, which Mr. Crane quotes: "Ownership is merely a collective term denoting the aggregate of several independent rights."¹⁸ The kind of ownership is determined by the legal incidents or rights in relation to the property which the law recognizes as existing in the owner. There can be as many kinds of ownership, joint or several, as there are possible combinations of rights in relation to property. It is true that joint tenancy has the incident that on the death of one co-owner his rights of control pass to the surviving tenants, and it is also true that this legal incident is adapted to the practical needs of the situation which arises on the death of a partner. But nothing shows more clearly than the decision of Lord Holt that other legal incidents of joint tenancy are not adapted to partnership property. If applied, these other legal incidents produce great injustice. This is not to be wondered at, because each form of co-ownership known to our law had its origin in some economic, social, or political necessity. Joint tenancy, whatever its origin, did not arise out of the custom of persons combining their property to carry on a

¹⁸ HEARN, *LEGAL RIGHTS AND DUTIES*, 186.

business. It would, therefore, be an extraordinary coincidence if the legal incidents of the tenancy were suited to the needs of the partnership relation. But if the law recognized the legal incidents of joint tenancy because those incidents were once adapted to the needs of some holders of land as co-owners, why should we not to-day give to partnership co-ownership the legal incidents which are adapted to the partnership relation? Or to state the question in the form of a proposition: Persons become co-owners of property as partners to further the ends of the partnership and the law should attach to their co-ownership legal incidents fitted to the partnership relation.

Acting on this principle the writer prepared a draft of a partnership act on the so-called aggregate or common-law theory of partnership, treating the partners, not as joint tenants, but as co-owners of the partnership property holding by a distinct tenancy which he called tenancy in partnership. To this tenancy in partnership he gave those legal incidents which seemed to correspond to the understanding of partners and promote partnership as a practical form of business organization. He then submitted the draft which he had drawn on the legal-person theory, and this other draft, to the Committee on Commercial Law of the Commission on Uniform State Laws, suggesting that the two drafts, as two distinct methods of meeting what were acknowledged as existing difficulties of our partnership law, be first referred by the committee to a conference of persons who could, because of special experience, be fairly called experts.¹⁹ The committee adopted this suggestion and invited, besides lawyers in general practice known to have large experience in advising partnerships, all the writers on partnership in the United States, as well as the teachers of partnership in the leading law schools of the country, to meet with the committee in Philadelphia. The invitation was generally

¹⁹ The two drafts, Drafts 3 and 4, are usually referred to in the Reports of the Conference of Commissioners of Uniform State Laws as Draft B, the one drawn on the legal-person theory, and Draft C, the one drawn on the theory thereafter adhered to in the subsequent drafts and which is embodied in the present Act. In the pamphlet in which these two drafts are printed there is also printed as Draft A the second or last draft submitted to the commissioners by Dean Ames. This second draft of the Act is sometimes referred to in the reports of the conference as Draft A. In preparing Drafts B and C the writer had the advantage of the assistance of Mr. James B. Lichtenberger of the Philadelphia bar.

accepted and the meeting was held in the spring of 1911. With one exception, all the teachers of partnership in our leading law schools were present, as well as all the prominent writers on the subject, besides several lawyers of large practice. The conference lasted two days.²⁰ At its conclusion those present unanimously recommended that the commissioners should draw the Act on the common-law or aggregate theory of partnership, treating the partners as holding partnership property by a peculiar tenancy to which should be given those legal incidents which now appear in the Uniform Act.

It is a significant fact that, with one exception, all those called to the conference had at one time believed that our law should adopt the legal-person theory of partnership.²¹ Several came to the meeting still believing that the Act should be drawn on that theory. The change in opinion which made possible the unanimous vote in favor of the theory underlying the existing Uniform Act was, in the main, due to three causes:

First. The realization that to draft a partnership act on the legal-person theory of partnership was not to express in statutory form the law of partnership which had grown up in our courts, but in effect to abolish much of our existing partnership law and substitute in its place radically different legal principles affecting this important business association.

Second. The perception that the legal-person theory not only rests on the fiction of group personality, but also on an assumption that business men in dealing with a partnership do not consider themselves as dealing directly with the partners, an assumption which is directly contrary to the fact; together with the perception that there were unforeseen practical difficulties in working out under that theory the rights of the partnership creditors.

Third. The belief resulting from an examination and discussion of the draft prepared on the aggregate theory submitted, that the worst of existing difficulties and confusions in our partnership

²⁰ To the best of the writer's recollection all, or practically all, the arguments in favor of the legal-person theory given by Mr. Crane in his article, as well as several others, were fully thrashed out to what seemed to those present a satisfactory conclusion.

²¹ Mr. George Wharton Pepper of the Philadelphia bar.

law — the rights of partners in specific partnership property — could be overcome by getting rid of the idea that partners hold partnership property as joint tenants with modifications and giving to the co-ownership incidents which fit in with the objects leading business men to form partnerships.

It should also be added that those with the largest practical experience present were opposed to regarding the partnership as a "legal person" because of the effect of the theory in lessening the partner's sense of moral responsibility for partnership acts.

The Committee on Commercial Law reported the result of the special conference to the Conference of Commissioners. The discussion before the Conference was largely a repetition of that before the meeting of experts. Thereafter the commissioners proceeded on the theory of the present Act. In Section 25 the partners are stated to be co-owners of partnership property, holding as tenants in partnership. The legal incidents of this tenancy as set forth in the Act may be summed up as follows: A partner has a right to possess specific partnership property for a partnership purpose, and for a partnership purpose to assign his rights in it in connection with the assignment of the rights of his partners; but he has no right or even power to assign his rights in specific partnership property separately from the rights of his partners, and therefore his creditors have no power to levy on or sell such rights. On the death of a partner his rights in specific partnership property pass to the surviving partners — or if he is the last surviving partner, to his executor — and are not subject to dower, courtesy, or allowance to widows, heirs, or next of kin. It is submitted that these legal incidents correspond to the practical necessities of the partnership relation, and that with the straightening out of the chief confusion in our existing law of partnership — the rights of the partner in specific partnership property — the chief reason for the adoption of the legal-person theory disappears.

Mr. Crane does not deny that the difficulties heretofore surrounding a partner's rights in specific partnership property are solved by the Act as drafted. Indeed, in his second criticism, which is that the Act does not explicitly adopt either the aggregate or legal-person theory, he declares that Section 25, as well as other sections of the Act in which existing confusions are corrected, produces its

good results because its provisions show an adoption, though an unconscious adoption, of the legal-person theory.

Having stated the reason why the commissioners have embodied in the Uniform Act the prevalent common-law or aggregate theory of the nature of a partnership, let us examine the three arguments, or rather statements, advanced by Mr. Crane in his article tending to favor the legal-person theory. These are:

First. That while the majority of textwriters and courts proceed on the aggregate theory in dealing with many problems arising out of partnership transactions, courts have in numerous cases been forced to accept and apply the entity (legal-person) theory.²²

Second. That there are decisions not expressly based on the entity (legal-person) view of the nature of the partnership, but not to be reconciled with any other view, and therefore unconsciously applying it.²³

Third. That legislators having occasion to deal with the partnership incidentally, while legislating for some purpose other than that of codifying the law of partnership, naturally treat the partnership as a legal person, the subject of rights and duties like a natural person or corporation.²⁴

From the first two propositions he concludes, that "the courts have been consciously or unconsciously tending toward the entity (legal-person) theory, and it is not unreasonable to expect that it may be eventually openly accepted and consistently applied, if courts are not hindered in so doing by legislation."

Whether the conclusion is warranted from any two or all of the statements is immaterial unless the statements themselves are warranted by the facts. In order to ascertain this the evidence in their support given by Mr. Crane must be examined.

The only evidence given in support of the first statement, that to solve many problems arising out of partnership transactions the courts have been forced to accept the legal-person theory, is the citation of a number of cases in which Mr. Crane says: "the courts for the purpose of reaching their decisions avowedly recognize the partnership as a legal person."²⁵ He does not give the

²² 28 HARV. L. REV. 766.

²³ *Ibid.*, p. 767.

²⁴ *Ibid.*, p. 768.

²⁵ *Ibid.*, p. 766. He also cites a statement of Jessel, M.R., made in the course of his opinion in *Pooley v. Driver*, L. R. 5 Ch. Div. 458, 476 (1876): "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence

facts of the cases cited. When they are examined it is found that while the courts deciding the cases, in whole or in part, base their conclusion on the legal-person theory, the cases themselves fall into two classes: first, those in which the same conclusion as that arrived at by the court can also be reached under the aggregate theory as set forth in the provisions of the Uniform Act; and second, those in which the conclusion, due solely to the conscious adoption of the legal-person theory, is inequitable and unjust. The result of this analysis of the cases cited by Mr. Crane, if correct, not only destroys the statement in support of which they were cited, but is in itself a strong argument against regarding the partnership as an artificial legal person. The writer has, therefore, set forth in a note the facts of each case cited so as to enable the interested reader to judge for himself the correctness of his conclusions.²⁶

of the firm as a separate entity from the existence of the partners." Jessel himself explains the reason for his statement by saying: "If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity" (p. 476). In spite of a very proper and natural respect for the learned Master of the Rolls, it has doubtless occurred to many readers of his opinion, as it has to the writer, to ask "Why not?" Why is it necessary to invent a legal person for whom the partner may be agent, when the fact that a man acts for himself as principal and as agent for his partners as his co-principals naturally results in a joint obligation of all the partners?

²⁶ *Analysis of Cases Cited by Mr. Crane in Support of Statement that Courts in Dealing with Many Problems Arising Out of Partnership Transactions have been Forced to Accept and Apply the Legal-Person Theory of the Nature of a Partnership.*

Lacey v. Cowan, 162 Ala. 546, 50 So. 281 (1909). This was a bill in equity by the trustee in bankruptcy of a partner to obtain the proceeds of the sale by the partners of partnership property, which proceeds the complainant alleged had been fraudulently placed by the partners in the hands of the respondent. The court dismissed the bill for want of equity. The same result would be necessarily reached under the Uniform Act. A partner has no right to possess partnership property except for a partnership purpose (Sec. 25 (2a)). Therefore, the trustee in bankruptcy of one, but not all the partners, has no right to possess such partnership property for the purpose of using it to pay the separate debts of the partner. Again, he has no right to possess partnership property for the purpose of paying partnership creditors, because such use is in effect winding up the partnership and, while the bankruptcy of a partner dissolves the partnership (Sec. 31 (5)), the partners not bankrupt have a right to wind up partnership affairs (Sec. 37). If the other partners consented to the trustee's administering partnership property, nevertheless, under the legal-person theory there would be an insurmountable objection to his doing so. A trustee in bankruptcy is not able to administer the fund to which his bankrupt has no title for the purpose of paying debts which are not his bankrupt's debts. Under the aggregate theory and

Mr. Crane's second statement is that there are decisions not expressly based on the legal-person theory of partnership, but not

the Uniform Act, however, the trustee with the consent of the other partners would be able to administer the partnership property for the purpose of paying partnership creditors, because partnership debts are under the Act the debts of the partners, and therefore the debts of the trustee's bankrupt. And it is submitted that there is no equitable reason why, with the consent of the other partners, partnership property should not be used by the trustee of the bankrupt partner to pay his debts to his partnership creditors.

Jones v. Bliss, 45 Ill. 143 (1867). A. and B. were partners. A. assigned all his interest to B., "including book accounts." One of the book accounts was a debt due by A. to the partnership. Held that B. could collect this debt from A. by a bill in equity. The only point at issue was the intent of the parties. By "book accounts," did they mean to include this account against A.? If they did, then A. had promised for a good consideration to pay B. the amount stated in the account, and if any technical objection existed to its collection at law, B. should be allowed to bring a bill in equity. It is submitted that so far from the legal-person theory of partnership being necessary to the decision, it only seems to confuse the issue which, as stated, is the intent of the parties. If a partner indebted to a partnership does not owe the debt to himself and partners acting for their common business enterprise, but owes a distinct "legal person," then "book accounts" of the partnership in this case necessarily include an account against a partner on the books. Thus the issue which should be decided by the real facts and intent of the parties is decided by the legal fiction of a separate partnership legal person. The case is only one of many, some of which are given in the text, by which the fiction of the legal person tends to foreclose a discussion on the real issue involved.

Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459 (1899). A. and B. were partners engaged as merchants in the sale of hardware and implements. A. entered a chattel mortgage "upon his individual one half interest in the stock of hardware and implements." Held, that this mortgage did not attach to the partnership property, but only to A.'s interest in the surplus remaining after the payment of firm debts. The same result would have been reached under the Uniform Act. Section 25 (2b) provides that a partner's right in specific partnership property is not separately assignable. Section 26 declares that a partner's interest in the partnership is his share in the profits and surplus. This interest is assignable (Sec. 27). Both under the separate legal-person theory, as under the Uniform Act, the only debatable question in the case cited is whether A. did, by attempting to execute a mortgage on one half his interest in partnership property, in effect mortgage one half his interest in the partnership.

Lansing v. Bever Land Co., 158 Ia. 693, 138 N. W. 833 (1912). The Iowa Code, 1897, § 3468, provides: "Actions may be brought by or against a partnership as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such may be enforced against the partnership property, or that of such members as have appeared or been served with notice. A new action may be brought, against the members not made parties, on the original cause of action." A. and B. were partners. Suit was brought against the firm and judgment obtained. Execution on this judgment was levied on the separate properties of the partners. A bill in equity to cancel this levy was sustained. The case is thus one interpreting a local procedural statute. It will be, however, of interest to inquire whether the statute as worded is inconsistent with

to be reconciled with any other view, and therefore unconsciously applying it. In support of this statement he cites several legal

the aggregate theory of partnership. It declares that a suit can be brought against the partners. This is unquestionably inconsistent with the legal-person theory. Dean Ames in drafting an act on the legal-person theory was consistent when he expressly provided that "actions upon claims in favor of or against the firm must be brought in the firm name." Draft 1, Sec. 5 (4); Draft 2, Sec. 4 (4). The fact that the statute also permits the suit to be brought in the partnership name does not make the statute as a whole consistent with that theory. Why should not the law provide, for purposes of convenience, that persons carrying on business under a common name may be sued under their common name? When they are sued in their common or partnership name, whether judgment should be levied on the separate properties of the partners is a practical question, which should not be decided one way or the other because of any legal fiction. There is much to be said for the provision embodied in the Iowa statute that the judgment shall bind the separate property of those partners only who have appeared or been served with notice. The provisions of this statute, though perhaps more happily expressed, were embodied in the procedural section which was part of the seventh draft of the Uniform Act submitted to the commissioners. The section was omitted in subsequent drafts because of the policy of the commissioners not to embody any procedural provisions in their commercial acts. The court in the case under discussion are apparently convinced that a partnership is a legal entity. Consequently they interpret the words "such members as have appeared" as if they read "such members as have appeared to defend in their personal capacity rather than as agents of the partnership" (p. 704). The remarks are *dicta*, but if practically applied are apparently calculated to do much injustice, as they appear to permit a partner actively to defend a suit against the partnership and yet prevent the judgment being levied on his separate property.

Cross v. Burlington Nat. Bank, 17 Kan. 336 (1876). The court applies the well-known principle, that while a partner on entering a firm is not liable for prior debts, yet very slight testimony will be sufficient to prove an assumption by him of those debts. This is in entire accord with the theory on which the Uniform Act is drawn. That the business formerly conducted by one or more persons is now carried on by that same person or persons in association with a person not formerly a co-owner of the business, is a fact. The recognition of the fact, however, does not involve the assumption that the business is conducted by an artificial person. Again, the partner entering an established business should in the words of the court share in its (past) obligation as well as its property and business. Thus Sec. 17 of the Uniform Act changes the existing rule that an incoming partner is not liable for existing debts by providing that "A person admitted as partner into an existing partnership is liable for all the obligations of the partnership arising before his admission, as though he had been a partner when such obligations were incurred except that this liability shall be satisfied only out of partnership property."

Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026 (1909). The court held that a suit could be maintained against a partnership for a slander uttered by an agent of the firm acting for and under the direction of the partners. What this has to do with the theory of the legal nature of a partnership is not at first easily perceived. Whether an obligation arising out of a tort committed in the course of carrying on a business owned by two or more persons should be regarded as an obligation to be sued on and collected in the same manner as an obligation arising out of a contract

rules pertaining to partnership law which we will proceed to examine, for convenience designating them by number.

made in the business is an important practical question. If the partners are liable for the torts of their agents, why should not the obligation to pay for the injury be regarded in the same way as any other obligation created in the course of the conduct of the business? To decide the question in the affirmative it is not necessary to affirm or deny either that a partnership is a legal person or that it is an association of persons each having a distinct legal personality. The court in the case under discussion took the position that two persons cannot be sued jointly for the same slander, on the ground that the words of one are not the words of the other. The court admits that one man can be sued for a slander uttered at his direction by his agent. Why then, when an agent acts by direction of two, the two principals cannot be sued jointly is not clear. Having, however, created an unnecessary difficulty by taking the position that an agent cannot in committing the act of slander act for two jointly, they escape from the difficulty by the fiction that the slanderer in the case before them did not act at the direction of the partners, which was the actual fact, but by the direction of a fictitious legal person.

Woodman v. Boothby, 66 Me. 389 (1876). I have shown in the text that this case does not involve the assumption that a partnership is a legal person. See page 187.

Robertson v. Corsett, 39 Mich. 777 (1878). A. and B. owned undivided interests in land. They entered into business with C., the business having the use of the land. A. mortgaged his undivided interest in the land to D., the mortgage merely describing the land by metes and bounds. The issue in the case was whether certain machinery put in to carry on the business was so far attached to the premises as to become a part of it, and therefore included in the mortgage, or whether it remained partnership property. The court decided that this was a question of fact depending on the intent of the parties. In deciding that some of the machinery was not covered by the mortgage it was not necessary to decide that the partnership was a legal person. Had the business been conducted by A. alone, the question whether the intent was to mortgage the machinery would have been essentially the same — namely, was the machinery merely there for the purposes of the business, or was it so identified with the land as to be a part of it?

Clarke v. Laird, 60 Mo. App. 289 (1895). A., B., and C. were members of one firm; A. and B. of another. The second firm sold and delivered goods to the first firm. Creditors of the second firm had the goods attached and seized. Held in an action of replevin that the attachment and seizure were unlawful. The same result would be reached under the Uniform Act. Sec. 25 (2c) declares that "A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." The existence of two partnerships is a fact. Each association had its property. There was no reason why goods used by A. and B. in the first business should not become part of the stock of the business of A., B., and C. if the parties so desired. The transfer having been effected, it is proper to speak of the goods as the property of the first partnership. The creditors in the attachment were not creditors of that partnership. To recognize two businesses conducted in part by the same persons as being two distinct businesses carried on by distinct associations is to recognize a fact. As pointed out in the text, page 161, the recognition of this fact is a very different thing from saying that each partnership is a separate legal person.

Clay v. Douglas County, 88 Neb. 363, 129 N. W. 548 (1911). A statute provided that "The property of banks or bankers, or other companies, and merchants . . . shall

First. "A creditor holding a security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm."²⁷

be listed and taxed in the county . . . where the business is done." *A. et al.*, all non-residents of the state, were partners. They maintained an office in Omaha, B. being the resident agent. B., acting for the partnership, loaned money on notes. The notes were made payable in Chicago, and were kept in the partnership office in that city, but as a matter of fact payment was made to B. in Omaha. The question at issue was whether the credits represented by these notes were taxable in Nebraska. It is clear that as the state had a right to tax these credits, the decision of the question depended on the wording of the state statutes. The court held that the partnership was subject to taxation on these credits although they intimated that had the notes been owned by a non-resident natural person such natural person might escape taxation (p. 366). This conclusion is reached on the ground that a partnership is an artificial person and that an artificial person has a residence wherever it has a place of business. It is submitted that to impose a tax on property owned by non-residents who happen to be associated in business, which would not be imposed if the business was owned by one person, the statutes of the state imposing no special rules in regard to the taxation of credits owned by partnerships, is an arbitrary and unjust result. This unjust result would never have been reached had it not been for the legal fiction of the partnership as a separate legal person.

Curtis v. Hollingshead, 2 Green (N. J. L.) 402 (1834). The question at issue was whether under the Attachment Act a creditor of a firm can sue out an attachment against a non-resident or against an absconding partner if the other partners reside in the state. This question the court, in an elaborate opinion, decided in the negative. At the end of this opinion they answered an argument of counsel to the effect that "each partner is a debtor, and his interest in partnership effects, at least after the debts of the firm are paid, is his separate property, and therefore liable to be attached," by saying that each partner is not a debtor to the whole amount of the partnership debt, because "a partnership is considered in law as an artificial person" (pp. 409, 410). The Act under discussion treated joint debtors and partners in the same manner. N. J. REV. LAWS, 1800, p. 366, ACT, March 8, 1798 (Sec. XXVII). If the only reason for not allowing the attachment in this case was the theory that the debts of a partnership are not the debts of the partner but of a fictitious legal person, then the decision, without any warrant from the wording of the Act, produces the following results: When two joint debtors not partners own in common property, and one leaves the state, the creditor may attach the property held in common; but if the debt is contracted in the course of their partnership business by the same persons, and one leaves the state, property held for the purposes of the business cannot be attached. Ingenuity in the shape of a legal fiction of an artificial partnership legal person is responsible for this anomalous result.

Peyser v. Myers, 135 N. Y. 599, 32 N. E. 699 (1892). *A. et al.* were partners. They were insolvent; they were indebted to C. B. was admitted as partner, not contributing any capital. E. *et al.* extended credit to the partnership after B.'s admission. The partnership assigned to T. for the benefit of creditors, directing that C. be paid first out of the assets. E. *et al.* attacked this preference, on the ground that C. was not a

²⁷ This and the other legal rules cited by Mr. Crane in support of the second statement will be found in 28 HARV. L. REV. 767, 768.

Under the Bankruptcy Act if a creditor holds property of the bankrupt as security, he must sell it and prove only for the balance,

creditor of the firm that assigned. The court sustained the preference on the ground that the property of the old firm on B.'s admission became the property of the new firm, and that under the facts of the case it was the understanding of B. and his partners that the debt to C. was assumed by the new firm. As pointed out in connection with *Cross v. Burlington Nat. Bank*, 17 Kan. 336 (1876), under the Uniform Act the same result would be reached without the necessity of proving that the incoming partner had agreed to pay the existing debts of the business, an assumption which even in this case is somewhat strained when we remember that we not only have to assume that the incoming partner agreed to permit the property in the business to be applied to the payment of existing debts, which is a natural assumption, but that we also assume that he agreed that his separate property could be taken for that purpose. Section 17 of the Uniform Act, as stated, makes the incoming partner liable for existing debts, but provides that this liability shall be satisfied only out of partnership property. Again, Sec. 41 (1) provides that "When any new partner is admitted into an existing partnership . . . if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business"; thus, as pointed out, producing the exact result reached by the court. Although in this case the court does not even reach its conclusion on the ground that a partnership is a legal person, they do explain that the reason why the separate creditors of a partner have only the debtor partner's rights in the profits after partnership creditors are paid is that "the *corpus* of firm property belongs to the firm as an entity" (p. 604). As pointed out in the text (see page 173), the provisions of Sec. 25 of the Uniform Act reach the same result, not by the assumption of a partnership legal person, but by giving the partner's right as cotenant in specific partnership property the legal incident of being assignable only in connection with the assignment of the rights of all the partners.

Clarke v. Slate Valley R. R. Co., 136 Pa. St. 408, 20 Atl. 562 (1890). In this case the court declared that ordinarily the majority of the partners have a right to select an attorney to prosecute a partnership claim. It is hardly necessary to point out that the legal-person theory of partnership is not necessary to the decision. Under any theory of the nature of a partnership, the real issue in such a case is whether the act is one which, in view of "the manner in which the business of a firm must be conducted" (p. 414), the majority of the partners, even against a protesting minority, should be allowed to do. To discuss the abstract question whether a partnership is a legal person separate from the partners tends, in this as in all similar cases, to cloud the real issue, by withdrawing the mind from the necessity of looking at the facts of partnership business and the way in which it can practically be conducted.

Trumbo v. Hamel, 29 S. C. 520, 8 S. E. 83 (1888). A. and B., partners, made an assignment of all their partnership property for the benefit of partnership creditors. They each had a small amount of separate property and separate creditors. After the assignment, D., a partnership creditor, secured a judgment and attempted to obtain a prior lien on the sum realized by the assignee from the sale of the property. The lower court permitted this, one of the grounds being that the assignment was void as a partial assignment in that it did not include the individual property of the partners. Two of the three judges, while not affirming that a partial assignment for the benefit of creditors is always void, answer the objection to the assignment by saying that "a co-partnership is a distinct entity, entirely separate from that of any of its

or he must surrender the security. On the other hand, if he holds as security for his claim against the bankrupt, property of a third

members" (p. 526). They also point out that the assignment was openly made, and that if there was individual property of the partners, the assignment left it, as before, liable to creditors. The assignee on the payment of the partnership creditors in full was, by the terms of the assignment, to return the surplus to the partners. It is submitted that this provision of the assignment raises the real issue in the case, which is whether the assignment was a hindrance to the creditors of the assignors not included in its terms. This can only be ascertained by the answer to the inquiry: What are the rights of the separate creditors in partnership property? To this inquiry both the legal-person theory and the provisions of the Uniform Act give the same answer. Under the legal-person theory, until all the partnership debts are paid, and the surplus divided among the partners, the separate creditors cannot attach partnership property. All they can do is to attach the partner's interest in the partnership. Under the Uniform Act there is precisely the same result. Sec. 25 (2c) provides that the partner's right as co-owner of specific partnership property is not subject to attachment or execution on the claims of separate creditors, and under Sec. 28 (1) his interest in the partnership may be attached (charged) by any separate creditor.

Good v. Jarrard, 93 S. C. 229, 76 S. E. 698 (1912). A., the owner of land on which was a house, leased the premises to B. and C., partners, for the purpose of their business, the lessees taking possession. Before the expiration of the lease, B. entered into an executory contract for the purchase of the property, the money to be paid on the delivery of an unencumbered title. Prior to the execution of the contract, and while B. and C. were in possession under the lease, the house burnt down. The court decided that the loss should fall on the vendor. They refer to the fact that the vendor was still exercising the rights of owner, and in this connection assert that B. "was not in possession as vendee, but in his representative capacity as a firm, which is a distinct entity from the members of the firm, in their capacity as individuals" (pp. 236, 237). It is manifest, however, that the legal-person theory to which the court gives adherence is not necessary to the conclusion. Even if we assume that the court would have held that the loss falls on the vendee when he is in possession, that possession would have to be possession as owner under the contract of sale; and whether we regard B.'s possession as the possession of an agent for a legal partnership person, or for himself and C. as partners in a particular business, he certainly was not in possession as owner under the contract.

Pierce's Adm'r v. Trigg's Heirs, 10 Leigh (Va.) 406 (1839). The legal title to certain real property, bought with partnership funds, was held in the names of the two partners. One died leaving infant heirs. The survivor brought a bill against the heirs compelling a sale for the benefit of the partnership. On the heirs attaining their majorities they attacked this sale. The court applied the rule that, though title to partnership real estate held in the name of a partner passes to his heirs, the beneficial interest passes to the surviving partner or partners. They, therefore, sustained the former decree. The result under the Uniform Act would, of course, be the same. Section 8 provides that "All property . . . acquired by purchase or otherwise on account of the partnership is partnership property." One of the judges who delivered an opinion in the case asserts that the partners during their lives held the legal title in trust, not for themselves as individuals, but for the partnership as an artificial person (p. 423). It is hardly necessary to point out, however, that the conclusion, which is that the property could be sold on the death of one partner by the survivor for the

person, he can obtain a dividend on the full amount of his claim from the bankrupt's estate and also retain the property of the third person to the extent required to pay his claim in full. It will be noted that the only difference in the facts of the two cases is that in the first case the creditor is using property which would otherwise go to the creditors generally, and in the second case he is not. This difference in the facts justifies the difference in the rules. Now under the Bankruptcy Act the partnership creditors have priority in the partnership assets, the separate creditors of the partners priority in the separate assets. Does the partnership creditor who holds as security the separate property of a partner stand in the same position as a creditor who holds what is known as "outside security," that is, property of a third person? To this question the facts compel an affirmative answer. He does in so far as he is a claimant on the partnership funds. Therefore the courts have treated the partnership creditors holding the separate property of the partner as security as holding "outside security." This is not, however, because they have unconsciously adopted the theory that the partner and the partnership are distinct legal persons. It is because each class of the partner's creditors, the partnership and separate creditors, have priority on the joint and separate assets respectively; and therefore the partnership creditor does not take any of the property out of which he or his fellow partnership creditors are claiming dividends when he uses the security which he has received from the separate estate of the partner. There is, therefore, no more reason why the dividend out of partnership assets should be reduced if he retains such security than if he retains security received from a third person. The result is the same as it would be if the partnership were a distinct legal person; but that is a very different thing from saying that the result involves the unconscious recognition of the partnership as a distinct legal person. After the partnership creditors have exhausted the joint estate, and turn to the surplus, if any, of the separate estate of the partner, then it is a question whether the fact

benefit of the partnership, can also be reached on the theory of the Uniform Act, which is that the partners hold the partnership property with the understanding that it shall be applied to partnership purposes before being applied to any purpose not connected with their mutual enterprise, and that on the death of a partner the survivors shall have a right to take the property and sell it for the purpose of winding up partnership affairs.

that the partnership creditor has already used the separate property of the partner to pay in part his claim should or should not reduce the amount for which he could otherwise claim. The determination of this last point does not involve any question of the recognition of the partnership as a legal person, but how far it is practically advisable to permit one partnership creditor to secure an advantage over other partnership creditors by his diligence in obtaining the separate property of a partner as security for his claim.

In connection with the foregoing discussion we may note one of the fundamental difficulties with the theory that a partnership, while not a natural, is a legal person. It forces us to decide the question at issue, in this case, whether the security is "outside security" — not because of the practical reason that the partnership creditor is using property which would in any event not go to swell the dividends which he and creditors of his class would receive out of partnership property, but because of a legal fiction that a partnership is a person.

Second. "Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the joint estate."

As already pointed out in another connection, just as a man may engage in two distinct businesses, which are distinct because as a matter of fact he keeps them separate, so two or more persons may engage jointly in two or more distinct businesses. Suppose A. and B. jointly engage in two distinct businesses. They become insolvent. Should or should not the properties used in both businesses be regarded as a single fund, or should they be kept separate and distinct, and the property devoted to each business first applied to the payment of the creditors who have extended their credits in transactions connected with that business? Here again we have a purely practical question: Shall the law in the distribution of the joint assets follow the partners themselves in keeping their joint assets devoted to each particular business distinct, or shall the law throw all joint assets into one fund and give all joint creditors an equal claim on that fund? The writer's belief that the courts have correctly decided this question is strengthened by the fact that in arriving at their conclusion they have apparently looked at the facts as they are, and that therefore their decision is not due to the mechanical application of a legal fiction.

Third. "When a firm signs a note as co-makers with an individual the liability of the firm is that of one person for purposes of contribution."

Perhaps a better way to state the rule without assuming the point at issue, which is whether the rule unconsciously assumes that the partnership is a legal person, would be to say, that for the purpose of contribution the liability of the firm is no greater than the liability of the individual.

The facts stated show a situation in which partners as a partnership group take part in a transaction with one or more persons acting separately. Suppose A., B., and C. are desirous of obtaining money on a note. B. and C. are partners. The three agree that they will sign the note "A.," and "B. and C. partners." Unless there is other evidence rebutting the inference, it is hardly possible to assume that the parties to the transaction did not intend to contribute toward the payment of the note, one half by A. and one half by B. and C.; and furthermore they have indicated that the act of B. and C. in signing the note was a transaction in their business as partners. To say, therefore, that for purposes of contribution the liability of the partnership is the same as A.'s liability is only to carry out the apparent intention. The legal-person theory of partnership is not necessary to the result.

Fourth. "A bill bearing the names of two firms engaged in two distinct activities, but composed of the same members, is signed by two persons."

Mr. Crane cites one case only, *Second National Bank v. Burt*,²⁸ in support of the proposition. That was an action brought by a bank against a former cashier to recover damages because of loss due to the defendant's negligence, one of the grounds being that acting for the bank he had discounted certain bills in violation of a section of the by-laws which provided: "To entitle any paper to be discounted, there must be two names of responsible persons liable upon the same . . . the name of a firm being considered one person."²⁹ The bills in question were drawn by one firm on another, both firms being composed of the same persons. The court held, that even if the defendant knew that the firms were composed of the same individuals, "he was justified in supposing that they

²⁸ 93 N. Y. 233 (1883).

²⁹ *Ibid.*, p. 239.

constituted two firms.”³⁰ This conclusion no more involves the assumption that each firm was a distinct legal person than the wording of the by-law. Two or more persons as a matter of fact carry on in association two distinct lines of activity; that is, form two distinct associations or partnerships. In view of the wording of the by-law the conclusion reached by the court was unavoidable. They were two distinct partnerships; but as already pointed out in another connection, it does not follow that the court’s recognition of that fact involves their recognition as a logical necessity of the legal theory that the business of each association was carried on by the partners as agents of two distinct legal personalities.

Fifth. “A promissory note given by a firm to a partner or *vice versa*, or by one firm to another having a common member, is not enforceable at law by the original parties because of procedural difficulties, as the same person cannot be both plaintiff and defendant. But the contract is valid and may be enforced if the procedural difficulty is removed, as by an assignment to a third person, even for the benefit of the assignee. So in the case of a balance of account due from the firm to a partner. A promissory note given by a firm to a partner may be enforced, though transferred after maturity, retransferred, and again negotiated after maturity, when it would be extinguished if the firm was not personified.”

The writer treats all these rules and illustrations together because he thinks that we shall find that their use by Mr. Crane to indicate an unconscious adoption of the legal-person theory is in each case due to the same mistake on his part. A close examination of his language is necessary to show why he regards the rules given as illustrations of the unconscious personification of the partnership. Indeed one statement, namely, that a promissory note given by a firm to a partner or *vice versa* cannot be enforced by the original parties to it, because the same person cannot be both plaintiff and defendant, is a distinct recognition that the partnership is an aggregate of persons and not an artificial legal person of which the partners are agents. He does, however, point out that the contract represented by the note is not void and may be enforced if the note is assigned to a third person and the proced-

³⁰ 93 N. Y. 233, 244 (1883).

ural difficulty removed. It therefore is apparent that recognition of the validity of the contract between the partner and the partnership is that which he regards as the unconscious assumption that a partnership is a legal person. Why this recognition of the validity of the contract should involve such an assumption is not clear. Surely Mr. Crane does not contend that a person cannot be interested on both sides of a contract. Take a case involving such a note as he describes. A., B., and C. are partners. A. holds as payee a note executed in the partnership name. This on its face indicates that A., B., and C. have agreed that on a day certain, or on demand, A. shall be paid a sum of money out of partnership funds, or failing such funds, B. and C. will pay A. their share as partners. The form of the obligation shows that it is understood that A. has a right to assign it to a third person, and that if he does so it will be treated as any other partnership debt. Until he assigns A. is unquestionably interested on both sides of the contract. The dual interest is a fact, not a legal theory. Again Mr. Crane can hardly contend that, unless by a fiction we call the partnership a legal person, the fact of A.'s interest on both sides of the contract makes the contract illegal. There is nothing illegal about the transaction just given or any similar transaction. As Mr. Crane himself points out, the reason A. cannot as payee enforce it is purely procedural. There is no reason in morals why A. should not enforce the note unless by so doing he competes with his own partnership creditors.

The situation arising when the partner to whom the note is payable assigns to a third person is exactly stated by Chief Justice Shaw in *Pitcher v. Barrows*.³¹ Speaking of a note of a partnership composed of five given to a partnership composed of two of the five, he says:

"It was a promise by five to pay to two of their own number on their order, and as an original contract it could not be enforced at law, for the obvious reason that the two promisees could not sue themselves as promisors, and the other three promisors were not liable without them. But this is a difficulty attending the remedy only, not the right; and when the note is endorsed by those having the right to endorse it,

³¹ 17 Pick. (Mass.) 361, (1835). See also: *Heywood v. Wingate*, 14 N. H. 73, 78 (1843); *Thayer v. Buffum*, 11 Met. (Mass.) 398, 399 (1846); *Woodman v. Boothby*, 66 Me. 389, 391 (1876).

to one against whom there is no such exception, whereby he acquires a legal interest and right to sue in his own name, the difficulty vanishes." ³²

The last statement of this fifth rule is that a promissory note given by a firm to a partner "negotiated before maturity, retransferred and again negotiated after maturity may be enforced when it would be extinguished if the firm were not personified."

Again it is not clear why Mr. Crane draws this inference, unless we assume that he either believes that a person cannot be interested on both sides of a contract, or that when he is the contract is always illegal except where the illegality is overcome by a fiction: one alternative being false in fact, the other having no foundation either in morals or law. Had, therefore, the authorities cited by Mr. Crane supported his statement, it would not, any more than the other illustrations, prove that the partnership was personified. But the only case cited in support of the text is *Woodman v. Boothby*.³³ This was a case in which a note was given, not by a firm to a partner, but by a partner to a firm. One Boothby placed his name on the back of the note in blank. The note was then negotiated. The maker not paying at maturity, the other members of the partnership paid the note, presumably either out of separate or firm funds, and then again negotiated it. The court decided

³² 17 Pick. (Mass.) 363.

³³ 66 Me. 389 (1876). After the citation is: "But see *Easton v. Strother & Conklin*, 57 Ia. 506, 10 N. W. 877 (1881); *Deavenport Co. v. Green River Dep. Bank*, 138 Ky. 352, 128 S. W. 88 (1910)." In neither of these was a note given by a firm to a partner. *Easton v. Strother & Conklin* stands for the proposition that a partner cannot by purchase become the owner of an outstanding note payable by the partnership, and *Deavenport Co. v. Green* holds that one of two obligors on a note cannot purchase it, citing *Gardner v. Salyer*, 1 Ky. L. Rep. 420 (1880), for the statement that "When a firm note comes into the hands of an individual member of the firm by assignment, this operates as an extinguishment of the note, and his assignee will take nothing by such an assignment. He cannot sue upon the note, and he can pass no such right to another" (p. 356). See apparently *contra*, *Kipp v. McChesney*, 66 Ill. 460 (1872). The rule which prevents a partner from doing anything with firm paper held by a third person except pay it is in accord with the sound policy of preventing a debtor speculating with his own debts, although the decisions supporting the rule, as Mr. Crane apparently recognizes, are not easily reconciled with the theory that the debts of the partnership are not the debts of the partners, but rather the debts of a partnership legal person. The absurd assumption that a partnership can be bankrupt, although there are one or more solvent partners, is due to the fact that some of the sections of the Bankruptcy Act lend color to the assertion that it proceeds on the legal-person theory. See *In re Bertenshaw*, 19 Am. B. R. 577, 588 (1907).

that the holder could recover from Boothby, as a joint maker, thus applying the rule in Maine prior to the adoption of the Uniform Negotiable Instruments Act, that an anomalous indorser is a joint maker. When the partnership as indorsers paid the indorsees, if the only reason they could not sue the partner and Boothby at common law was procedural, this reason did not bar their subsequent assignee. If, on the other hand, the note was made by the partner to enable money to be raised for the partnership, there being no intention that the partner should pay the sum mentioned on the face of the note into the partnership funds, then both the partner and Boothby as joint makers had an equitable defense to any claim of the partnership, and this claim could be set up against an assignee of the note who took it after maturity. The court decided that the note was not given for the accommodation of the firm, but for a debt due by the partner to the firm.

It is interesting to note that the court in its opinion shows the confusion of thought which the idea of a partnership as a fictitious person tends to produce. It points out in one paragraph the fact that while the note was held by the firm no action could be brought on it, a conclusion which is necessarily based on the assumption that a partnership is an aggregation of persons and not a legal person, distinct from the partners, and then in the very next sentence it asserts that "a firm is to be regarded as a distinct personality" as a reason for regarding a note given by a firm to a partner as valid.

Sixth. "A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt."

Mr. Crane cites cases for and against this proposition. It may, however, be doubted whether there is any real conflict. The question in each case should depend on the intent of the parties to the transaction. If that intent is not formally expressed in words all the circumstances should be taken into consideration. These circumstances might in one case indicate that by "any sum for which he became indebted" sums for which he became indebted as a partner were intended; while in another case the circumstances would compel an opposite conclusion. The legal-person theory of partnership would compel the conclusion in every case of this

class that partnership debts are excluded. Thus, as in other cases, the theory would prevent the court from ascertaining the intent of the parties from the facts.

Seventh. "Two firms consisting in part of the same members are joined in insolvency proceedings. A non-resident creditor who has proceeded against one is not barred thereby from later seeking to enforce a claim against the other."

A single case, *Pattee v. Paige*,³⁴ is cited for the proposition, and that seems to have been decided by a majority of the court only. It is difficult to understand how the affairs of one partnership could have been settled without ascertaining the value of the interest of the partners, who were members of the other partnership, in that other partnership by winding up its affairs.³⁵ It has been found impractical to settle affairs of a partnership without at the same time settling the separate affairs of the partners, for the reason that the partnership creditors have a right to be paid out of the separate assets of the partners after their separate creditors are satisfied. To insist that a non-resident who proves his claim against one partnership should also prove his claim against the other partnership included in the same insolvency proceedings or have his claim against the second partnership barred, would not on its face be an injustice to such non-resident. This is said without any intention to criticise the conclusion reached by the court in the case cited. In any event, however, the recognition that there are two distinct businesses, one run by A. and B. and the other by A., B., and C., which is all that is involved in the court's decision, is a recognition of a patent fact, which, as has been already pointed out, does not involve the necessity of saying that each business is conducted by a legal personality distinct from the legal personalities of the partners.

Eighth. "One partnership having joined with natural persons to form a second partnership, and both being insolvent, the assets of the first partnership are to be applied to the payment of its own debts, then to the payment of those of the second partnership of which it was a member."

³⁴ 163 Mass. 352, 40 N. E. 108 (1895).

³⁵ The difficulties of attempting to put a partnership into bankruptcy without settling at the same time the separate affairs of the partners are familiar to the profession.

Here again Mr. Crane's use of this rule as an example of unconscious adoption of the legal-person theory of partnership shows a failure to perceive that the recognition of the fact that a partnership is a group of persons acting together for a definite purpose, with activities as partners distinct from their activities not connected with the partnership, does not necessarily involve the assumption that the partners, when carrying on the partnership, are in law acting as "a distinct legal personality." Let us look at what actually takes place in a case illustrating the rule. A., B., and C. are in partnership. They join with D. to form a new partnership. Their understanding is that the act of A., B., and C. in joining in the second contract is an act which they do jointly as partners in the first partnership, and that the second business is distinct from the first. As A., B., and C. regard their act in joining the second partnership as an act which they do jointly as partners in the first partnership, they impliedly agree among themselves that their obligations as partners in the second partnership to make good any deficiency of partnership assets is an obligation to which the property of the first partnership will be devoted before any division is made of the property among themselves. In the rule given by Mr. Crane the first partnership has apparently more than enough to pay all its obligations except its obligations to make good a deficiency of assets of the second enterprise. It is in accord with the understanding of the parties that the property of the first partnership should be used first to settle the debts contracted directly in the carrying on of its business, and that the surplus should be devoted to pay the joint obligation of A., B., and C. to make good any deficiency in the property of the second partnership. The case cited by Mr. Crane in support of his illustration³⁶ merely applied to the understanding between the parties the principles of equity and of the Bankruptcy Act, that partnership creditors should be paid first out of partnership assets. It is true that the result is not in conflict with the theory that a partnership is a legal person; but it no more necessarily involves the assumption that a partnership is a legal person than any other application of the rule that partnership creditors should be first paid out of partnership assets involves such assumption.

³⁶ *In re Knowlton & Co.*, 196 Fed. 837 (1912).

Ninth. "A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm."

I have already dealt with the subject of this illustration in dealing with Section 25 of the Uniform Act and the rights of a partner in specific partnership property.³⁷ As explained, the rule does not necessarily involve the conception that partnership property is owned by a legal person distinct from the partners. It is equally in accord with the theory on which the Uniform Act is drawn, namely, that the partners are co-owners of partnership property holding as tenants in partnership, an incident of this tenure being that a right of possession for a non-partnership purpose, or the right of assignment apart from the collective assignment of the rights of all the parties, does not exist. In some jurisdictions the sheriff is not subject to an action of trespass;³⁸ but he ought to be, because as representative of the separate judgment creditor of a partner he is using partnership property for a non-partnership purpose, something which the partner has no right to do.

This completes our examination of all the illustrations of the unconscious adoption by the courts of the theory that a partnership is a separate legal person. None of them necessarily involves that view of the nature of a partnership. They are no more than illustrations of the obvious fact that the activities of the partners as associated in partnership form a group of activities separate from their other activities.

Mr. Crane's third statement is that legislators having occasion to deal with the partnership incidentally, naturally treat it as a legal person.³⁹ In proof of this assertion he cites acts which allow a firm to sue or be sued in a firm name, or which require property to be listed for the purposes of taxation in a firm name, or which penalize a partnership as such for breaches of the Fish and Game or Anti-Trust Laws. But the habit of speaking of any association by the name the members apply to it is not proof that they or we regard the association as a distinct legal personality. It is therefore somewhat puzzling to understand why anyone should regard a right conferred by statute on the associates to sue or be sued in matters arising out of their common business in the name in which,

³⁷ *Supra*, p. 173.

³⁸ BURDICK, PARTNERSHIP, 273.

³⁹ 28 HARV. L. REV. 768-769.

for purposes of convenience, they carry on that business, as conclusive proof that those who voted for the statute treated the association as a distinct legal person. Neither is it easy to see why we must draw a similar conclusion from a statutory requirement that for purposes of taxation property used for the common purpose must be listed in the common name. So with the provisions of the Fish and Game or Anti-Trust Laws. In case a crime is committed by the partners in furtherance of their partnership business, the provisions of the statutes rightly make the money claim of the state, which is the punishment for the crime, a claim against the partners as organized to carry on partnership business. This is a recognition of a fact — the fact that the crime is committed in the carrying on of the common or partnership business. So a tort committed in the carrying on of the partnership business creates a similar claim in the person injured, and yet even Mr. Crane does not argue that this is any proof that the partnership is therefore considered a legal person. Thus Mr. Crane's examples given to support his statement that legislators "naturally treat a partnership as a legal person," like his illustrations to prove his statements tending to show the tendency of the courts to adopt the legal-person theory, are no more than illustrations of the fact that partners as associated in partnership carry on a group of activities which are separate from their other activities.

William Draper Lewis.

(To be continued)

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THE LAW SCHOOL. — The registration in the School on November 15 of each of the last twelve years is shown in the following table: —

	1904-05	1905-06	1906-07	1907-08	1908-09	1909-10
Res. Grad. . .	1	1	—	2	—	—
Third year . .	182	192	190	171	169	187
Second year . .	232	216	199	198	207	191
First year . .	285	243	243	280	244	311
Specials . . .	58	64	62	63	64	70
	<u>758</u>	<u>716</u>	<u>694</u>	<u>714</u>	<u>684</u>	<u>759</u>
	1910-11	1911-12	1912-13	1913-14	1914-15	1915-16
Res. Grad. . .	1	3	5	4	5	8
Third year . .	178	219	176	169	167	177
Second year . .	238	217	186	197	197	226
First year . .	296	289	287	260	288	308
Unclassified . .	82	76	84	64	68	66
Specials . . .	3	4	5	1	5	1
	<u>799</u>	<u>808</u>	<u>744</u>	<u>695</u>	<u>730</u>	<u>786</u>

With the exception of the five special students and seventeen men who have satisfactorily completed the work prescribed for the A.B. degree but

who have not actually received diplomas, all the men now registered in the School are college graduates. As four of the special students are graduates of law schools, there is at present only one man in the School who has not completed a college or law school course.

There are now in the School representatives from one hundred and forty-four colleges and universities, as compared with the same number last year and one hundred and forty-two the previous year.

The following table shows the geographical source from which the twelve successive first year classes have been drawn: —

	Massachusetts.		New England outside of Massachusetts.		Outside of New England.		Total in Class.
	Number.	Percentage.	Number.	Percentage.	Number.	Percentage.	
1907	92	32	44	15	150	53	286
1908	71	29	39	16	134	55	244
1909	71	29	34	14	138	57	243
1910	81	29	37	13	162	58	280
1911	72	29	33	14	137	57	242
1912	78	25	45	14	189	61	312
1913	65	22	32	11	200	67	297
1914	73	25	44	15	172	60	289
1915	59	21	34	12	194	67	287
1916	59	22	23	9	179	69	261
1917	65	23	29	10	194	67	288
1918	81	26	39	12	188	62	308

In the present first year class seventy-six colleges and universities are represented as follows: —

Harvard, 92; Yale, 28; Princeton, 25; Dartmouth, 18; Brown, 12; Williams, 7; University of Minnesota, 6; Bowdoin College, University of Georgia, Holy Cross College, 5; University of Missouri, Ohio Wesleyan University, University of Wisconsin, 4; Amherst College, Boston College, Clark College, Johns Hopkins University, Laval University, University of Nebraska, University of Texas, 3; University of Alabama, University of California, Carleton College, Catholic University, Colby College, Haverford, University of Illinois, University of North Carolina, Ohio State University, University of Pennsylvania, Pomona, Rutgers College, University of South Carolina, Tufts College, University of Vermont, Wabash College, 2; University of Arkansas, Beloit College, Bucknell University, Cambridge University (England), University of Colorado, Cornell University, Dalhousie, Dickinson College, Drake University, Drury College, Fargo, Fordham University, Franklin and Marshall College, Imperial University of Tokyo, Indiana University, Iowa Wesleyan University, Knox College, Lafayette College, Lake Forest College, Lawrence College, Lincoln University, Macalester College, University of Michigan, Morehouse College, Nebraska Wesleyan University, University of New Brunswick, Northwestern University, Ohio Northern, University of Rochester, St. Ignatius College (Cleveland), St. Lawrence University, Syracuse University, University of Toronto, Transylvania University, Trinity College (Conn.), Trinity College (N. C.), Union College, Utah Agricultural College, Wesleyan University (Conn.), West Virginia University, 1.

THE HARVARD LEGAL AID BUREAU. — It has been recognized as a grave defect in a system of technical law that its benefits are often available only to those who can meet the expense of hiring counsel. The legal aid bureaus, now established in all the larger cities, and designed to furnish free legal advice and assistance where it is most needed, are performing an important function in rendering the law of more general serviceableness. In the city of Cambridge this work has been performed faithfully, and with growing success, by the Harvard Legal Aid Bureau, conducted by students at the Law School, and now entering on its fourth year.

During the past year 191 cases were brought before the Bureau, 18 of them going to trial. All of these latter were won in the court of first instance, and two of them, which have been appealed, will be argued by members this year. The number of cases brought to the Bureau during October of this year shows an increase of fifty per cent over the number brought in during the same period last year.

The officers and members for the coming year are as follows: P. V. McNutt, President; F. L. Daily, Vice-President; A. E. Case, Secretary; J. H. Philbin and B. D. Edwards, Directors; J. P. Begley, J. E. Bennett, W. F. Cahill, T. W. Doan, Shelton Hale, W. W. Hodson, F. S. Moulton, D. C. Pitcher, W. F. Rogers, H. A. Scragg, E. B. Shea, E. O. Tabor, R. B. Wigglesworth, from the Third Year Class; and G. B. Barrett, Lawrence Clayton, R. C. Foster, M. M. Manning, A. L. Rabb, G. S. Pitney, Marion Rushton, O. G. Saxon, and E. C. Thayer, from the Second Year Class.

CONDEMNATION BY THE ENGLISH PRIZE COURT OF AMERICAN CARGOES CONSIGNED TO COPENHAGEN. — On September 16, 1915, Sir Samuel Evans handed down a Prize Court decision, which must be regarded, if it is supported in the future, as a momentous step in the development of belligerent rights. Reports of the case are now available through the British legal periodicals. *The Kim*, *The Alfred Nobel*, *The Bjornstern Bjornson*, and *The Fridland*, L. J. 463 (Sept. 25, 1915).¹ The vessels in question must not be confused with the thirty-one vessels which sailed between February 9 and April 17 from this country and are still detained by England under the blockade Order in Council of March 11, 1915. The two groups of vessels involve very different questions, though both are loosely referred to as the "Packers' Cases," from the nature of their cargoes.

The vessels whose cargoes were in large part condemned² were all neutral Scandinavian bottoms bound for Copenhagen, a neutral port, carrying goods owned by neutral American shippers. The cargoes consisted of foodstuffs, still nominally recognized by England as conditional contraband, and rubber, which since the outbreak of the war she has

¹ See also LONDON TIMES, Sept. 17, 1915, p. 3, and 59 SOL. J. 752.

² The penalty of condemnation is itself unusual. It is customary simply to exempt contraband when it is merely conditional or is a product native to the exporting country. *The Sarah and Bernhardus*, 1 Marriott, 96. See HALL, INTERNATIONAL LAW, 6 ed., 663; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS, 372.

declared to be absolute contraband.³ Nearly all the consignments were "to order" instead of being made to named consignees. The court had to determine two questions in order to make both the rubber and the foodstuffs confiscable under the doctrine of continuous voyage. It had to find, first, that the rubber, as absolute contraband, was destined for Germany; and, second, that the foodstuffs as conditional contraband were destined not only for Germany but for the enemy's forces. It is advisable to consider the two questions separately.

To find that the cargoes were ultimately destined for Germany, Sir Samuel Evans seems to have considered that the fact that these consignments were out of all proportion to the annual Danish imports of the same commodities raised a presumption against the claimants which they failed to rebut.⁴ Sir Edward Grey, however, has intimated to our government that there was further affirmative evidence introduced against the claimants by the Crown.⁵ Under strict prize procedure the admission of such evidence is questionable. The long-accepted practice has been to confine the hearing to the ship's papers and statements of the crew, and only where this evidence was suspicious or unsatisfactory would there be an order for "further proof." Captors were held to such rigid exactness to avoid delay, expense, and uncertainty, and to reduce this irritating interference with neutrals to a minimum by confining seizures to the clearest cases. The rise of the doctrine of continuous voyage only increased the number of exceptional circumstances where "further proof" was necessary.⁶ But the procedure of British prize courts has been altogether relaxed by the Prize Court Procedure Act of 1914, so that external evidence may be admitted even at the preliminary hearing, with the result that neutral ships are brought into port and un-

³ Rubber was placed on the list of absolute non-contraband by Article 28 (3) of the Declaration of London. BRIT. BLUE BOOK, MISC., No. 4 (1909), p. 80. The full text of the Declaration is perhaps more accessible in the WORLD PEACE FOUNDATION PAMPHLET SERIES, Vol. V, No. 3, Pt. II, which may be obtained at 40 Mt. Vernon Street, Boston. The Declaration was, of course, never ratified by any of the nations. England raised rubber to the conditional contraband list by the Order in Council of Sept. 21, 1914. MANUAL OF EMERGENCY LEGISLATION, 1914, p. 111. And made it absolute contraband by the Proclamation of Dec. 23, 1914. SUPPLEMENT 3 to the same Manual, 302, 304. This last order was after the vessels in question had sailed. England's unrestrained action during this war in adding to the list of absolute contraband scarcely corresponds with Sir Edward Grey's advice to the British delegates to the Naval Conference in 1909 that "a rule preventing any additions whatever at the outbreak or after the commencement of war might well form part of the proposed convention." BRIT. BLUE BOOK, MISC., No. 4 (1909), 24.

⁴ The lard in these cargoes was found to be more than thirteen times the quantity which had been imported annually into Denmark for each of the three years before the war. In the Law Journal (Sept. 25, 1915) report of Sir Samuel Evans' opinion, he bases his decision solely on this presumption.

⁵ BRIT. NOTE OF OCT. 11, 1915. See N. Y. TIMES, Oct. 12, 1915, p. 3, col. 5. He speaks of "cablegrams and letters in the possession of the British Government which were ultimately produced in court."

⁶ See BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS, pp. 368-369. The strictness of the rule allowing further proof by either captor or shipper only in very exceptional cases is declared in Story's well-known notes in 1 Wheat. (U. S.), Appendix, 496, 499, 504, and 2 Wheat. (U. S.), Appendix I, 19, 26. See also Dana's Note in WHEATON, ELEMENTS OF INTERNATIONAL LAW, 8 ed., 480; 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., §§ 473-474, 478-479. England recognized the same principle in the Naval Prize Act, 27 & 28 VICT., c. 25, §§ 17-21.

justifiably detained while the captors are searching about for further proof.⁷ Without such evidence in the principal cases, which the court showed a natural disinclination to rely upon, the presumption arising from Denmark's increased imports was clearly inadequate.⁸ It could only go to show that quantities of foodstuffs were being shipped to Denmark with the hope of resale and reshipment; and this has never been deemed sufficient to allow the doctrine of continuous voyage to apply.⁹

The second step which the court took in order to hold the foodstuffs confiscable was still more questionable. It involved the application of two Orders in Council. The first permitted the extension of the doctrine of continuous voyage to conditional contraband.¹⁰ So many excellent articles have been written on this doctrine that it is unnecessary to consider its history in detail.¹¹ It is sufficient to say that there has never been a case which has applied the doctrine to conditional contraband where there has been no blockade. The American cases of conditional contraband cited by Sir Samuel Evans were all cases where the doctrine was being applied on the basis of blockade and not simply on the basis of contraband.¹² Such an extension of the doctrine is particularly to be deplored when it is so generally conceded, in thoughtful times of peace, that the seizure of conditional contraband under the clearest circumstances involves loss and annoyance to the neutral which are not compensated for by the benefit to the belligerent.¹³ But the court, in applying

⁷ 4 & 5 GEO. V, c. 13. MANUAL OF EMERGENCY LEGISLATION, 1914, 256, 274. The Naval Prize Act of 1864 was thereby repealed as to the admission of evidence. See TIVERTON, PRIZE LAW, 91. See the BRITISH NOTE of Feb. 10, 1915, replying to the United States' objection on this score. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 44, 48. The United States has again objected in paragraphs 8 and 9 of the Note of Oct. 21, 1915, N. Y. TIMES, Nov. 8, 1915, p. 4, col. 3.

⁸ See the objections of the United States to this presumption in paragraphs 12 and 14 of the Note of Oct. 21, 1915, N. Y. TIMES, Nov. 8, 1915, p. 4, cols. 3 and 4.

⁹ See Sir Edward Grey's "Memorandum setting out the views of His Majesty's Government founded upon the decisions in the British Courts as to the Rules of International Law" governing the points to be discussed at the International Naval Conference of 1909. BRIT. BLUE BOOK, MISC., No. 4 (1909), 8. The doctrine of continuous voyage is there said not to apply where "evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere."

¹⁰ This was the famous Order in Council of August 20, 1914. MANUAL OF EMERGENCY LEGISLATION, 1914, 143. The Declaration of London, Art. 35, had specifically freed conditional contraband from the application of the doctrine of continuous voyage. BRIT. BLUE BOOK, MISC., No. 4 (1909), 82.

¹¹ See 24 HARV. L. REV. 167; 9 AMER. JOURN. INT. LAW, 583; 4 *ibid.* 823; 1 *ibid.* 61; 3 L. MAG. & REV. (4th Ser.) 1. The doctrine became firmly established during England's war with France in the late eighteenth century to prevent neutrals trading between France and her colonies by reshipping from their own ports. The William, 5 Rob. 385; The Maria, 5 *ibid.* 365. It was next applied to prevent reshipment by England at Bermuda and Nassau to blockade runners during our Civil War. The Springbok, 5 Wall. (U. S.) 1. In the same war the doctrine became crystallized in its third stage as applicable to *absolute* contraband when there was no blockade. The Peterhoff, 5 Wall. (U. S.) 28. In this last aspect the doctrine has been more recently recognized by Lord Salisbury in the case of The Bundesrath during the Boer War, BRIT. BLUE BOOK, AFRICA, No. 1 (1900); and by the Italian prize case of The Doelwyck, 24 JOURNAL DU DROIT INTERNATIONAL PRIVÉ (1897) 268.

¹² See CLAPP, ECONOMIC ASPECTS OF THE WAR, 177.

¹³ It so appeared to England when she was instructing her representatives before the Naval Conference in 1909. "Any proposal tending in the direction of freeing neu-

the doctrine of continuous voyage to conditional contraband, did not even require clear evidence that it was destined for the enemy's forces. To establish this fact reliance was placed upon a second Order in Council which declared that such a destination would be presumed where the goods were shipped "to order."¹⁴ Sir Samuel Evans was doubtless bound to follow this Order in Council.¹⁵ But the net result of doing so is a close approach to ignoring the distinction between food destined for the civil population and for the enemy's forces.¹⁶ This result seems to be appreciated by England, as would appear from the constant references to Germany's high state of organization and government control.¹⁷ The fact, however, that every shipment to civilians releases, *pro tanto*, domestic foodstuffs to the military, and that governments make necessary requisitions anyway, indicates that the distinction does not rest upon a mere question of relative belligerent advantage, but is another evidence of the desire of nations to confine narrowly the injurious effects of war upon strangers to the quarrel.

In short, the decision of Sir Samuel Evans in its several steps appears to be nothing but an instance of the spirit of protective retaliation which

tral commerce and shipping from the interference which the suppression by belligerents of the trade in contraband involves should receive your sympathetic consideration, and, if not otherwise open to objection, your active support." BRIT. BLUE BOOK, MISC., No. 4 (1909), 23. See also the admirable argument to this end by Earl Loreburn made as recently as 1913. LOREBURN, CAPTURE AT SEA, chap. V.

¹⁴ "Declaration of London Order in Council No. 2" of Oct. 29, 1914, cl. 1 (iii). MANUAL OF EMERGENCY LEGISLATION, 1914, SUPPLEMENT I, 17, 18. The United States objected to the creation of this presumption in her Note of Dec. 26, 1914. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 40. In the Note of Oct. 21, 1915, the right to object to this order is specifically reserved and its use merely criticized. N. Y. TIMES, Nov. 8, p. 4, col. 3, paragraph 10.

¹⁵ The Fox (1811), Edw. Adm. 311. See also the elaborate *dictum* of Sir Samuel Evans last June on this precise point. The Zamora, Brit. & Colonial Prize Cases, Pt. 3, 309, 328-331. Both Lord Stowell and Sir Samuel Evans avoided a frank declaration that a municipal order must be followed though contrary to international law; they asserted, however, that it is inconceivable that Parliament should promulgate such an unlawful order. The result is obviously the same. It is tolerably clear that the Order then followed in The Fox was contrary to international law. See 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., § 436. The United States has protested twice against this attitude of English Prize Courts towards national Orders in Council. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, Oct. 21, 1915, 177; Note of Oct. 21, 1915, paragraphs 29, 30; N. Y. TIMES, Nov. 8, 1915, p. 4, col. 6.

¹⁶ This distinction has always been one of the most sacred principles of international law. There have been only two real attempts to violate it — by England in 1793 on the theory that she was starving France out, and by France in 1885 on the ground that rice occupied such a unique position in China. See HALL, INTERNATIONAL LAW, 6 ed., 658-659. England has twice in the last twenty years officially asserted the distinction — through Lord Salisbury in the Boer War and through Lord Lansdowne in the Russo-Japanese War. See CLAPP, ECONOMIC ASPECTS OF THE WAR, 41, 42.

¹⁷ "The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy government disappears when the distinction between the civil population and the armed forces itself disappears." BRIT. NOTE OF Feb. 10, 1915. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 51.

"Regard must also be had to the state of things in Germany during this war in relation to the military forces and to the civil population, and to the method described in evidence, which was adopted by the government in order to procure supplies for the forces." Sir Samuel Evans in The Kim and Other Vessels, L. J. (Sept. 25, 1915) 464.

is reflected in several of England's notes to this government.¹⁸ Sir Edward Grey has suggested that it is open to this country, if the decision is appealed and affirmed by the Judicial Committee of the Privy Council, to lay its claim before an international court of arbitration at the end of the war.¹⁹ But the United States has wisely adopted the course of objecting immediately through diplomatic channels, in an effort to check in some degree this progressive enlargement of the field of belligerent interference with neutral trade.

JUDICIAL ACCEPTANCE OF WORKMEN'S COMPENSATION. — An interesting chapter in the history of workmen's compensation legislation in this country, and of its progress through the judicial mill, is brought to a happy conclusion by a late decision of the New York Court of Appeals holding the new compensation act not in violation of the federal Constitution. *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600. A recent case in California on a similar statute comes to the same conclusion. *Western Indemnity Co. v. Pillsbury*, 151 Pac. 398. This result is not surprising in view of what has come to be a settled public sentiment in favor of such legislation.

Consideration of the subject in the United States was not begun until after compensation laws had been in force for years in other countries and had proven generally beneficial. Hence the development of public opinion on the subject here was extremely rapid, and legislation was swift to follow. Beginning in 1909,¹ with legislation in Montana and the appointment of investigating commissions in New York, Minnesota, and Wisconsin, a majority of our states have come to enact workmen's compensation or industrial insurance laws, the variety of whose provisions must be pleasing to those who see in the number of our states a fortunate broadness of field for legislative experiment.

Not a small part of this experimenting has resulted from the attempt to avoid constitutional objections; and it has met with varying success. The first act to be questioned in a court of last resort was the statute of New York. That statute had been framed with some care to meet constitutional objections; it was believed that the fact that it applied only to certain industries, declared with reason to be extra-hazardous, would see it safely through. This belief proved to be unfounded, for the act was held to be a violation of the Fourteenth Amendment and of a similar provision of the constitution of New York.² The decision was greeted with

¹⁸ See, for instance, the Note of Oct. 11, 1915, N. Y. TIMES, Oct. 12, 1915, p. 3, col. 5.

¹⁹ See BRIT. NOTE of July 31, 1915, clauses 6 and 7. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, Oct. 21, 1915, 182. He cites the Jay Treaty and the Treaty of Washington as instances where this mode of procedure was recognized by the two countries. For these treaties see TREATIES AND CONVENTIONS BETWEEN UNITED STATES AND OTHER POWERS (off.), Great Britain, 1794, Art. VII, p. 323; Great Britain, 1871, p. 413.

¹ Leaving out of account the short-lived Maryland act of 1902 and the federal act of 1908, which applied only to employees of the government.

² *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431.

a storm of disapproval, both from popular sources and from eminent legal authorities.³ It threw something like dismay into the camp of those who favored the new legislation,⁴ for it was recognized that, right or wrong, the decision was binding in New York, and might be followed in other jurisdictions. The search was therefore started for some device whereby a law could be enacted that would be effective and at the same time not unconstitutional. Naturally an optional or elective system was proposed, but in view of previous experience in Maryland and Massachusetts⁵ it was pretty clear that a system genuinely optional would not prove satisfactory. In these circumstances legislative ingenuity in Kansas and New Jersey contrived the scheme which has since become so common, and which consists in juggling with the common-law defenses to the disadvantage of the employer or employee who refuses to come within the act. That the legislature may completely do away with these defenses is undoubted.⁶ Whether they may classify employers according to whether they come within the act or not, denying to one class the defenses left available to the other, is another matter. So far as known, only one case has held the practice a violation of the Constitution.⁷ But to object to an act with compulsory provisions and allow this sort of an "option" is to talk in terms of unrealities which do no credit to constitutional law.⁸ The practical working of the "option" legislation is not here in question, though some difficulties have been suggested and others have developed.⁹ Further legislation on this pattern should therefore not be encouraged, provided it is clear that compulsory legislation will not be held invalid.

That such legislation ought to be upheld has been tolerably clear ever since the decision in the Oklahoma Bank case.¹⁰ That decision was brought to the attention of the court in the Ives case, and, but for the belief of the New York court that "due process" in the constitution of the state meant something different from what the Supreme Court of the United States declared it meant in the Constitution of the United States, must have been decisive in that case.¹¹ State legislatures which

³ See, for instance, the signed statement by teachers of law in fourteen law schools published in the Outlook of July 29, 1911 (98 OUTLOOK 709), and the careful article by Mr. Freund in 2 AMERICAN LABOR LEGISLATION REVIEW 43 (1912).

⁴ See, for example, the discussion reported in 38 ANNALS OF THE AMERICAN ACAD. OF POL. & SOC. SC. (1911), especially at 147, 173, 277.

⁵ See RUBINOW, SOCIAL INSURANCE, 169, 171; 1 AMERICAN LABOR LEGISLATION REVIEW 98 (1911).

⁶ Second Employers' Liability Cases, 223 U. S. 1.

⁷ Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S. W. 1166. *Contra*, Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209; State v. Creamer, 85 Oh. St. 349, 97 N. E. 602; Opinions of the Justices, 209 Mass. 607, 96 N. E. 308; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211; Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286, 148 N. W. 71; Sexton v. Newark District Telegraph Co., 84 N. J. L. 85, 86 Atl. 451, *affd.* 86 N. J. L. 701, 91 Atl. 1070; Hawkins v. Bleakly, 220 Fed. 378 (Iowa act); Shade v. Ash Grove Lime and Portland Cement Co., 93 Kan. 257, 144 Pac. 249; Mackin v. Detroit-Timkin Axle Co., 153 N. W. 49 (Mich.).

⁸ See Ernst Freund, "Constitutional Status of Workmen's Compensation," in 2 AMERICAN LABOR LEGISLATION REVIEW 43, 53.

⁹ See RUBINOW, SOCIAL INSURANCE, 178 *et seq.*

¹⁰ Noble State Bank v. Haskell, 219 U. S. 104.

¹¹ Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 317, 94 N. E. 431, 448. This particular absurdity gives strength to the position of those who contend that the "due

have enacted compulsory workmen's compensation acts have been rewarded by having their acts upheld.¹² Some states have amended their state constitutions to permit legislation of this sort.¹³ The Arizona constitution goes so far as to direct the legislature to enact it.¹⁴ It is not explained in just what manner these provisions remove the objections under the Fourteenth Amendment;¹⁵ this is more evidence that those objections are really non-existent. So it seems probable that compulsory legislation would now be held good in most jurisdictions.

The present outlook shows, therefore, the great change that has occurred since the decision in the *Ives* case. The reason for this is found in the nature of the thing decided. As has been often said, decisions on the limits of due process and the propriety of what is claimed to be an exercise of the police power are decisions mainly of fact and public policy.¹⁶ Results are different as facts change or are more clearly brought to the attention of the court.¹⁷ Courts appreciate more fully the strength of settled public convictions. So legislation that once seemed an unreasonable interference with the liberty and property of citizens is seen, though the court may still be a disbeliever in its wisdom, to embody a sufficient public sentiment and to be calculated to effect a sufficient public purpose to make it not an unreasonable exercise of power.¹⁸ These decisions have met with general favor, evincing as they do a decent respect for the opinion of the legislature, and leaving to that body the large room for experiment which the wisest critics of our institution have always held desirable.¹⁹

TENANCY BY THE ENTIRETY AND THE NEW YORK TRANSFER TAX. — The members of the New York Court of Appeals have just expressed three

process" clauses should be removed from our state constitutions, and the whole matter left to be governed by the Fifth and the Fourteenth Amendments.

¹² *State v. Claussen*, 65 Wash. 156, 117 Pac. 1101; *Stoll v. Pacific Coast Steamship Co.*, 205 Fed. 169 (Washington act); *State v. Creamer*, 85 Oh. St. 349, 97 N. E. 602 (where the act was compulsory on the employee after his employer had elected); and the two principal cases. *Contra*, *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554, on an unfortunate detail of the Montana law. The court considers the other provisions of the act and declares that they are not repugnant to the constitution.

¹³ Ohio (CONST., Art. II, § 35, adopted Sept. 3, 1912); California (CONST., Art. XX, § 21); New York (CONST., Art. I, § 19, adopted Nov. 4, 1913); Wyoming (adopted 1913); Vermont (adopted April 8, 1913).

¹⁴ ARIZ. CONST., Art. XVIII, § 8.

¹⁵ Hence a judge of the New York Supreme Court, before the decision in the principal case, expressed the opinion that the new act was unconstitutional. *Herkey v. Agar Mfg. Co.*, 90 N. Y. Misc. 457.

¹⁶ See A. A. Bruce, in 20 GREEN BAG 546, 552; Prof. Frankfurter, in 28 HARV. L. REV. 790; FREUND, POLICE POWER, §§ 21, 63.

¹⁷ Compare, for instance, the discussion in *Lochner v. New York*, 198 U. S. 45, 59, and in *People v. Williams*, 189 N. Y. 131, 81 N. E. 778, with that in the dissenting opinion of Harlan, White, and Day, JJ., in *Lochner v. New York*, 198 U. S. 45, 70, and with *Muller v. Oregon*, 208 U. S. 412, 419, and with *McLean v. Arkansas*, 211 U. S. 539, 549, and with *People v. Schweinler Press*, 214 N. Y. 395, 108 N. E. 639.

¹⁸ See *Holden v. Hardy*, 169 U. S. 366, 386; *Otis v. Parker*, 187 U. S. 606; *Noble State Bank v. Haskell*, 219 U. S. 104; *Borgnis v. Falk Co.*, 147 Wis. 327, 349, 372, 133 N. W. 209, 215, 223.

¹⁹ See THAYER, LEGAL ESSAYS, 16 *et seq.*; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 253.

different opinions upon the following case: A man deeded property to himself and his wife expressly declaring that the grantees were tenants by the entirety. He later willed all his property to his wife and died in her lifetime. The question arose whether the transfer of any of the property could be taxed under the law which provides for taxing transfers to take effect in possession or enjoyment at or after the death of the grantor.¹ *Matter of Klatzel*, N. Y. L. J., Oct. 20, 1915. Perhaps the opinion of three majority judges is inaccurately reported. The provision of the deed characterizing the tenancy is set forth. It is also pointed out with great particularity that tenancy by the entirety has not been abolished in New York either by the married women's acts² or by the statute which provides that every estate granted to two persons in their own right shall be a tenancy in common unless expressly declared to be a joint tenancy.³ The decision then is that half the property is subject to the tax, because the deed created a tenancy in common by not expressly declaring the estate to be a joint tenancy. It is a subject for speculation how any one *could* create a tenancy by the entirety under this holding.⁴

The main argument of the dissent is clear. Since tenancies by the entirety still exist, this deed must be given that effect in accordance with its expressed intention. The wife then at once became seized of the whole estate under the deed, and, nothing new having passed to her on the husband's death, no transfer tax should be imposed. There is one difficulty here, however. It is an ancient rule that a man cannot convey to himself.⁵ The dissent meets this by saying that the grantor did not convey to himself, but to a separate entity composed of himself and his wife. They, however, indorse the statement that at common law "the wife had no legal existence apart from the husband, who in contracting with her simply contracted with himself." And it used to be said, on a parity of reasoning, that he could not convey to his wife.⁶ In short, the old common-law

¹ TAX LAW, § 220, subsec. 4; 5 CONS. L., p. 5978.

² *Bertles v. Nunan*, 92 N. Y. 152; *Zornlein v. Bram*, 100 N. Y. 12, 2 N. E. 388; *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. 510. Cf. *In re Thompson's Estate*, 81 Misc. 86, 142 N. Y. Supp. 1064. The most pertinent statutes are summarized in DOM. REL. L., §§ 51, 56; 1 CONS. L., pp. 1037, 1054. The weight of authority under similar statutes is in accord. *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824; *Diver v. Diver*, 56 Pa. St. 106; *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904. See 2 REEVES, REAL PROPERTY, 975; 1 WASHBURN, REAL PROPERTY, 5 ed., 426. 2 BISHOP, MARRIED WOMEN, § 284. Voluminous authority is collected in 30 L. R. A. 314-317. But cf. *Green v. Cannaday*, 77 S. C. 193, 200.

³ See New York cases in n. 2, *supra*. The statute is REAL PROP. L., § 66; 4 CONS. L., p. 4960. Similar statutes in other states are given the same construction. *Boland v. McKowen*, 189 Mass. 563, 76 N. E. 206; *Shaw v. Hearsey*, 5 Mass. 521; *Hardenbergh v. Hardenbergh*, 10 N. J. L. 42. See FREEMAN, COTENANCY, §§ 65, 66. *Contra*, *Hoffman v. Stigers*, 28 Ia. 302, 307. Even statutes abolishing survivorship in joint tenancies do not extend to tenancies by the entirety. *Thornton v. Thornton*, 3 Rand. (Va.) 179.

⁴ These judges inform us that tenancy by the entirety must be considered "pretty much independent of any principles which govern other cases." They appear to have succeeded.

⁵ See *Southcot v. Stowel*, 2 Mod. 207. *Pibus v. Mitford*, 1 Vent. 372, 378; LEAKE, LAND LAW, 2 ed., 36.

⁶ See WILLIAMS, REAL PROPERTY, 22 ed., 317; SCHOULER, HUSBAND AND WIFE, 429; 1 WASHBURN, REAL PROPERTY, 279; LEAKE, LAND LAW, 37, n. (b).

joke that man and wife were one, and he was the one,⁷ was close to the truth. Now the dissent maintains that neither the statute allowing direct conveyance between spouses nor any similar statutes have affected the unity of person. Must it not be, then, that the husband is still the one? If so, the conveyance failed altogether and the assessment should have been upon the whole property passing by will. But if metaphysical reasoning can help us at all, it would seem as a matter of logical necessity that a statute making possible a conveyance from husband to wife severs the unity for that purpose.⁸ We have then a conveyance to two persons, one of them the grantor, to be seized *per tout*, and since he cannot take, the other grantee takes all.⁹ In this view of the case no tax was assessable. Possibly the majority construed the conveyance as creating a tenancy in common¹⁰ on the ground that this would be on the whole more in accord with the general intention of the grantor than the result here reached, but the opinion reported gives no basis for this explanation.

The Chief Justice, while being of the opinion that a tenancy by the entirety had been created, swung the decision in favor of the tax by a liberal construction of the Transfer Tax Law. It may well be contended that in a popular sense the wife did not acquire the use and enjoyment of half the property until the grantor's death. But the fact remains that in contemplation of law she at once acquired from the deed the right to use and enjoy the whole. True, her husband had that right also, but they were each seized *per tout et non per my*.¹¹ Queer and artificial as the

⁷ See SCHOULER, HUSBAND AND WIFE, 9; 1 WILLIAMS, REAL PROPERTY, 22 ed., 311.

⁸ See *Saxon v. Saxon*, 46 Misc. 202, 93 N. Y. Supp. 191. It has been said that any destruction of the unity must preclude the existence of tenancy by the entirety. See *Stelz v. Schreck*, 128 N. Y. 263, 267, 28 N. E. 510, 511. It seems a safer doctrine that the nature of the tenancy would persist until expressly changed even if the apparent reason therefor no longer exists. See *Bertles v. Nunan*, 92 N. Y. 152, 165. "This maxim (of the unity) is one of those fictions of the law intended to subserve a useful purpose but not to be applied absolutely and without qualification." *Knapp v. Windsor*, 60 Mass. 156, 157. The spouses never were regarded as identical with regard to property rights. Even Bracton uses a "quasi":⁸ "*vir et uxor sunt quasi unica persona quia caro una, et sanguis unus*." Quoted in *Co. Lit.* 187 (f). The dissent admits they may hold as tenants in common. This is clearly the case where they thus acquire the property before marriage, and by the weight of authority they may by express words take as tenants in common during coverture. *Miner v. Brown*, 133 N. Y. 308, 31 N. E. 24. See *McDermott v. French*, 15 N. J. Eq. 78; 1 WASHBURN, REAL PROPERTY, 425; 2 BISHOP, MARRIED WOMEN, § 285; 4 KENT, COMM. 363; 2 PREST., ABSTR. OF TITLE, 41. *Contra*, *Stuckey v. Keefe's Executors*, 26 Pa. St. 397; FREEMAN, COTENANCY, §§ 71, 72. In New York they can take as joint tenants. *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. 136; *Wurz v. Wurz*, 15 N. Y. Supp. 720; *Cloos v. Cloos*, 8 N. Y. Supp. 660. The unity theory is, however, carried to the extent of holding that the spouses are together seized of one and not of two shares when they hold in common with others. *Barber v. Harris*, 15 Wend. (N. Y.) 615; *In re Jupp*, 39 Ch. D. 148; *Darden v. Timberlake*, 139 N. C. 181, 51 S. E. 895. See 1 WILLIAMS, REAL PROPERTY, 22 ed., 316; 1 WASHBURN, REAL PROPERTY, 278.

⁹ *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13; *Dowset v. Sweet*, 1 Amb. 175; *Humphrey v. Tayleur*, 1 Amb. 136; *McCord v. Bright*, 44 Ind. App. 275; *Cameron v. Steves*, 4 Allen (N. Brunswick) 141. See *Martin v. Wagener*, 1 T. & C. (N. Y.) 509, 522; FREEMAN, COTENANCY, § 28; CRITICA JURIS INGENIOSA, 133; FLETA, lib. 3, cap. 4, § 6, p. 180, ed. 1685; PERK, PROF. BK., p. 203; 1 PREST. SHEP. TOUCH. 71.

¹⁰ Cf. *Dressler v. Mulhern*, 136 N. Y. Supp. 1049.

¹¹ BL. BK. II, 182. The Transfer Tax Law seems never to have been applied to such a case as this. Cf. cases collected in n. 5 CONS. L., p. 5982; *Matter of Patterson*,

old conception of property rights may seem, courts have wisely held that they shall not be changed by implications not strictly necessary. Of course the imposition of a tax does not directly involve unsettling titles, but an unsystematic breaking away from the theories of seizure and the nature of estates must eventually have that result.

IS THE LIABILITY OF THE MAKER OF A DOMICILED NOTE PRIMARY OR SECONDARY? — The effect of the failure of a bank upon the relation of the parties to a promissory note made payable at the bank has been determined by the Court of Appeals of New York in the recent case of *Baldwin's Bank of Penn Yan v. Smith*, 109 N. E. 138.¹ The holder of a note sent it by post for collection to the bank at which it was made payable, and did not make inquiries, nor hear from the bank, for seven days, at which time the bank failed. The maker had sufficient funds with the bank and had given it orders to pay the note when he learned that it was there. The bank promised to do so, but did nothing in furtherance of the order. It was held that the holder could not recover from the maker. The decision was rested upon the ground of payment, or, in the alternative, negligence of the bank as the holder's agent in not procuring payment.

In so far as this result is based upon actual payment, it cannot be supported. Undoubtedly the courts have gone to great lengths to spell out a payment where negotiable paper has been sent to a bank which has funds on hand to pay it. Thus the transfer of credits upon the books of the bank has been held sufficient.² And there is a case in Massachusetts to the effect that the cancellation of the note, the preparation of a cashier's check to be remitted to the holder, and the making of a memorandum on a pad, to be entered upon the permanent books at the end of the day, constituted a payment.³ The validity of this decision may very well be doubted, for although the maker had been deprived of control over his account to the extent of the amount of the note, there had been no step toward giving anything to the holder. And where, as in the principal case, there has not even been an act depriving the maker of control over his deposit, it is impossible to find any payment.⁴

Regarding the second contention of the court, it is futile to talk of negligence of the holder in sending the note by mail, or of the negli-

81 N. Y. Misc. 86, 142 N. Y. Supp. 1064; *In re Thompson's Estate*, 130 N. Y. Supp. 970. It has been held that when a joint tenant takes by survivorship no tax lies. *In re Heiser's Estate*, 85 N. Y. Misc. 271, 147 N. Y. Supp. 557. Tenancy by the entirety is then an *a fortiori* case, for joint tenants are seized *per my et per tout*. BL. BK. II, 182. Minor states that this maxim should be *per tout et per mie*. 2 MINOR, INST., 4 ed., 470. Cf. "*Quilibet totum totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*" LEWIS' BL. BK. II, 182 n. (j).

¹ See RECENT CASES, p. 217.

² *Pratt v. Foote*, 9 N. Y. 463; *Daniel v. St. Louis National Bank*, 67 Ark. 223, 54 S. W. 214.

³ *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N. E. 670.

⁴ *Sutherland v. First National Bank*, 31 Mich. 230. Cf. *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809.

gence of the bank being imputed to the holder on some theory of agency, if the maker of a domiciled note is primarily liable. A debtor cannot complain that his creditor is careless in pursuit. In the absence of payment, the maker's defense must be that his liability is conditional and not primary. At common law this question has caused considerable confusion. In England, presentment of a domiciled note at the designated place is necessary as a condition precedent to suit against the maker, but failure to present at the day of maturity seems only to affect the question of interest and costs.⁵ In America, before the Negotiable Instruments Law, no presentment was necessary as a condition to bringing suit against the maker, though, as in England, the maker could set up as a valid tender the fact that he had funds at the bank at the day of maturity.⁶ If the holder did thus present the note, the majority view was that the bank might pay it out of funds of the maker on deposit,⁷ though this was vigorously disputed.⁸ And there seem to have been but two isolated and much criticised decisions which denied the holder a recovery where his neglect to present resulted in a loss to the maker due to failure of the bank.⁹

However, the situation has been materially changed by the Negotiable Instruments Law. At common law the bank had at most but a bare authority to pay a note domiciled there. Now, by express provision, such an instrument is equivalent to an order on the bank to pay the same.¹⁰ This is in effect the creation of negotiable paper similar to a check, differing only in that it is payable at a future date. And there is not even this distinction when the note is payable on demand. In both cases the business understanding is that the debtor will have sufficient funds at the bank, and it is the duty of the bank to apply such funds to payment of the instrument. It might well be urged, therefore, that the statute has, in substantial effect, put the maker of a domiciled note in a position of secondary liability similar to that of the drawer of a check. It then becomes unnecessary to determine whether the holder in the principal case was negligent in sending the note to the domiciled bank for collection, or whether the bank was made the agent of the holder.¹¹ Treating the mailing of the note to the bank as a sufficient

⁵ *Dickinson v. Bowes*, 16 East 110; *Sands v. Clarke*, 8 C. B. 751. *Contra*, *Nichols v. Bowes*, 2 Campb. 498. Cf. *Rowe v. Young*, 2 Brod. & B. 165.

⁶ *Wallace v. McConnell*, 13 Pet. (U. S.) 136.

⁷ *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713; *Kymer v. Laurie*, 18 L. J. Q. B. 218.

⁸ *Wood & Co. v. Merchants Savings, etc. Co.*, 41 Ill. 267; *Grissom v. Commercial National Bank*, 87 Tenn. 350, 10 S. W. 774.

⁹ *Lazier v. Horan*, 55 Ia. 75, 7 N. W. 457. (This case was thought to hold that there was a payment, and was in terms overruled in *Bank of Montreal v. Ingerson*, 105 Ia. 349, 75 N. W. 351; *Bank of Charleston, etc. v. Zorn*, 14 S. C. 444. See STORY, PROMISSORY NOTES, § 228. For a careful criticism of these cases, see *Adams v. Hackensack*, 44 N. J. L. 638. See also *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

¹⁰ See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 87. "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

¹¹ That such action is negligence, see *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012, and cases cited.

For a decision based upon agency of the bank for the holder, see *Farwell v. Curtis*, 7 Biss. 160.

presentment for payment, justified by reasonable business custom,¹² the holder should still not be allowed to recover. Failure by the bank to remit to the holder within a reasonable time was sufficient to indicate that the note had been dishonored,¹³ and the holder having failed to give seasonable notice of dishonor,¹⁴ the defendant as a party secondarily liable was thereby discharged, just as if he were the drawer of a check.¹⁵ It is to be hoped that this construction of the Negotiable Instruments Law, desirable as it is from a commercial viewpoint, may find favor with the courts.¹⁶

THE WRIT OF *NE EXEAT*. — A novel application of the writ of *ne exeat*, which has lately been made by the Court of Chancery of New Jersey, gives proof of an encouraging tendency of courts of equity to extend old remedies to new situations, whenever necessary to prevent a failure of justice. The writ was issued in aid of a decree awarding the custody of a minor child to the mother and ordering her to allow the father to have access to the child at a specified place in New Jersey. *Palmer v. Palmer*, 95 Atl. 241 (N. J.).¹

The writ of *ne exeat*² is an equitable remedy in the nature of bail at common law.³ It is directed to the sheriff, commanding him to commit the party to prison until he gives security not to leave the jurisdiction without permission of the court.⁴ Its prototype appears to have been a writ *de securitate invenienda*,⁵ designed to prevent too close relations between the clerical body of England and the Papal See,⁶ by forbidding clergymen to depart from the realm without the King's license. The writ of *ne exeat* was first used in England some time between the reign of John and that of Edward I, as a high prerogative writ, founded on the duty of the subject to defend the King and his realm.⁷ In view of the political nature of the original writ, it is quite natural that the courts have been inclined to limit its application as a purely civil remedy.⁸ As early as the reign of Queen Elizabeth, how-

¹² *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Heywood v. Pickering*, L. R. 9 Q. B. 428. See *Indig v. National City Bank*, 80 N. Y. 100, 106.

¹³ *Bailey v. Bodenham*, 10 L. T. N. S. 422, 423.

¹⁴ See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, §§ 102, 104.

¹⁵ See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 89. *Bacigalupo v. Parrilli*, 112 N. Y. Supp. 1040; *Kuflick v. Glasser*, 114 N. Y. Supp. 870.

¹⁶ The court in the principal case seems to have thought of this interpretation, but did not rely upon it. See 109 N. E. 138, 139.

¹ For a more complete statement of this case, see RECENT CASES, p. 222.

² In England, called *ne exeat regno*. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1465. In the United States, called *ne exeat republica*. See 1 WHITEHOUSE, EQUITY PRACTICE, § 428.

³ See *Haffey v. Haffey*, 14 Ves. Jr. 261; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606.

⁴ For form of writ, see *Rice v. Hale*, 59 Mass. 238, 242; 3 DANIELL, CHAN. PLEAD. AND PRAC., 2328.

⁵ For form of this writ see BEAMES, NE EXEAT, Appendix I.

⁶ See BEAMES, NE EXEAT, 9, 11; 3 CO. INST., ch. 84, p. 179.

⁷ 2 BRITTON, 283; see FITZHERBERT, NATURA BREVIVM, 85.

⁸ See *Tomlinson v. Harrison*, 8 Ves. Jr. 32; *Whitehouse v. Partridge*, 3 Swanst. 365, 379; *Dick v. Swinton*, 1 Ves. & Bea. 371, 373.

ever, in some unexplained manner,⁹ the practice of using the writ for the enforcement of private rights had become established.¹⁰ In this country it has always been treated, not as a prerogative writ, but as an ordinary process which issues as of right in cases in which it is properly grantable.¹¹

But both the English and the American courts have established and adhered to the rule that *ne exeat* will issue only for the enforcement of equitable¹² pecuniary¹³ demands, presently payable.¹⁴ To this arbitrary rule two exceptions have been recognized. The writ will be granted, on application of a wife, to prevent the threatened departure of her husband with intent to evade a decree for the payment of alimony.¹⁵ And where the circumstances are such that equity will entertain a bill for an account, the writ is available to keep within the jurisdiction a defendant who admits that a balance on a legal claim is due to the plaintiff, but denies that it is as large as the plaintiff asserts.¹⁶ This latter use of the writ has been explained as a process in aid of the concurrent jurisdiction of courts of equity;¹⁷ and on the same theory a *ne exeat* has been issued in actions for the specific performance of contracts, at the instance of the vendor.¹⁸ The remedy, however, has not been given so broad an application as this explanation would imply, but has been strictly limited to cases where there is a money demand to be enforced in equity. Moreover, its availability has been further impaired in some jurisdictions by decisions to the effect that constitutional or statutory provisions abolishing imprisonment for debt restrict the power to issue a *ne exeat* as it existed at common law;¹⁹ and in many of the code states, the writ has been expressly or impliedly abolished.²⁰

⁹ "How it happened that this great prerogative writ, intended by the laws for great political purposes and the safety of the country, came to be applied between subject and subject, I cannot conjecture." Lord Eldon in *Flack v. Holm*, 1 J. & W. 405, 414.

¹⁰ See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1467.

¹¹ *Lamar v. Lamar*, 123 Ga. 827, 51 S. E. 763.

¹² *Jenkins v. Parkinson*, 2 Myl. & K. 5; *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138. The use of *ne exeat* was not extended to legal debts by the adoption of the Judicature Act. *Drover v. Beyer*, 13 Ch. Div. 242. Nor by codes which abolish the distinction between actions at law and suits in equity. *Bonesteel v. Bonesteel*, 28 Wis. 245.

¹³ *Williams v. Williams*, 3 N. J. Eq. 130; *Cowdin v. Cram*, 3 Edw. Ch. (N. Y.) 231. It has also been held that the demand must be certain in its nature. See *Anon.*, 1 Atk. 521; *Rico v. Gualtier*, 3 Atk. 501; *Shearman v. Shearman*, 3 Bro. Ch. 370.

¹⁴ *De Rivafinoli v. Corsetti*, 4 Paige (N. Y.) 264. See also *Seymour v. Hazard*, 1 Johns. Ch. (N. Y.) 1.

¹⁵ *Dawson v. Dawson*, 7 Ves. Jr. 173; *Lamar v. Lamar*, 123 Ga. 827, 51 S. E. 763. It has been said that this use of the writ arose from compassion and from the fact that the ecclesiastical courts could not take bail. See *Anon.*, 2 Atk. 210; *Vander-gucht v. De Blaquiere*, 8 Sim. 315, 322; STORY, EQUITY JURISPRUDENCE, 13 ed., § 1472.

¹⁶ *MacDonough v. Gaynor*, 18 N. J. Eq. 249; *Jones v. Sampson*, 8 Ves. Jr. 593.

¹⁷ See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1473.

¹⁸ *Boehm v. Wood, Turn. & Russ.* 332; *Goodwin v. Clarke*, 2 Dick. 497.

¹⁹ See *Adams v. Whitcomb*, 46 Vt. 708; *Malcolm v. Andrews*, 68 Ill. 100. But, on principle, the arrest of a defendant under a *ne exeat* is not imprisonment for debt. *Dean v. Smith*, 23 Wis. 483; *Brown v. Haff and Lyon*, 5 Paige (N. Y.) 235.

²⁰ *Ex parte Harker*, 49 Cal. 465; *Cable v. Alvord*, 27 Oh. St. 654. In England, *ne*

This apparent prejudice against a valuable equitable remedy makes especially noteworthy the issuance of the writ of *ne exeat* in the principal case, where no pecuniary demand was involved. The Chancellor held that even though there might be no precedent for this use of the writ,²¹ equity would "make a precedent to fit a case, novel in incident, which comes within some head of equity jurisprudence."²² An injunction would have been inadequate. The court could have enjoined the defendant from taking the child out of the state, and ordered her to give security that she would not leave.²³ But she might disobey the court, and get the child into another state before the decree could be enforced by contempt proceedings. And a court of equity in another state could not secure to the father, *in specie*, his right to have access to the child in New Jersey. A writ of *ne exeat*, on the other hand, would keep the defendant in custody in New Jersey, until she gave security. It would accomplish the result aimed at by an injunction in a more effective manner; and there is no reason, on principle, why it should not be issued in such cases.²⁴ Where the plaintiff's case is clear, and his remedy at law is inadequate, equity should disregard all arbitrary limitations, and make use of every remedy which it possesses, in order to secure the plaintiff's rights.²⁵

ADMISSIBILITY OF HEARSAY EVIDENCE BEFORE AN ADMINISTRATIVE TRIBUNAL. — The rapid development of administrative law, with the consequent delegation of quasi-judicial authority to boards and commissions, raises the question whether such a body is bound by the established rules of judicial procedure or may act in accordance with the principles governing the ordinary transaction of business.¹ Two recent California cases have held it reversible error for the commission to base its findings upon hearsay under a Workmen's Compensation Act permitting the commission to disregard "technical rules of evidence." *Englebreton v. Industrial Accident Commission*, 151 Pac. 421; *Employers' Assurance Corporation v. Industrial Accident Commission*, 151 Pac. 423. A recent New York case comes to the opposite conclusion.²

exeat issues only when the case is within the exceptions of the Debtors Act, 1869 (32 & 33 VICT., c. 62), § 6. *Drover v. Beyer*, 13 Ch. Div. 242.

²¹ Cf. *In re J. Watts Kearney, Jr.*, 21 N. J. L. J. 25.

²² Cf. *Earle v. American Sugar Refining Co.*, 74 N. J. Eq. 751, 761, 71 Atl. 391, 395.

²³ *De Manneville v. De Manneville*, 10 Ves. Jr. 52.

²⁴ In New York a defendant may now be arrested whenever his contemplated departure from the state threatens to render ineffectual any judgment or order requiring the performance of an act, the non-performance of which would be punishable as a contempt. This is a statutory substitute for the writ of *ne exeat*. BLISS, N. Y. ANN. CODE, 6 ed., § 550.

²⁵ See Chancellor Kent's opinion in *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169. Cf. also, *Fisher v. Stone*, 4 Ill. 68, 70; *Lucas v. Hickman*, 2 Stewart (Ala.) 111, 114.

¹ See *Local Government Board v. Arlidge*, [1915] A. C. 120, 132, 133. 31 LAW QUART. REV. 148, 150.

² For the facts of the cases here discussed, see RECENT CASES, p. 227.

Carroll v. Knickerbocker Ice Co., 155 N. Y. Supp. 1. The two cases can be easily distinguished upon the wording of the statutes,³ but they are so clearly opposed in spirit and reasoning⁴ that a more fundamental difference is apparent.

The importance of these decisions is emphasized by the fact that of the twenty-four⁵ states which have adopted Workmen's Compensation statutes, fifteen have placed the administration of the act in the hands of a commission or administrative officer.⁶ Only three⁷ of these states have adopted a provision similar to the one here discussed, but in almost every other case the legislature has given the commission power either to "regulate the nature and extent of proofs and evidence and the method of taking and furnishing the same,"⁸ or to "adopt reasonable and proper rules to govern its procedure."⁹ Under such a provision at least one commission¹⁰ has adopted a rule similar to the statute here discussed, and the power of the commission to do so is clear under such an act.¹¹ The statutes in question, as interpreted by the New York court, allow the commission a very broad discretion, but the construction by the California court seems unduly narrow, for the evident intention of the legislature was to allow the commission, within its dis-

³ By CAL. LAWS, 1913, ch. 176, § 77, the commission shall not "be bound by technical rules of evidence." By N. Y. LAWS, 1914, ch. 47, § 68, the commission is not "bound by common law or statutory rules of evidence." Though it is a conceivable conclusion that the hearsay rule is not a "technical rule of evidence," there can be no doubt that it is a "common-law rule."

⁴ Howard, J., in *Carroll v. Knickerbocker Ice Co.*, 155 N. Y. Supp. 1, 3. "The very instant that the old rules of evidence are invoked, the informal character of the hearing disappears and the rigid formal rules of procedure and all the technicalities incident to the practice of law will grow up around the commission."

Shaw, J., in *Englebreton v. Industrial Accident Commission*, 151 Pac. 421, 423. "If the circumstance that the eyewitness of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property."

⁵ Statutes were examined down to March 1, 1915, only.

⁶ These statutes may be found conveniently collected in 2 BRADBURY, WORKMAN'S COMPENSATION. England and the seven Canadian states which have workmen's compensation acts have provided for arbitration with resort to the courts.

⁷ Connecticut (LAWS, 1913, ch. 138, § 25) is the only state beside New York and California.

⁸ Kentucky (LAWS, 1914, ch. 73, § 7), Nevada (LAWS, 1913, ch. 111, § 12), and West Virginia (LAWS, 1913, ch. 10, § 8) have essentially this provision, in addition to New York and California.

⁹ Illinois, Iowa, Massachusetts, Michigan, Ohio, Oregon, Texas, and Wisconsin, as well as the states mentioned in the preceding note, have substantially this provision.

¹⁰ Rule 7 of OHIO INDUSTRIAL COMMISSION provides that: "The Commission will not be bound by the usual common law or statutory rules of evidence." See 1 BRADBURY, WORKMAN'S COMPENSATION, 2 ed., 876.

¹¹ The holding of the court in the *Englebreton* case, *supra*, to the effect that this was an unconstitutional delegation of authority, must be regarded as the expiring gasp of a dying dogma. CAL. CONST., Art. III, reads: "No person charged with the exercise of powers properly belonging to one of these departments [legislative, executive, or judicial] shall exercise any functions appertaining to either of the others." However, Art. XX, § 21, as amended to allow the passage of the Workmen's Compensation Act, says: "The legislature may provide for the settlement of disputes . . . by an industrial accident board . . . anything in the constitution to the contrary notwithstanding." This amendment is clearly broad enough to justify the act as passed. See *McCullough v. Maryland*, 4 Wheat. (U. S.) 316, 408, 415, 421.

cretion, to receive any logically probative matter.¹² That hearsay has considerable value as proof is hardly open to question. Indeed the courts have repeatedly held that if evidence of a hearsay character gets in unobjected to it must be given its full weight.¹³ Many of the code states have modified the hearsay rule¹⁴ and one of the others¹⁵ has so limited it that any of the declarations ruled upon in the three cases here considered would have been admissible within the discretion of the trial judge. It is clear that a similar modification is more than justified in the case of administrative tribunals, especially as the growth of the excluding rules of evidence was due to the practical needs of trials before indiscriminating juries.¹⁶

As the functions and duties of government expand, and statutes like the present add increasingly to governmental responsibilities, it is inevitable that a large amount of business which was once carried on by private individuals will be put into the hands of various governmental agencies.¹⁷ In the transaction of this business many questions of a judicial or quasi-judicial nature must be decided, and it has become increasingly evident that the common-law court cannot adapt itself to the decision of technical questions of mechanics, railroad management, physics, and chemistry, or the broad considerations of economic policy which are necessarily involved in these new functions. The rigidity of the common-law procedure, the fact that the jury were chosen without regard for their ability, the lack of confidence in the jury and the trial judge, and the necessarily contentious nature of the proceedings, established a great number of rigid and technical rules and made inevitable the introduction of the administrative tribunal.¹⁸ These bodies are, in theory, composed of trained men who are fitted by education and experience to pass upon the very questions which are presented, and ready to approach each case with an open and unprejudiced mind.

¹² This intention is indicated both by § 77, authorizing the commission to disregard "technical rules of evidence," and by § 75 (6), giving the commission power to "regulate the nature and extent of the proofs and evidence."

¹³ *Damon v. Carroll*, 163 Mass. 404, 408; *Diaz v. United States*, 223 U. S. 442, 450; *Kansas City & So. Ry. v. Albers Commission Co.*, 223 U. S. 573, 596; *Kimmerle v. Farr*, 189 Fed. 295, 298. This is the point that Woodward, J., dissenting in the New York case, seems to have overlooked when he maintains that the statute merely allows the commission to admit hearsay, but still requires the award to be based on "legal" evidence. From the cases above cited it is clear that the exclusion of hearsay is not regarded as inherently necessary to proper judicial process.

¹⁴ See, for example, IOWA CODE, §§ 4621, 4622.

¹⁵ MASS. R. L., 1902, ch. 175, § 66: "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." In a recent case the declarations of a deceased employee were admitted under this statute before the Industrial Accident Board to support a recovery under the Workmen's Compensation Act. The case is very similar to those here discussed. *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932.

¹⁶ See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 180, 267 *et seq.*; 1 WIGMORE, EVIDENCE, § 8; Mansfield, C. J., in *Berkeley Peerage Case*, 4 Campb. 414, 415; MAINE, VILLAGE COMMUNITIES, 3 ed., 302.

¹⁷ See n. 1, *supra*.

¹⁸ See *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *United States v. Uhl*, 215 Fed. 573, 574; *In re Georgia & Florida Ry.*, 215 Fed. 195, 199.

It will improve neither the caliber nor the administrative efficiency of these tribunals to confine them to the crystallized and archaic methods of the common law. Men of power, insight, and wide experience can be secured upon a commission only if it is clothed with large discretion and given the means to make its own decisions reasonably effective; not, however, if it is to be a mere automaton for the application of unscientific legislative measures. Courts were foredoomed to failure in handling these complex questions because of their inelastic machinery. Administrative tribunals, now in their formative period, may come to similar grief, unless they are kept free from annoying restrictions of form and procedure.

THE EFFECT IN FEDERAL PRACTICE OF GIVING A CRIMINAL DEFENDANT NOTICE TO PRODUCE DOCUMENTS IN HIS POSSESSION. — That over-careful regard for the rights of the criminal defendant,¹ which is still occasionally noticeable in the reports, seems lately to have been responsible for some unfortunate reasoning in the federal courts. In a recent case the Circuit Court of Appeals for the Seventh Circuit held that it was error, though not prejudicial in the particular case, for the trial court to allow the prosecuting attorney to read before the jury a notice to the defendant to produce certain letters which he had in his possession. *Hanish v. United States* (not yet reported).² This dictum is in accord with *McKnight v. United States*,³ an earlier case in the Sixth Circuit, in which the presentation of notice was given as a ground for reversing judgment. The ruling seems to be based on the ground that to allow such notice would permit inferences to be drawn which would be a violation of the defendant's constitutional right of immunity against self-incrimination.⁴ By statute in almost every state and by the federal law, unfavorable inferences may not be drawn from the accused's failure to testify,⁵ but by the weight of authority the jury is permitted to take into account the criminal defendant's failure to produce witnesses, or, so the cases seem to decide, documents not of his own authorship.⁶

It would seem, however, erroneous to bring notice to produce within

¹ See BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book IX, pt. IV, c. III.

² For a full statement of this case, see RECENT CASES, p. 223.

³ 115 Fed. 972, 976.

⁴ The Fifth Amendment of the federal Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. This has been held to apply only to the federal courts. *Twining v. New Jersey*, 211 U. S. 78, 93. The states, either by constitution or statute, have adopted similar provisions. See, for instance, IOWA CODE, § 5484.

⁵ U. S. COMP. STAT., § 1465; *Wilson v. United States*, 149 U. S. 60. See 3 WIGMORE, EVIDENCE, § 2272 and notes. Allowing inferences to be drawn has been held not to be a violation of the due process clause of the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 99.

⁶ *Clifton v. United States*, 4 How. (U. S.) 242, 247; *People v. Cline*, 83 Cal. 374, 378, 23 Pac. 391; *United States v. Flemming*, 18 Fed. 907, 916. See 3 WIGMORE, EVIDENCE, § 2273. But see *State v. Hull*, 18 R. I. 207, 211, 26 Atl. 191, 192. Although in the principal case one of the letters in question was written by the defendant, the court tried to distinguish the *McKnight* case where the document in question was "highly incriminating."

the rule applying to comment on a failure to testify. The rule of law is that if a party to a suit wishes to prove a writing he must either bring it into court, or show why it is not feasible for him to do so.⁷ Therefore, with certain important exceptions, a notice to the adversary to produce documents in his possession has always been held a necessary foundation for the introduction of secondary evidence.⁸ If the adversary has destroyed the document or suppressed it either himself or in collusion with a third person, no notice is necessary, as his action amounts to a refusal to produce.⁹ Also if notice is implied in the declaration or indictment, the rule is considered to have been complied with.¹⁰ But in such cases if formal notice were given such surplusage would naturally not be considered error. The court in the McKnight case, however, utterly overlooks the reason for the rule, in concluding that, as the notice to produce is a comment on the defendant's claim of privilege, or at least would give ground for inferences to be drawn against him, secondary evidence may be given without such notice. The fallacy in this argument lies in supposing that any comment can be made on, or inference drawn from, a claim of privilege before the claim is made. There can be no claim of privilege until the notice is given. Moreover, the refusal to produce on notice is not necessarily a claim of privilege, as the party with papers in his possession may refuse to produce for other reasons.¹¹ It is furthermore difficult to see wherein a notice to produce and consequent refusal gives any more basis for inferences than proof that documents which have not been produced are in the defendant's hands. Yet that such proof must be made before introducing secondary evidence is universally admitted.¹²

From a practical point of view the decision in the McKnight case is a pitfall for an unwary prosecutor. If the trial judge admits secondary evidence without requiring notice he may well be reversed above by a court which knows only the common-law rule.¹³ On the other hand if the prosecution is required to give notice, the exotic rule of the McKnight case may be applied. On either hypothesis the defendant can except with a good chance of being sustained. The only safe way of proceeding is to have the jury sent out or to present the notice before

⁷ See *Queen v. Inhabitants of Kenilworth*, 7 Q. B. 642. Also for a full discussion of the rule, see 2 WIGMORE, EVIDENCE, §§ 1178-1250.

⁸ *Young v. People*, 221 Ill. 51, 56, 77 N. E. 536, 538; *Snider v. State*, 78 Miss. 366, 29 So. 78; *Doe d. Phillips v. Morris*, 3 A. & E. 46, 50; 2 WIGMORE, EVIDENCE, § 1202.

⁹ *Leeds v. Cook*, 4 Esp. 256; *Doe d. Pearson v. Ries*, 7 Bing. 724; *Gray v. Pentland*, 2 S. & R. (Pa.) 23, 31; *Nealley v. Greenough*, 25 N. H. 325, 330. See 2 WIGMORE, EVIDENCE, § 1207.

¹⁰ *McGinnis v. State*, 24 Ind. 500; *United States v. Doeblen*, Baldw. 519; *State v. Mayberry*, 48 Me. 218, 238; *People v. Rial*, 23 Cal. App. 713, 719, 139 Pac. 661, 663; *United States v. Reyburn*, 6 Pet. (U. S.) 352, 365.

¹¹ See 3 WIGMORE, EVIDENCE, § 2273, n. 3.

¹² "The introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant." Day, J., in *McKnight v. United States*, 115 Fed. 972, 980.

¹³ In *Dunbar v. United States*, 156 U. S. 185, 195, defendant's counsel objected because he had no notice, whereupon notice was given to him in open court. There was no objection raised or discussed as to comment on failure to testify, although the writings in question were of the defendant's own authorship. See also cases cited in the following footnote.

the judge in chambers. It might be argued that there is no great objection to pursuing this method. There is, however, a measure of inconvenience involved. Furthermore, the need of breaking off in the middle of presenting a case to the jury, in order to send them from the room, has the effect of taking their minds from the thread of the story, and thus rendering the evidence when presented far less telling than if it were allowed to come in without delay. An addition to the many technicalities of our criminal procedure, which is only necessary because of this mistaken decision,¹⁴ is certainly to be deplored.

ARE PREFERENTIAL VOTING STATUTES UNCONSTITUTIONAL? — How nearly "effective voting" may be accomplished by means of legislation alone is a question upon which the authorities are in confusion. Two late conflicting decisions serve to increase the uncertainty in which the law here finds itself. In each case the plaintiff brought suit to contest the right of the defendant to an elective office. Under a constitution guaranteeing to all electors the right "to vote . . . for all officers that now are, or hereafter may be, elective by the people" the Supreme Court of Minnesota held that a statute providing for preferential voting was unconstitutional. *Brown v. Smallwood*, 153 N. W. 953. Upon the same facts and under a substantially similar constitutional provision the Supreme Court of New Jersey reached the opposite conclusion. *Orpen v. Watson*, 93 Atl. 853.

The right to vote is not a right inherent in any person but is a political privilege granted by the state to a specified class of electors and is subject to state control and regulation.¹ So the power of a state legislature to effectuate ballot reform is limited only by the negative provision of the Fifteenth Amendment to the federal Constitution² and the suffrage guarantees of the state constitution. The court must decide in each case what the constitution of the state does or does not guarantee to the electors.

In determining the power of the legislature to regulate the manner of exercising the elective franchise the courts, as a rule, have been liberal

¹⁴ *McKnight v. United States*, 115 Fed. 972, 976, probably stands alone. There is some talk in the books pointing toward an exception making notice unnecessary in the case of a criminal defendant where the writing has been clearly traced to his possession, but there is nothing to indicate that to allow such notice would be error. The ground on which the rulings are based is that the accused could not be compelled to produce and therefore notice is useless. *Moore v. State*, 130 Ga. 322, 333, 60 S. E. 544, 548; *State v. McCauley*, 17 Wash. 88, 91, 49 Pac. 221, 222; *State v. Gurnee*, 14 Kan. 111, 120. See 3 RICE, EVIDENCE, § 31; UNDERHILL, CRIMINAL EVIDENCE, 2 ed., § 42. Such reasoning results from a mistaken idea of the purpose of the rule. And the great weight of authority is that notice to produce is necessary as well in criminal as in civil cases. *Regina v. Kitson*, 6 Cox C. C. 159; *Regina v. Elsworthy*, 10 Cox C. C. 579; *United States v. Winchester*, 2 McLean (U. S.) 135; *State v. Kimbrough*, 2 Dev. Law (N. C.) 431; *Young v. People*, 221 Ill. 51, 56, 77 N. E. 536, 538; *Snider v. State*, 78 Miss. 366, 29 So. 78; *State v. Martin*, 229 Mo. 620, 635, 129 S. W. 881, 885; *State v. Barnett*, 110 Mo. App. 592, 85 S. W. 613. See *State v. Mann*, 39 Wash. 144, 148, 81 Pac. 561, 562.

¹ See *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339.

² See *United States v. Cruikshank*, 92 U. S. 542, 555.

enough. Thus it is well settled that the legislature may prescribe rules for the proper registration of voters,³ and for the manner of marking the ballot.⁴ Furthermore the privilege of voting "by ballot"⁵ is held not to be violated by the innovation of a voting machine, though the result seems to be otherwise where the constitution provides for "written ballot."⁶ Nor is a provision that a valid vote must register a choice for a prescribed number of candidates regarded as unconstitutional under the usual constitutional provisions.⁷ But when the question concerns the power of the legislature to change the very nature of the vote, that is, its effective character, the courts have been stricter. The fundamental principle to be generally applied is that there must be no discrimination between the various electors; the voting strength of one must be exactly equal to the voting strength of another. The difficulty lies in determining just what constitutes this equality of voting strength. For example, is a statute unconstitutional which allows cumulative voting? The answer to this question should depend primarily upon whether or not a statute is unconstitutional which provides that no elector may record his choice for more than a certain portion of the elective offices. Such so-called "restricted voting" would seem to be clearly unconstitutional when the constitution guarantees to the electors the privilege of voting "for all officers to be elected,"⁸ though this result would be more doubtful where the constitution merely guarantees the privilege of voting "at all elections."⁹ If a restricted vote is unconstitutional, then it would seem that cumulative voting is open to the same objection. For, assuming that an elector has a privilege under the constitution of casting a vote for a candidate for every elective office, it must follow that he has the privilege of registering himself as a full voting unit for each of those candidates. To allow a second elector to register as more than one full voting unit for any one candidate, by cumulating his vote, would seem to impair the constitutional privilege of the first elector. For instance, suppose there are three elective offices to be filled, under a constitution guaranteeing to every elector the privilege of voting for each of the three candidates. Surely this must mean that he may give to each of those candidates one full vote. If, then, another elector has the power to cast three votes for any one candidate it would seem that the system has permitted discrimina-

³ *Capen v. Foster*, 12 Pick. (Mass.) 485; *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596.

⁴ *Cole v. Tucker*, 164 Mass. 486, 41 N. E. 681.

⁵ *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 698; *Detroit v. Inspectors*, 139 Mich. 548, 102 N. W. 1029; *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723. See 20 HARV. L. REV. 329.

⁶ *Nichols v. Board of Election Comm'rs*, 196⁷ Mass. 410, 82 N. E. 50, overruling advisory opinion in *In re House Bill No. 1291*, 178 Mass. 605, 60 N. E. 129.

⁷ *Farrell v. Hicken*, 125 Minn. 407, 147 N. W. 815. Note that this case presented also the same situation as did the principal case, but the constitutionality of the preferential ballot was not questioned. See also *McEwen v. Prince*, 125 Minn. 417, 147 N. W. 275; *Silberstein v. Prince*, 127 Minn. 411, 149 N. W. 653.

⁸ *McArdle v. Jersey City*, 66 N. J. L. 590, 49 Atl. 1013; *Bowden v. Bedell*, 68 N. J. L. 451, 53 Atl. 198; *In re Opinion of Judges*, 21 R. I. 579, 41 Atl. 1009.

⁹ Restricted voting statutes have been held invalid under such a constitutional guarantee. *State v. Constantine*, 42 Oh. St. 437. And see *People v. Kenney*, 96 N. Y. 294. *Contra*, *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67.

tion between the voting strength of the electors. The constitutionality of such a statute may, therefore, well be doubted.¹⁰

But a statute providing for preferential balloting presents a very different problem.¹¹ Here every elector has a right to vote for a candidate for every office to be filled. Moreover, in no way can an elector cast more than one effective vote for the same candidate. The ballots of the several electors are allowed exactly the same weight and effect. If a sufficient number of candidates do not receive a majority of first choice votes it is a violation of no right of the electors to declare that a resort may be had to the second choice votes in order to fill the deficiency.¹² The several choices of the several electors receive equal weight. This essential equality being preserved, it matters not that preferential voting was unknown at the time the constitution guaranteeing the right "to vote" was adopted, for the change is merely in pursuance of the undoubted legislative power to regulate the election machinery with a view to obtaining a more accurate registration of the electoral will. So, regardless of the constitutionality of the restricted vote or of the cumulative vote, the Minnesota court seems unnecessarily narrow in its decision invalidating the preferential voting legislation.¹³

RECENT CASES

ALIENS — EXCLUSION OF ALIENS — JUDICIAL POWER OF REVIEW — CONSTRUCTION OF STATUTE. — Under the immigration laws, "persons likely to become a public charge are to be excluded." 34 U. S. STAT. AT L. 898; as amended 36 U. S. STAT. AT L. 263. The petitioners were excluded under this provision by a Commissioner of Immigration on the ground that the industrial

¹⁰ It has been held unconstitutional. *Maynard v. Board*, 84 Mich. 228, 47 N. W. 756. See *State v. Thompson*, 21 N. D. 426, 443. And see *McCrary, Elections*, 4 ed., § 212. But see *People v. Nelson*, 133 Ill. 565, 27 N. E. 217.

¹¹ Under the statutes in the principal cases each elector is allowed to register a first choice, a second choice, and "additional" choices, but each voter may cast only one choice for a particular candidate. Upon the failure of the first choices to elect a sufficient number of candidates by a majority vote the second choices are added in. If still a sufficient number of candidates do not receive a majority of choices the "additional" choices are added in and the candidate receiving the greatest number of choices declared elected.

¹² It will be seen that an elector might give undue weight to his first choice by failing to exercise his other choices, that is, by failing to exercise his complete franchise. But this overweight is an incident of the elector's abuse of the franchise and is attainable under the ordinary system of voting wherever several candidates are to be elected. Moreover, a state may require that no vote be counted unless the elector has exercised his complete franchise. *Farrell v. Hicken, supra*, 125 Minn. 407, 147 N. W. 815.

¹³ *Adams v. Lansdon*, 18 Idaho 483, 110 Pac. 280, presents a situation similar to that seen in the principal cases, except that the case involved a primary election. Ordinarily a primary election is held not to be an election within the general suffrage provisions of the constitutions. *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388. But the court did not make this point in upholding the law. And see *State v. Nichols*, 50 Wash. 508, 97 Pac. 728, another case of a primary election, but supporting the constitutionality of preferential voting in a strong *dictum*.

conditions at their destination would render it impossible for them to obtain employment. *Held*, that this is an improper ground of exclusion. *Gegiow v. Uhl*, 238 U. S. 620.

It is clear that the decision of a Commissioner of Immigration as to questions of fact is final, subject only to an appeal to the Secretary of Labor. *Lee Lung v. Patterson*, 186 U. S. 168; *Zakonaile v. Wolf*, 226 U. S. 272. It was on this ground that the lower court refused a writ of *habeas corpus* in the principal case. *Gegiow v. Uhl*, 211 Fed. 236, 215 Fed. 573. But immigration officials cannot finally adjudicate questions of law. Thus where the question is one of due process as to whether or not there has been a fair hearing the courts have a power of review. *Chin Yow v. United States*, 208 U. S. 8. Similarly, a finding that a citizen of Porto Rico is an alien within the meaning of the immigration laws is reviewable. *Gonzales v. Williams*, 192 U. S. 1. See 17 HARV. L. REV. 412. The question of statutory construction involved in the principal case falls within the same category. The court interpreted the statute as meaning that under the clause in question an immigrant could be excluded only because of some personal deficiency, and not because of an external state of facts over which he has no control. The decision is important as reversing a long-standing administrative interpretation of a clause of the Immigration Act under which more aliens are excluded than under all the others combined. See (1914) ANN. REPORT OF SECRETARY OF LABOR, 64.

BILLS AND NOTES — FORMAL REQUISITES — FICTITIOUS PAYEE: CHECK TO FICTITIOUS PAYEE DRAWN BY AGENT WITH NO AUTHORITY TO DRAW CHECKS PAYABLE TO BEARER. — The United States deposited funds in the defendant bank to be drawn on by a government agent for his authorized expenses, but only by checks in favor of the party by name, to whom payment was to be made. The agent drew checks payable to fictitious payees, and indorsed them in their names. The defendant bank cashed these checks. The agent used part of the proceeds to pay his authorized expenses and misappropriated the remainder. The government sued the defendant bank for the amount of the checks. *Held*, that it may recover the full amount. *National Bank of Commerce v. United States*, 224 Fed. 679 (C. C. A., 9th Circ.).

A bank, regardless of due care, can charge a depositor only with disbursements made on his order and in conformity with the words of the instrument. *Mechanics' National Bank v. Harter*, 63 N. J. L. 578, 44 Atl. 715; *Winslow v. Everett National Bank*, 171 Mass. 534, 51 N. E. 16. See 22 HARV. L. REV. 605. Again, one who deals with a government agent is charged with notice of all the limitations on the agent's authority. *The Floyd Acceptances*, 7 Wall. (U. S.) 666. But an agent acting within his authority can bind his principal regardless of his intent, if the third party acts in good faith. *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. Still in the principal case, if the checks were payable to bearer, they were outside the agent's authority, and so did not bind the government. Both at common law and under the Negotiable Instruments Law, an instrument payable to a fictitious payee is in legal effect payable to bearer. *Minet v. Gibson*, 1 H. Bl. 569; *Foster v. Shattuck*, 2 N. H. 446. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 12. See 22 HARV. L. REV. 141. But on principle the instrument is payable to the order of the drawer or maker under the fictitious name, and his indorsement passes a good title. See 7 HARV. L. REV. 494. Under this view the bank here would escape liability. And even though the checks were outside the agent's authority, the bank should not be liable for the amount that the government drew out and retained, for a principal by retaining the benefits of his agent's unauthorized act after learning all the facts, thereby ratifies the transaction. *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40; *First National Bank of Las Vegas v. Oberne*, 121 Ill. 25, 7 N. E. 85. *Contra*, *Spooner v. Thompson*, 48 Vt. 259.

BILLS AND NOTES — NOTE PAYABLE AT BANK — PAYMENT — PRESENTMENT AND NOTICE OF DISHONOR. — A promissory note was sent by mail for collection by the holder to the bank at which it was made payable. The day after maturity, the maker, hearing that the note had reached the bank, requested the president of the bank to charge it to his account, on which he was credited with sufficient funds to meet the note, and was informed that such would be done. Seven days later the bank failed without having taken further action on the note. During all this time the holder made no inquiries concerning the note. The holder now sues the maker. *Held*, that he cannot recover. *Baldwin's Bank of Penn Yan v. Smith*, 109 N. E. 138 (N. Y.).

For a discussion of this case, see NOTES, p. 204.

CARRIERS — INTERSTATE COMMERCE — CONNECTING LINES — LIABILITY UNDER CARMACK AMENDMENT FOR EXCESS CHARGE. — The plaintiff shipped lumber by the defendant railway to a point beyond the defendant's lines. By an error of a connecting carrier the lumber was misrouted and additional freight charged. Although the defendant had contracted only to deliver to the connecting carrier and had expressly restricted its liability to its own line, the plaintiff sues for the excess charge under the Carmack Amendment, which subjects the initial carrier to liability for "loss, damage, or injury to such property" caused by a connecting carrier, and forbids any form of contractual exemption. U. S. COMP. STAT. 1913, § 8592, cl. 11. *Held*, that the defendant is liable. *Chesapeake & O. Ry. v. W. T. Ward Lumber Co.*, 60 Oh. L. Bull. 594, 35 O. C. C. 594.

A carrier's liability beyond its own terminus is contractual. See *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 240; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 680. And whether such a contract has been made is a question of fact. *Gray v. Jackson*, 51 N. H. 9. The English rule, adopted in a few states, is that the mere acceptance of the goods for a point beyond the carrier's own terminus is *prima facie* evidence of a contract to carry them there, and thus involves liability for the negligence of the connecting carriers as agents. *Muschamp v. Lancaster & P. J. Ry. Co.*, 8 M. & W. 421. See *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 240. See 21 HARV. L. REV. 539. On the other hand, in the United States before the amendment, by the weight of authority, further evidence of a contract was necessary for this liability to attach. *Myrick v. Michigan Central R. Co.*, 107 U. S. 102; *Louisville & N. R. Co. v. Cooper*, 19 Ky. L. R. 1152, 42 S. W. 1134; *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157. On either view, the defendant's liability in the principal case must rest solely upon the Carmack Amendment, since the existence of any contract is expressly negatived. But an excess charge does not come within the scope of the amendment, for a money loss to the owner is not "loss, damage, or injury to . . . property." *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390; *Wolf v. Wall*, 40 Oh. St. 111. See *Gulf, C. & S. F. Ry. Co. v. Nelson*, 139 S. W. 81, 85 (Tex.). Cf. *Missouri, K. & T. Ry. Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410. Nor is it possible to consider the amendment as an enactment of the English rule, for the qualifying phrase "to property" clearly refers to all three preceding words. See *Great Western Ry. Co. v. Swindon & C. E. Ry. Co.*, 9 A. C. 787, 808. Accordingly, the principal case seems to impose a wider liability than the provisions of the amendment warrant.

CONDITIONAL SALES — CONFLICT OF LAWS — SALE BY CONDITIONAL VENDEE. — A conditional vendee in Massachusetts sold a chattel in the same state to one who was assumed by the court to have taken without notice of the con-

dition. The latter subsequently transported the property to Pennsylvania, where the defendant bought it in good faith. Upon removing it to Delaware he was there sued in replevin by the original vendor. The court gave judgment for the defendant. *Fuller v. Webster*, 95 Atl. 335.

In Massachusetts and Delaware a *bonâ fide* purchase from a conditional buyer does not divest the original seller of his right. *Coggill v. Hartford & N. H. R. Co.*, 3 Gray (Mass.) 545; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192. In Pennsylvania it does. *Dearborn v. Raysor*, 132 Pa. St. 231, 20 Atl. 690. Now the rights of a buyer purchasing goods from a conditional vendee should be determined by the law of the place of purchase and not by the law of the state where the conditional vendee had originally obtained the goods. *The Marina*, 19 Fed. 760; *Cooper v. Phila. Worsted Co.*, 68 N. J. Eq. 622, 57 Atl. 733. See WILLISTON, SALES, § 339. But, in the principal case, if the attempted unconditional purchase by the sub-vendee in Massachusetts was a conversion, the sub-vendee acquired nothing which he could convey in Pennsylvania. However, Massachusetts law recognizes a transfer to the sub-purchaser of the conditional vendee's beneficial interest, where the original contract of sale does not prohibit assignment or removal of the article from the conditional vendee's possession. *Day v. Bassett*, 102 Mass. 445; *Chase v. Ingalls*, 122 Mass. 381; *Dame v. Hanson*, 212 Mass. 124, 98 N. E. 589. The attempted sale is treated as an assignment of the beneficial interest, and the analogy of the tortious transfer of, or swollen claim in, a pledge is wisely ignored. For the interest of a conditional vendee, differing from that of a pledgee, is that of beneficial ownership, and entitles its possessor to use the property as his own. See WILLISTON, SALES, §§ 331 *et seq.* But attachment by a creditor of the conditional vendee is a conversion. *Barrett v. Pritchard*, 2 Pick. (Mass.) 512; *Blanchard v. Child*, 7 Gray (Mass.) 155; *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519. The distinction would seem to lie in that the attachment process involves the legal title.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT TO CONFER WITH EXPERT WITNESSES. — The plaintiff, who had brought a bill to restrain the defendant, his former employee, from divulging certain alleged secret processes, obtained a preliminary injunction forbidding the defendant from disclosing these processes to expert witnesses whom he intended to call to prove that the processes were well known to the trade. *Held*, that the injunction denied the defendant due process of law. *Masland v. Du Pont De Nemours Powder Co.*, 224 Fed. 689 (C. C. A., 3d Circ.).

To prevent the impairment of a disputed right, a temporary injunction will be granted at the discretion of the court to preserve the *status quo* pending the adjudication of that right. *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85; *Sims v. Sims*, 110 Ga. 283, 34 S. E. 847. But the court in exercising its discretion should consider the effect of granting or refusing the injunction on both parties and take the course which seems most conducive to justice. See *Sampson & Murdock Co. v. Seaver-Radford Co.*, 129 Fed. 761, 771. It is obvious, in the principal case, that the interest which the plaintiff claims would be utterly destroyed by an unrestrained disclosure of the secret processes to witnesses. On the other hand, the right to enjoy due process of law gives the defendant a right to be heard in his own defense. *Harley v. Montana, etc. Co.*, 27 Mont. 388, 71 Pac. 407. To prevent consultation with expert witnesses is to some extent an infringement of that right. Again, the plaintiff's right can be largely protected by an injunction forbidding the witnesses from disclosing the processes pending suit, the injunction to be made permanent if the plaintiff's contention is sustained. Hence, in the conflict of disadvantages which this case involves, the balance of justice is with the defendant and the result of the principal case seems correct. But it may well be doubted that the opposite result

would necessarily involve a violation of the defendant's constitutional right of due process.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTE RESTRICTING EMPLOYMENT OF ALIENS — INJUNCTION AGAINST CRIMINAL PROSECUTIONS. — An Arizona statute forbade an employer of over five men to hire more than a certain percentage of aliens. The plaintiff, an alien employee, without a fixed term of service, was discharged solely because of this provision. He now brings a bill for reinstatement and to restrain action under the statute. *Held*, that the statute is unconstitutional. *Truax v. Raich*, Sup. Ct. Off., No. 361.

For a discussion of the similar decision of this case in the Circuit Court of Appeals, and the general problem of liberty of contract under the Constitution, see 28 HARV. L. REV. 496. As to the further question of the jurisdiction of the equity court, there is no doubt that equity may restrain criminal prosecutions in order to safeguard property rights. *Dobbins v. Los Angeles*, 195 U. S. 223. See *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218. It is equally well settled that the right of an employee not to have his means of livelihood disturbed is a property right, even where his employment is for no fixed term but at the will of his employer. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — ADMIRALTY JURISDICTION — VALIDITY OF TREATIES. — A libel *in rem* was brought in the federal court by an American citizen against a Dutch ship to recover wages earned as a seaman. The owners of the vessel intervene and claim that the court has no jurisdiction, on the ground that a treaty between the United States and the Netherlands gives exclusive jurisdiction over such cases to the consul of the Netherlands. *Held*, that the court has no jurisdiction. *The Albergen*, 223 Fed. 443 (Dist. Ct., Georgia).

By Article VI of the Constitution, treaties regularly entered into by the United States are the supreme law of the land. It is well settled, however, that a treaty has only the dignity of a statute and may be repealed by a later act of Congress. *Taylor v. Morton*, Fed. Cas., No. 13,799; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Thomas v. Gay*, 169 U. S. 264. And whatever may be the international effects of a treaty which conflict with the provisions of the Constitution, it is generally agreed that it will be disregarded by the courts. *The Neck*, 138 Fed. 144. See *The Cherokee Tobacco*, *supra*, 621; *Doe v. Braden*, 16 How. (U. S.) 635, 657. See 1 WILLOUGHBY, CONSTITUTION, 495. Now Article III, Section 2, of the Constitution gives the Federal courts jurisdiction over "all cases of admiralty and maritime jurisdiction" and it seems clear that this provision precludes the state courts from exercising such jurisdiction. See *Martin v. Hunter's Lessees*, 1 Wheat. (U. S.) 304, 337; *The Moses Taylor*, 4 Wall. (U. S.) 411, 428; *Claffin v. Housman*, 93 U. S. 136. See THE FEDERALIST, No. 80; 2 STORY, CONSTITUTION, § 1754; 2 WILLOUGHBY, CONSTITUTION, 1114. But see *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 572. Where the libellant was not an American citizen a treaty giving exclusive jurisdiction to foreign consuls over certain admiralty cases has been upheld. *The Bound Brook*, 146 Fed. 160; *The Koenigin Luise*, 184 Fed. 170. This result offers no difficulties, for the courts of the United States, while they may take jurisdiction over admiralty controversies between foreigners, and ought to take it where justice requires it and international comity permits it, are not obliged to exercise such jurisdiction. *The Bee*, Fed. Cas., No. 1,219; *One Hundred and Ninety-Four Shaws*, Fed. Cas., No. 10,521; *The Ester*, 190 Fed. 216; *The Bound Brook*, *supra*. But it has been held that a treaty cannot operate to deprive an American citizen of his right to a trial in the federal courts when he is involved in an admiralty controversy. *The Neck*, *supra*. See *The Falls of Keltie*, 114 Fed. 357, 359; *The Ester*, 190 Fed. 216, 225; *The Troop*, 117

Fed. 557, 559. Nevertheless the result in the principal case seems correct, for it appears that the constitutional provision in question was not intended to limit the treaty-making power, but to mark the division between federal and state jurisdiction. See *The Koenigin Luise*, *supra*. Again, similar treaties were concluded in 1787 and in 1788 and were understood by the framers of the Constitution as compatible therewith. See 2 MOORE, DIGEST OF INTERNATIONAL LAW, 300.

CONSTITUTIONAL LAW — REVENUE BILLS — PROHIBITING TAX ATTACHED BY HOUSE TO SENATE BILL. — A federal statute known as the "Cotton Futures Act" imposed a practically prohibitory tax on contracts for the sale of cotton for future delivery not in certain prescribed statutory forms. 38 U. S. STAT. AT L. 693. The bill originated in the Senate in the form of an exclusion of such transactions from the mails, but the House, retaining only the enacting clause, substituted the bill in its present form. The plaintiff sues to recover the tax paid under this statute. *Held*, that the statute is unconstitutional, being a revenue bill originating in the Senate. *Hubbard v. Lowe*, 54 N. Y. L. J. 193 (Dist. Ct., N. Y.).

The Constitution requires that all revenue bills originate in the House. U. S. CONST., Art. I, sec. 7, cl. 1. The courts have tended to construe as revenue bills under this clause only bills primarily for raising revenue and not such bills as might raise revenue incidentally. *Millard v. Roberts*, 202 U. S. 429; *cf. United States v. Hill*, 123 U. S. 681; *United States v. Norton*, 91 U. S. 566. But nevertheless a bill intended as a prohibitory tax, because in form a bill for revenue is considered an exercise of the taxing power. *McCray v. United States*, 195 U. S. 27, 59. The decision that the statute in the present case is one for revenue seems to follow necessarily from this. The wide scope of amendment allowed the Senate on revenue bills illustrates further the formality with which the Constitution is construed in this regard. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 143. The same spirit of rather formal construction supports the finding that this bill originated in the Senate as certified, although its taxation features originated in the House. Although not expressly based on it, this decision is really compelled by the well-settled rule of the federal courts that the records deposited with the Secretary of State may not be controverted by the Journals of Congress. *Field v. Clark*, 143 U. S. 649, 671; *Harwood v. Wentworth*, 162 U. S. 547, 562. The court does not discuss the constitutionality of this statute as an exercise of the taxing power. But see *McCray v. United States*, *supra*; U. S. DEPT. OF AGRICULTURE, OFFICE OF MARKETS AND RURAL ORGANIZATION, 1915 SERVICE AND REGULATORY ANNOUNCEMENTS NO. 5, 51.

CONTRACTS — REWARDS — PERFORMANCE WITHOUT KNOWLEDGE OF THE OFFER — MEANING OF "ARREST AND CONVICTION." — The legislature of a state passed a statute providing "that the Governor is hereby authorized to offer a reward for the arrest and conviction of the persons guilty of the murder of X." A reward was offered in pursuance of the statute. A posse, without knowledge of the offer, killed the Indians guilty of the crime. *Held*, that the members of the posse are entitled to the reward. *Smith v. State*, 151 Pac. 512 (Nev.).

An offer of a reward is an offer to a unilateral contract, and can be accepted only by performing the act designated. *Biggers v. Owen*, 79 Ga. 658. Since every contract, unilateral as well as bilateral, requires mutual assent, the act must be performed with an accepting mind, in order to claim the reward. The first requisite of this accepting mind is knowledge of the offer. *Howland v. Lounds*, 51 N. Y. 604; *Williams v. West Chicago R. Co.*, 191 Ill. 610, 61 N. E. 456. *Contra*, *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 9 Bush

(Ky.) 572. It has been said, however, that there is a different rule when the reward is offered by statutory authorization. See *Drummond v. United States*, 35 Ct. Cl. 356; *Broadnax v. Ledbetter*, 100 Tex. 375, 378, 99 S. W. 1111, 1112. Such a distinction can only be supported on the ground that the legislature intended that the reward should be paid to any one performing the designated act regardless of his knowledge of the offer. The legislature can, of course, make such a provision; but it is submitted that it is not to be presumed without clearer language than that of the statute in this case. *Smith v. Vernon Co.*, 188 Mo. 501, 87 S. W. 949. As to the question of whether in the principal case there was sufficient compliance with the terms of the offer; though the reward was offered for "arrest and conviction," its real object was to prevent the murderers from repeating their crime; and this object was attained. The growing trend of authority is to construe the terms used here liberally. *In re Kelly*, 39 Conn. 159; *Wilmoth v. Hensel*, 151 Pa. St. 200, 25 Atl. 86; *Moseley v. Stone*, 108 Ky. 492, 56 S. W. 965. But see *Williams v. West Chicago R. Co.*, *supra*.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR BREACH OF WARRANTY AFTER RESALE OF SEED. — The defendant sold to the plaintiff a quantity of cucumber seed for purposes of resale, warranting it to be of a certain variety. The seed was resold, and, when planted, produced a crop of an inferior variety of cucumbers. The plaintiff, although he has not yet been sued by the sub-buyer, and has neither paid nor adjusted the latter's claim, now sues for breach of warranty. *Held*, that he can recover the difference in value between the crop actually produced and an equal crop of the warranted variety. *Buckbee v. P. Hohenadel, Jr., Co.*, 224 Fed. 14 (C. C. A., 7th Circ.).

Where the seller has notice of the buyer's intention to resell the goods warranted, the buyer can recover any damages which he has been compelled to pay to a sub-buyer to whom the goods were resold with a warranty. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065. See 3 SUTHERLAND, DAMAGES, 3 ed., § 675; 2 MECHEM, SALES, § 1834. Now as the wrong in breach of warranty consists in the sale of the defective goods, the buyer may sue immediately and recover nominal damages without proving substantial injury. *Vogel v. Osborne*, 34 Minn. 454, 26 N. W. 453. See *Hammar Paint Co. v. Glover*, 47 Kan. 15, 27 Pac. 130. Accordingly, in an action for breach of warranty of title, the better view is that the buyer may sue at once and recover prospective damages though he has not been dispossessed. *Grose v. Hennessey*, 13 Allen (Mass.) 389. The case of breach of warranty of quality is analogous, and the buyer who has resold the goods may recover for the liability incurred although no claim has been made against him by the sub-buyer. *Randall v. Raper*, E. B. & E. 84; *Muller v. Eno*, 14 N. Y. 597. See *Passinger v. Thorburn*, 34 N. Y. 634, 639. Nor are the damages in the principal case too conjectural, for the plaintiff is clearly liable to the sub-buyer. See WILLISTON, SALES, § 615. And the measure of damages there laid down is the one usually adopted. See 21 HARV. L. REV. 286.

ELECTIONS — CONSTITUTIONALITY OF STATUTE PROVIDING FOR PREFERENTIAL VOTING. — The constitution of Minnesota guarantees to all electors the right to vote "for all officers . . . elective by the people." A statute authorized preferential voting at certain municipal elections. The plaintiff, a voter of the city, contests the election of the defendant under this statute. *Held*, that the statute is unconstitutional. *Brown v. Smallwood*, 153 N. W. 953.

On the same facts and under a similar constitutional provision, *held*, that the statute is constitutional. *Orpen v. Watson*, 93 Atl. 853 (N. J.).

For a discussion of the principles involved in these cases, see NOTES, p. 213.

EQUITY — JURISDICTION — WRIT OF *NE EXEAT* WHERE NO PECUNIARY CLAIM INVOLVED. — On *habeas corpus* proceedings, a mother was awarded the custody of her minor child and ordered to allow the father to have access to the child at a specified place and at stated times. In disobedience of the decree she left the state, taking the child with her. Upon her return, the father applied for a writ of *ne exeat* against her, until she should purge herself of the contempt and should fully respond to any order which the court might make touching the custody of the infant. *Held*, that the writ should be issued. *Palmer v. Palmer*, 95 Atl. 241 (N. J.).

For a discussion of the case and the use of this writ, see NOTES, p. 206.

EQUITY — LIMITATION OF ACTION — EFFECT OF DELAY ON PLEDGOR'S RIGHT TO RECLAIM. — The defendant was the pledgee of certain stock certificates which were transferred to his name. The pledgor became insolvent, and subsequently his assignee paid the debt, but did not reclaim the stock, which remained in the defendant's possession for twenty-eight years thereafter. Then the first assignee's successor brought a bill in equity to recover the shares. The defendant's demurrer to the bill was sustained. *Held*, that the decree be affirmed. *Wehrle v. Mercantile National Bank*, 221 Mass. 585.

On payment of the debt the defendant became trustee of the stock, for though his beneficial pledge interest was cut off he retained the legal title. *Thomas v. Van Meter*, 62 Ill. App. 309; *Merrifield v. Baker*, 91 Mass. 29. See JONES, PLEDGES, 2 ed. §§ 151-153, 558. Since the defendant never claimed to hold the certificates adversely to the pledgor's rights, there was, strictly speaking, no termination of the trusteeship. *Haney v. Legg*, 129 Ala. 619. See 2 PERRY, TRUSTS, 3 ed. §§ 863-865; 2 STORY, EQUITY JURISPRUDENCE, 13 ed. § 1520 *a*. But such a trusteeship, implied from the preëxisting pledge relationship, contains no idea of permanency, for the substantial right of the beneficiary is that the trust should be ended by a transfer to him of the legal title. See 3 POMEROY, EQUITY JURISPRUDENCE, 2 ed. § 1030. It follows, therefore, that the *cestui* has an immediate equitable claim which he must assert within a reasonable time, whereas an express trust not repudiated by the trustee remains unaffected by the passage of time. *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657. See *Riddle v. Whitehill*, 135 U. S. 621, 634. Where claims remain so long unasserted as in the principal case, equity, on the ground that the facts have become irremediably blurred, refuses to aid the tardy claimant. *Gilmer v. Morris*, 80 Ala. 78; *Waterman v. Brown*, 31 Pa. St. 161; *Kare v. Burnham*, 206 Pa. St. 330. See 2 STORY, EQUITY JURISPRUDENCE, 13 ed. § 1520 *a*. That time works havoc with facts in human minds is a vital consideration which outweighs the apparent injustice of the refusal in the principal case to order restoration of the shares held in trust.

EVIDENCE — *CORPUS DELICTI* — NECESSITY FOR DIRECT PROOF. — In a trial of two prisoners for murder, the evidence consisted of that given by accomplices and, in respect to one of the accused, of a confession also. The body of the deceased, who had disappeared a year before the arrest of the accused, was unidentified, only a few small bones having been found. *Held*, that there was not proper evidence upon which to convict either of the accused. *Rex v. Tshingwayo*, 1915, South African L. J. 86.

The doctrine that the death in trials for homicide must be proven either by inspection of the body or by direct evidence of the killing, may be traced to expressions used by Sir Matthew Hale and Lord Stowell which were not intended to assert a general proposition. See 2 HALE, PLEAS OF THE CROWN, 290. *Evans*

v. Evans, 1 Hagg. Cons. 35, 105. See 3 WIGMORE, EVIDENCE, § 2081. However, it is still laid down as an arbitrary rule by many courts. *Hinmarsh's Case*, 2 Leach, 4 ed., 569; *Regina v. Hopkins*, 8 C. & P. 591; *Ruloff v. People*, 18 N. Y. 179. See STARKIE, EVIDENCE, 9 ed., 758 [862]. Though the rule is defended as a protection of the innocent prisoner, it is submitted that less rigid rules can secure adequate protection. Again, it is difficult to see what principle requires that the fact of crime be established by direct evidence when its agency may be established by circumstantial evidence. *Thomas v. Commonwealth*, 14 Ky. L. Rep. 288, 20 S. W. 226. Such an inflexible doctrine puts a premium on cleverness in crime, making a conviction impossible whenever the criminal succeeds in completely destroying the body of his victim unwitnessed. See *United States v. Gilbert*, 2 Sumn. 19, 27. Finally, a confession is direct evidence. True, it is often of no great weight when uncorroborated. See CHAMBERLAYNE, BEST, EVIDENCE, §§ 563-577; HEALY, PATHOLOGICAL LYING, 23 and cases 20, 23, 25. If made in court, however, it will alone support a conviction. See 1 GREENLEAF, EVIDENCE, § 216. It would seem, therefore, that an extrajudicial confession, when corroborated, should be able to support a conviction without further proof of the *corpus delicti*. See *State v. Lamb*, 28 Mo. 218, 230; 19 HARV. L. REV. 469.

EVIDENCE — DOCUMENTS — FAILURE TO PROVE LOSS OF PRIMARY EVIDENCE — NEGLIGENT LOSS OF ORIGINALS. — The defendant sought to introduce into evidence a copy of a written contract, the original of which he claimed had been mislaid and was therefore unavailable despite diligent search. The trial judge excluded the copy. *Held*, that the exclusion was proper on the ground that the original was negligently lost. *Missouri, Oklahoma, etc. Co. v. West*, 151 Pac. 212 (Ok.).

Early cases and writers on evidence believed that the necessity of producing originals to prove documents as such was but an aspect of the general maxim which they regarded as one of the fundamental rules of evidence, that the best evidence procurable in the nature of the case should be presented. See THAYER, PRELIM. TREATISE ON EVIDENCE, 484-497. With this conception they readily decided that the profferer's negligence in rendering a document unavailable could not be made an excuse for violating a maxim supposed to be at the root of the law of evidence. See *Thomas v. Thomas*, 2 La. 166, 168. See GILBERT, EVIDENCE, 7 ed., 84; BULLER, NISI PRIUS, 252; 3 BL. COMM., 368; SWIFT, EVIDENCE, 31. In reality, however, the best evidence rule is an outgrowth of the ancient mode of trial by production of documents, which later developed into a rule of oral pleading requiring proffers of writings declared on, and finally emerged as a narrow rule of evidence, that was extended to all written instruments because of its excellent sense. See THAYER, PRELIM. TREATISE ON EVIDENCE, 484-507. Thus the history and nature of the doctrine reveal no basis for the early view that documents cannot be proved as such if negligently lost by the profferer. *Rodgers v. Crook*, 97 Ala. 722. Exclusion of secondary evidence should be confined to those cases where originals were rendered unavailable purposely to avoid producing them. *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483. See *Blake v. Fash*, 44 Ill. 302; *Bagley v. Eaton*, 10 Cal. 126, 149; *Breen v. Richardson*, 6 Colo. 605, 607.

EVIDENCE — DOCUMENTS — SECONDARY EVIDENCE: NOTICE TO ACCUSED TO PRODUCE PRIVILEGED DOCUMENTS. — In a trial upon a charge of sending obscene literature through the mails, the district attorney was allowed to read before the jury a notice to the defendant to produce certain "decoy letters" sent to the defendant and also a letter written by him in reply thereto, all of

which were then in the defendant's possession. *Held*, that this is error, though not prejudicial. *Hanish v. United States* (not yet reported).

For a full discussion of the principle involved, see NOTES, p. 221.

EVIDENCE — OPINION EVIDENCE — DOES THE OPINION RULE APPLY TO DYING DECLARATIONS. — In a trial for voluntary manslaughter, a dying declaration of the deceased, to the effect that the defendant had killed him "on purpose," was admitted over the defendant's objection that it was opinion evidence. *Held*, that the admission was proper. *Pippin v. Commonwealth*, 56 S. E. 152 (Va.).

It is a general rule that only such testimony as would have been admissible from the deceased if he were a witness is admissible as his dying declaration. *Whitley v. State*, 38 Ga. 50, 70. This would generally exclude opinions. See 1 GREENLEAF, EVIDENCE, 16 ed., § 159. Accordingly, the opinion of the deceased as to the defendant's fault in killing him is excluded in many states. *Berry v. State*, 63 Ark. 382, 38 S. W. 1038; *Kearney v. State*, 101 Ga. 803, 29 S. E. 127; *State v. Sale*, 119 Ia. 1, 92 N. W. 680. *Contra*, *Gerald v. State*, 128 Ala. 6, 29 So. 614; *Boyle v. State*, 105 Ind. 469, 5 N. E. 203. There seems to be a general feeling in all the cases that opinion as such should be excluded; many courts which admit accusations of the deceased as dying declarations construing the accusation as a method of indicating a complex set of facts. *Commonwealth v. Mathews*, 89 Ky. 287, 12 S. W. 333. It has been argued that the reason for the opinion rule, which is to leave the drawing of inferences to the jury when the facts from which the witness drew his opinion can be detailed to them, does not apply to dying declarations, where it is impossible to put the jury in possession of the facts. See 2 WIGMORE, EVIDENCE, § 1447. But as the opinion rule is also based largely on the fear that opinions of witnesses will unduly prejudice the jury, an objection to which accusations like those in the principal case are especially open, it seems wise to exclude such declarations whenever, in the opinion of the trial judge, the danger of prejudice outweighs their probative value. Abuse of the trial judge's discretion should then be the only ground for reversal.

EVIDENCE — *RES GESTAE* — WHETHER STATEMENTS CHARACTERIZING ADVERSE POSSESSION ARE HEARSAY. — On the issue of whether X.'s possession of certain land was adverse, testimony that X. had said, while in possession, "that she made an exchange . . . in which she got the land now in dispute," was held inadmissible. *Oahu Ry. Co. v. Kaili*, 22 Hawaii Adv. 673.

The court subscribed to the accepted doctrine that the declarations of a person in possession of land as to the nature of his claim are part of the *res gestae*. *McConnell v. Hannah*, 96 Ind. 102. Nevertheless it excluded the testimony on the ground that it was merely narrative of a past transaction. *Wilkinson v. Bottoms*, 56 So. 948 (Ala.); *Whitaker v. Whitaker*, 157 Mo. 342, 354, 58 S. W. 5, 8. But the use of the term "narrative" as a limitation to the *res gestae* doctrine means "non-contemporaneous with the act characterized." Cf. *Rockwell v. Taylor*, 41 Conn. 55, 59-60; *Carter v. Buchannon*, 3 Ga. 513, 517-18; *Commonwealth v. Hackett*, 2 Allen (Mass.) 136, 139; *Sorenson v. Dundas*, 42 Wis. 642, 643. See 1 GREENLEAF, EVIDENCE, § 110; 3 WIGMORE, EVIDENCE, § 1756 (c). In the principal case, as the words in question characterize a contemporaneous possession, their exclusion indicates a confusion of the popular with the technical import of the word "narrative." But a correct analysis shows the problem not to be one of *res gestae* at all. The fact to be proven is the mental attitude of the occupant of the land. As circumstantial evidence of this, evidence whose value lies rather in the inference from the fact of statement than in the truth of what is asserted, the declarations are properly

admitted without reference to hearsay rules. See THAYER, LEGAL ESSAYS, pp. 291 *et seq.*; 3 WIGMORE, EVIDENCE, §§ 1715, 1778-80; 28 HARV. L. REV. 299. The form of statement, therefore, whether narrative of a past event or explanatory of a present occurrence, is immaterial.

HOMESTEAD — EXEMPTION — REVIVAL OF JUDGMENT LIEN ON SALE OF HOMESTEAD. — The plaintiff had recovered a judgment against one who owned only a homestead constitutionally exempt from forced sale. Later the homestead was alienated and the plaintiff now attempts to enforce his judgment lien against the grantee. *Held*, that the property passed to the grantee free from any lien. *Gray v. Deal*, 151 Pac. 205 (Ok.).

There are two views as to the operation of a judgment lien on property exempt by statute from forced sale. In a few states it is held, as in the principal case, that the provision negatives the possibility of even a dormant lien so that the homestead may be conveyed free and clear. *Morris v. Ward*, 5 Kan. 239; *Green v. Marks*, 25 Ill. 221. This result is sometimes reached by a construction based on other statutes indicating this to be the legislative intent. *Lamb v. Shays*, 14 Ia. 567. The majority view, however, is that the lien attaches, though it is held in abeyance by the exemption statute, which grants only a personal right of exemption to the owner of the homestead. Thus the lien becomes active when the land is alienated. *Allen v. Cook*, 26 Barb. (N. Y.) 374. See *Norris v. Kidd*, 28 Ark. 485. The Oklahoma constitution provides that the homestead of the family shall be exempt from forced sale for the payment of debts. WILLIAMS, CONST., § 303. But a statute declares that judgments of courts of record shall be liens on the real estate of the debtor. GEN. STAT. OKL., § 5192. A strict construction of the exemption would not prohibit the attachment of the lien but only the final process or forced sale. Whether a court will make such a construction, or follow the rule of the principal case, depends, in the absence of any evidence of legislative intent, on the general attitude toward the policy of the exemption acts in the particular jurisdiction. *Morris v. Ward*, *supra*. Cf. *Norris v. Kidd*, *supra*.

INSURANCE — RIGHT OF BENEFICIARY — WHETHER RESERVED RIGHT TO CHANGE BENEFICIARIES GIVES INSURED RIGHT TO SURRENDER POLICY WITHOUT CONSENT OF BENEFICIARY. — A man in taking out a policy of life insurance reserved the right to change beneficiaries. Later, without the consent of the beneficiary, the insured surrendered the policy to the company, receiving consideration therefor. After the death of the insured the beneficiary sues the company on the policy. *Held*, that she may recover. *Roberts v. N. W. Nat'l Life Ins. Co.*, 85 S. E. 1043 (Ga.).

It is well settled that the beneficiary of an ordinary life insurance policy has a vested right to the amount to be paid. *Mutual Life Ins. Co. v. Allen*, 212 Ill. 134, 72 N. E. 200; *Washington Life Ins. Co. v. Berwald*, 97 Tex. 111, 76 S. W. 442. See 13 HARV. L. REV. 682. The same is true although the policy provides that on a certain condition another is to become beneficiary. *In re Peckham*, 29 R. I. 250, 69 Atl. 1002; *Lockwood v. Mich. Mutual Life Ins. Co.*, 108 Mich. 334, 66 N. W. 229. In these cases the insured has put the policy beyond his power of control. Even where the insured has reserved control through the right to change beneficiaries, some courts, as that in the principal case, hold that the right of the beneficiary is vested. *Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853; *Sullivan v. Maroney*, 76 N. J. Eq. 104, 73 Atl. 842. As the reservation of the right to change of beneficiaries certainly cannot be construed to include a right of the insured to surrender the policy, if the interest of the beneficiary is vested, it cannot be destroyed by an unconsented surrender. *Holder v. Prudential Ins. Co.*, *supra*. However, a vested right in the bene-

fiary can exist only if the parties to the insurance contract intend that it should. As an insurer, by reserving to himself the right to determine the beneficiary, clearly shows an intent that no right shall vest in any particular person, the right of the beneficiary is not a vested one, and therefore the insured should be allowed to surrender the policy without the beneficiary's consent. *Equitable Life Assurance Soc. v. Stough*, 45 Ind. App. 411, 89 N. E. 612; *Hick v. North Western, etc. Co.*, 147 N. W. 883 (Ia.).

LANDLORD AND TENANT — REPAIR AND USE OF PREMISES — LANDLORD'S LIABILITY TO CUSTOMER OR GUEST OF TENANT FOR NEGLIGENT REPAIRS. — A shopkeeper requested his landlord to have an iron post erected in his shop, and in consideration of his rent not being raised, agreed to pay for the expense of the work. The work was negligently done by the landlord, and a customer was injured by the falling of the post. He now sues the landlord. *Held*, that he may recover. *Feeley v. Doyle*, 109 N. E. 902 (Mass.).

A landlord negligently repaired a hand rail, which at the request of the tenant he had gratuitously promised to repair. A social guest of the tenant was injured because of the defective rail. He now sues the landlord. *Held*, that he may not recover. *Thomas v. Lane*, 221 Mass. 447, 109 N. E. 363.

When a landlord has made repairs on the premises, it does not affect his liability to the tenant whether or not his prior agreement to make them was for a consideration. *Gill v. Middleton*, 105 Mass. 477; *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824. Since neither a customer nor a social guest of the tenant is a party to the agreement, it is submitted that *a fortiori* the character of the agreement has no effect on the rights of either against the landlord. A customer is a business guest to whom the occupant is liable for injuries caused by defects in premises due to his negligence. *League v. Stradley*, 68 S. C. 515, 47 S. E. 975; *Kean v. Schoening*, 103 Mo. App. 77, 77 S. W. 335. Therefore where the defects are due to the landlord's negligence, the landlord is liable to the guest, as well if we consider his duty to be that of an occupant as if we consider it to be the general duty of care owed to a stranger. But to a social guest the occupant of the premises seems to owe only the limited duty which he owes to a licensee. *Southcote v. Stanley*, 1 H. & N. 247. See *Indermaur v. Dames*, L. R. 1 C. P. 274, 287; *Beard v. Klusmeier*, 158 Ky. 153, 156, 164 S. W. 319, 321. See BIGELOW, TORTS, 7 ed., § 741. *Contra*, *Barman v. Spencer*, 49 N. E. 9 (Ind.). Some *dicta* hold that for repairs made on the premises the landlord owes to the licensee only the duty that the occupant owes. *Barman v. Spencer*, *supra*. See *Malone v. Laskey*, [1907] 2 K. B. 141, 154. However, on the better view, a stranger who contracts with the tenant for repairs must use ordinary care toward a guest of the tenant. See 28 HARV. L. REV. 818. It is submitted that there is no reason why the landlord should not owe this same duty of care, and why he should not be liable in the second principal case.

LIMITATION OF ACTIONS — FRAUD — DISCOVERY — PRESUMPTION OF KNOWLEDGE OF DOCUMENT FROM READING. — The defendant, who was the plaintiff's confidential adviser, sold her a piece of land to which he had no title, and gave her a quitclaim instead of a warranty deed. The plaintiff read over the document, but failed to comprehend its character. On discovering the error seven years later she brings suit. The state statute of limitations bars actions for fraud not brought within two years after the discovery of the fraud. 1910 OKL. R. L., § 4657, c. 3. *Held*, that the plaintiff cannot recover because reading over the document is conclusive discovery of its contents. *Jones v. Woodward*, 151 Pac. 586 (Okl.).

A plaintiff in equity is not guilty of laches when he delays suit in reasonable ignorance of the fraud. *Phalen v. Clark*, 19 Conn. 421. See *Hovenden v.*

Lord Annesley, 2 Sch. & Lef. 607, 634. Many courts of law followed this equitable rule in construing the statute of limitations. *First Massachusetts Turnpike v. Field*, 3 Mass. 201; *Sherwood v. Sutton*, 5 Mason (U. S.) 143. See *Bree v. Holbeck*, Dougl. 654. *Contra, Troup v. Executors of Smith*, 20 Johns. (N. Y.) 33. Later, many of the state codes lent express legislative sanction by providing that the statute should not run until "discovery of the fraud." See WOOD, LIMITATIONS, 3 ed., § 274, appendix. Even under such enactments the statute is held to run not only from actual knowledge of the fraud, but also whenever both the means of discovery and a reasonable cause for suspicion coexist. *Archer v. Freeman*, 124 Cal. 528, 57 Pac. 474; *Higgins v. Crouse*, 147 N. Y. 411, 42 N. E. 6; *Smalley v. Vogt*, 166 S. W. 1 (Texas). When, therefore, as in the principal case, a relation of confidence between the parties prevents suspicion, the statute does not run. *Kirkley v. Sharp*, 98 Ga. 484, 25 S. E. 562; *Arkins v. Arkins*, 20 Colo. App. 123, 77 Pac. 256. But the court in the principal case rested its decision on the ground that as the plaintiff had read the conveyance, she had "actual notice of the character of the instrument." Since stupidity, ignorance, or, as in the principal case, inattention born of confidence may prevent comprehension of what is read, such notice is not in fact the necessary result of reading the conveyance. Nor on the ground of policy should such notice be conclusively presumed in an action for fraud, for neither is there culpability in a failure to understand what is read nor should the courts protect a fraudulent defendant on the ground of the credulity of the plaintiff. *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.*, 4 N. D. 219, 59 N. W. 1066.

MASTER AND SERVANT — WORKMAN'S COMPENSATION ACTS — CONSTRUCTION OF CLAUSE EXCLUDING OTHER REMEDIES. — An injured seaman applied for a *mandamus* to the Industrial Insurance Commission to compel his employer to reimburse him for his injury in accordance with the Workman's Compensation Act, which excludes "every other remedy, proceeding, or compensation." 1913 SUPP. WASH. STAT. 667. Held, that the plaintiff is not entitled to the benefit of the act. *State v. Daggett*, 151 Pac. 648 (Wash.).

Under a similar statute, 1914 SUPP. N. Y. COMP. STAT. 997, it was held that an injured maritime servant could recover. *Walker v. Clyde Steamship Co.*, 765 N. Y. Comb. 529 (Ct. of App.).

An injured maritime servant can sue in admiralty for damages. *The Slingsby*, 116 Fed. 227. The Judiciary Act, which confers admiralty jurisdiction on the federal courts, saves "to suitors in all cases the right to a common-law remedy where the common law is competent to give it." 1 U. S. COMP. STAT. 516. This clause has been construed by the courts to include the statutory remedy created by a Workman's Compensation Act. *Berton v. Tietjen, etc. Co.*, 219 Fed. 763; *Kennerson v. Thames Towboat Co.*, 94 Atl. 372 (Conn.). On the other hand, any attempt by a state to modify the admiralty jurisdiction of the federal courts over such a case must necessarily fail. *Workman v. City of New York*, 179 U. S. 552, 557. See *The Fred E. Sander*, 208 Fed. 724, 730. Now a statute should not be construed as in conflict with the Constitution and laws of the United States, when it will bear any other interpretation. See *Knights, etc. Co. v. Jarman*, 187 U. S. 197, 201. It thus follows that the remedy created by the Workman's Compensation Acts should be construed as a substitution for former common-law remedies only, and so be coexistent with a remedy in admiralty, in the case of an injured seaman. *The Fred E. Sander, supra*. Hence the fact that an exclusive remedy cannot be given in admiralty should not deprive a maritime servant of the benefit of the act.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — ADMISSIBILITY OF HEARSAY BEFORE ADMINISTRATIVE TRIBUNAL. — An employee

was taken ill while at work and died two weeks later from the effects of an internal hemorrhage which might have been caused by muscular strain or exertion. Declarations of the deceased employee furnished the only evidence as to whether the injury arose "out of and in the course of the employment." The Workmen's Compensation Act having authorized the disregard of "technical rules of evidence," the commission based its award upon this hearsay testimony. *Held*, that the award must be annulled, the rule against hearsay not being a "technical rule." *Englebreton v. Industrial Accident Commission*, 151 Pac. 421 (Cal.).

On a similar state of facts the New York Workmen's Compensation Commission based an award upon declarations of the deceased employee as to the circumstances of his injury, under an act providing that the commission "shall not be bound by common law or statutory rules of evidence." *Held*, that the award should be affirmed. *Carroll v. Knickerbocker Ice Co.*, 155 N. Y. Supp. 1.

For a discussion of these cases, see NOTES, p. 208.

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS — VALIDITY OF FRONTAGE ASSESSMENT FOR PAVING STREET OF VARYING WIDTH. — The assessment for paving a street eight blocks long in defendant city was levied equally in proportion to the frontage of the lots, regardless of the varying width of the street. *Held*, that the assessment was valid. *Kaplan v. City of Macon*, 86 S. E. 219 (Ga.).

A special assessment is levied for the purpose of collecting part or all of the cost of an improvement from the property especially benefited by it. *State v. Jersey City*, 36 N. J. L. 56. See 21 HARV. L. REV. 533. Consequently the amount of the assessment must not substantially exceed the benefit to the property. *Norwood v. Baker*, 172 U. S. 269; *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204. See 2 PAGE & JONES, TAXATION BY ASSESSMENT, § 651. Assessments by the frontage method have, however, been generally upheld, on the theory that this method will usually approximate a just result. *Sears v. Boston*, 173 Mass. 71, 53 N. E. 138; *Ramsey Co. v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108. But such assessments are invalid as a confiscation of property without compensation if, in fact, the amount assessed on any property greatly exceeds the benefit received thereby from the improvement. *White v. Tacoma*, 109 Fed. 32. In the principal case there is nothing to show that a uniform application of the frontage method would be unjust, or that property fronting on a wide part of the street would reap a greater benefit from the paving than that facing a narrower part. Giving proper effect to the presumption of the validity of the legislative act, the case seems right. See *French v. Barber Asphalt Co.*, 181 U. S. 324; *Savannah v. Weed*, 96 Ga. 670, 23 S. E. 900.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — RIGHT OF LIFE BENEFICIARY TO LIEN ON INSURANCE POLICY FOR PREMIUMS VOLUNTARILY PAID. — Insurance policies on a husband's life were assigned with other property to trustees for the use of the wife for life and then for her child. The husband covenanted to pay the premiums, and the trustees had discretion to pay them if he failed to do so. The husband being unable to make the payments, the wife paid the premiums for twenty-five years. On the husband's death the wife claimed a lien on the proceeds of the policy for the amount she paid. *Held*, that she cannot recover. *In re Jones' Settlement*, [1915] 1 Ch. 373.

One who pays the debt of another, unless the payment was unreasonable or officious, may recover the amount from that other on general quasi-contract principles. *Exall v. Partridge*, 8 T. R. 308. See 25 HARV. L. REV. 77; 24 HARV.

L. REV. 583. Thus a mortgagee to protect his own interest may pay off a prior incumbrance and hold the mortgagor liable for the amount. *Hogg v. Longstreth*, 97 Pa. St. 255; *Milburn v. Phillips*, 143 Ind. 93, 42 N. E. 461; *Bowen v. Gilbert*, 122 Ia. 448, 98 N. W. 273. In the principal case the husband was legally bound to pay the amount himself, and thus the wife could clearly have a lien on any interest of his. But to repay her the full amount out of the trust fund would practically allow her to force the trustees to pay the premiums and deprive them of their discretion. *In re Waugh's Trusts*, 46 L. J. Ch. 629. See *In re Leslie*, L. R. 23 Ch. D. 552, 560, 561. But if a life tenant pays off an incumbrance, he may enforce contribution from the remainderman. *Downing v. Hartshorn*, 69 Neb. 364, 95 N. W. 801; *Whitney v. Saller*, 36 Minn. 103, 30 N. W. 755; *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566. See *In re Leslie*, L. R. 23 Ch. D. 552, 565. Thus, as the wife acted under a strong moral compulsion to protect the interests of her child, on equitable principles she should be entitled to contribution from the remainderman for his proportionate share of the expenditure.

SALE OF FUTURE GOODS — BANKRUPTCY — POSSESSION BY VENDEE — PREFERENCE. — The defendant lent money to a partnership, with knowledge of its insolvency, under an agreement that the firm was to manufacture certain property to be his when completed. He took possession of such property within four months prior to the day on which a petition in bankruptcy was filed against the firm. The trustee in bankruptcy sues to recover the property as a voidable preference. *Held*, that he cannot recover. *Sieg v. Greene*, 225 Fed. 955 (C. C. A., 8th Circ.).

At one time it seemed that the rule of *Holroyd v. Marshall* would not afford protection to a mortgagee of future goods if he acquired possession within four months previous to the filing of a petition in bankruptcy against his mortgagor. *Matthews v. Hardt*, 9 Am. B. Rep. 373; *In re Ball*, 123 Fed. 164. See 18 HARV. L. REV. 606. But it is now clearly settled that the mortgagee is protected. *Thompson v. Fairbanks*, 196 U. S. 516; *Humphrey v. Tatman*, 198 U. S. 91. It seems doubtful whether a similar result in the case of a sale is justified. It is true that when the vendee parts with his money in reliance on a specific return he acquires a right *in specie*, which at once gives equity jurisdiction, and that the intervening insolvency of the vendor, which renders the legal remedy substantially inadequate, gives ground for equitable relief. But the whole spirit of the Bankruptcy Act seems to make the insolvency of the vendor the signal for proportionate distribution of his assets among all of his creditors, and nothing in the statute justifies a preference of specific over general claims. See WILLISTON, SALES, § 144. Nevertheless, the principal case has the support of a previous Supreme Court decision. *Hurley v. Atchison, T. & S. F. Ry. Co.*, 213 U. S. 126.

SALES — BREACH OF WARRANTY — WAIVER OF BREACH BY ACCEPTANCE. — In pursuance of a contract to buy and sell all the steers of a certain age then on the ranch of the seller, subject to a fifteen per cent cut, the seller delivered stock depreciated in weight from underfeeding. There was no express warranty in the agreement as to the condition of the cattle. The buyer, because of necessity occasioned by other contracts, accepted the cattle. He did not protest at the time and now seeks to recover damages for the breach. *Held*, that his right of action does not survive the unprotested acceptance of performance. *Cadwell v. Higginbotham*, 151 Pac. 315 (N. Mex.).

In ordinary contracts it is well settled that the mere acceptance of a defective performance does not bar the right to sue for a breach. See WILLISTON, SALES, § 485. But in sales and contracts to sell the law is in confusion. Where the

defect in the goods is one which cannot be easily discerned, acceptance never bars the buyer's right of action. *Buffalo Barbwire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360; *Bell v. Mills*, 78 N. Y. App. Div. 42, 80 N. Y. Supp. 34. Where the defect is apparent, if the warranty is clearly express, the right to sue will survive a mere acceptance. *Day v. Pool*, 52 N. Y. 416; *Shupe v. Collender Co.*, 56 Conn. 489, 15 Atl. 405. The same rule applies where the warranty is implied or arises from the description of the goods, provided the sale is executed. *Munford v. Kevil*, 109 Ky. 246, 58 S. W. 703. But where title has not passed, considerable authority maintains that the buyer's right is destroyed by the mere acceptance of the goods. *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Reed v. Randall*, 29 N. Y. 358. See *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, 519. *Contra*, *English v. Spokane Commission Co.*, 48 Fed. 196. See *Watson v. Bigelow Co.*, 77 Conn. 124, 130, 58 Atl. 741, 742. The delivery of title to unspecified goods which do not correspond with the warranties of the contract, it is true, furnishes valid consideration to support an accord and satisfaction. See 19 HARV. L. REV. 208. But it is submitted that no waiver of the buyer's rights can occur unless he accept the defective performance as full satisfaction of the seller's obligation, which is by no means a necessary result of accepting defective performance. The question is therefore one of fact to be left to the jury in each case. See *Morse v. Moore*, 83 Me. 473, 481, 22 Atl. 362, 364. However, the failure to make protest within a reasonable time is strong evidence that the goods were received in full satisfaction, and the Sales Act, to obtain commercial certainty, has made such delay an absolute bar to recovery. See WILLISTON, SALES, § 484.

SCHOOL BOARDS — INJUNCTION AGAINST ABUSE OF DISCRETION — POWER TO PASS RULE EXCLUDING MEMBERS OF TEACHERS' UNION FROM SCHOOLS. — The Chicago Board of Education appointed some seven thousand teachers, many of whom were members of the Chicago Teachers' Federation, and later passed a rule prohibiting membership in this Federation on the part of the teachers. A taxpayer's suit was instituted to obtain an injunction against the enforcement of this rule. *Held*, an injunction will issue. *People ex rel. Fursman*, 3163 Chic. Leg. News 66 (Superior Court of Cook County, Ill.).

On exactly similar facts an Ohio court issued an injunction which was violated and attacked collaterally. *Held*, that the inferior court had no power to issue the injunction. *Frederick v. Owens*, 60 Oh. L. Bull. 538, 35 Oh. Circ. Ct. 538.

In general courts are slow to review the acts of an administrative board, deeming it essential to successful administration that if the board act within its powers, its decisions, no matter how unfortunate, should be final. *Fitzgerald v. Harms*, 92 Ill. 372; *Lem Moon Sing v. United States*, 158 U. S. 538; *United States v. Ju Toy*, 198 U. S. 253. School boards are given large discretion in the matter of hiring and dismissing teachers, the statutes generally providing that a teacher "may be dismissed for cause." See, for example, ILL. REV. STAT., ch. 122, §§ 133, 161. The right of the teacher to have written notice of the charge and to be heard in his defense gives that publicity which is an essential feature of administrative control. As the membership of teachers in a federation is conceivably productive of some slight degree of insubordination in the schools, it would seem to be a possible cause for dismissal. With this established, the fact that a school board acted unwisely in exercising its discretion, cannot give equity power of review. However, Illinois has previously gone to an unusual length in this direction. *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314. But elsewhere courts generally refuse to review the decisions of school boards in matters of discretion. *Lane v. Morrill*, 51 N. H. 422; *Wharton v. School Directors*, 42 Pa. St. 358; *Hysong v. School District*, 164 Pa. St. 629, 30 Atl. 482. Again, it is to be noted that the taxpayer's bill in the Chicago case

alleged only that the enforcement of the rule complained of would so disorganize the schools that taxes would be dissipated without adequate return. Though taxpayers' bills are numerous in Illinois they have heretofore been based on a certain injury to the taxpayer. *Board of Education v. Arnold*, 112 Ill. 11; *Martin v. Jamison*, 39 Ill. App. 248. See *Fitzgerald v. Harms*, 92 Ill. 372, 375. While the Chicago teachers have gained a temporary advantage over a blundering school board, the entrance of a court of equity into the field is unfortunate.

SURETYSHIP — SURETY'S DEFENSES — BANK'S FAILURE TO SET OFF CLAIM AGAINST PRINCIPAL DEBTOR. — An accommodation note was indorsed to the plaintiff bank at which it was made payable. The bank with knowledge of the accommodation permitted the accommodated indorser to withdraw deposits made after the maturity of the note and sufficient to cover it. It now sues the accommodation maker. *Held*, that it cannot recover. *Tatum v. Bank*, 69 So. 508 (Ala.).

At common law, the holder of a bill or note who has knowledge of the suretyship of one party for another has a duty of equitable conduct toward the surety, on pain of discharging him. *Laxton v. Peat*, 2 Campb. 185; *Ewin v. Lancaster*, 6 B. & S. 571; *Valley Nat. Bank v. Meyers*, 17 N. B. R. 257. In some states it is a breach of that duty for a bank which holds accommodation paper to permit the accommodated party to withdraw sums on deposit at or after maturity of the instrument. *McDowell v. Bank*, 1 Harrington (Del.) 369, 382, 383; *Pursifull v. Bank*, 97 Ky. 154, 30 S. W. 203. See 2 MORSE, BANKS AND BANKING, 4 ed., § 563; 9 HARV. L. REV. 146. But, by the weight of authority, the surety is not discharged by a mere failure to retain such deposits, as he would be if the bank released a mortgage or pledge to which he might be subrogated. *Glazier v. Douglass*, 32 Conn. 393; *Davenport v. Bank*, 126 Ga. 136, 54 S. E. 977; *Citizens' Bank v. Booze*, 75 Mo. App. 189. Whether the right is regarded as a lien, as in the principal case, or as a set-off, it is well settled that the surety cannot be subrogated to the right of the bank to retain the deposit. See *Davenport v. Bank*, *supra*, 146; *Pursifull v. Bank*, *supra*. See SHELDON, SUBROGATION, § 124. But, although no right of subrogation is destroyed, the bank, by failing to exercise its right of set-off, which would have afforded a simpler means of satisfying the debt than would be afforded by a pledge, mortgage, or lien, has prejudiced the surety's interests as much as if it had surrendered a security on which it held a specific lien. *McDowell v. Bank*, *supra*; *Pursifull v. Bank*, *supra*; *Law v. East India Co.*, 4 Ves. 824. Under this view it should make no difference whether the deposits were made before or after the maturity of the note. *McDowell v. Bank*, *supra*; *Bank of Taylorville v. Hardesty*, 91 S. W. 729 (Ky.). See *Davenport v. Bank*, *supra*, 144. Cf. *People's Bank v. Legrand*, 103 Pa. St. 309; *Commercial Bank v. Heninger*, 105 Pa. St. 496. And it is also immaterial whether the principal debtor is maker or indorser, provided the real relationship between the parties is known to the bank. *Ewin v. Lancaster*, *supra*; *Guild v. Buller*, 127 Mass. 386. Accordingly, the principal case seems correct in holding that the bank should be compelled to make the set-off against the account of the depositor. The court did not have to decide whether the Negotiable Instruments Law would affect the correctness of this result, because the statute of the sister state where the note was payable was not pleaded.

TAXATION — CONSTITUTIONAL RESTRICTION: UNIFORMITY — MORTGAGE REGISTRY TAX. — A Kansas statute imposed a tax on mortgages when recorded, making those not recorded unenforceable, and exempting those recorded from the general property tax. The former small registry fee was also continued. *Held*, that the tax violates the constitutional requirement of "a

uniform and equal rate of assessment and taxation." *Wheeler v. Weightman*, 149 Pac. 977 (Kan.).

The common provision in state constitutions requiring equality of taxation has been construed to require that the method of valuation shall be equal for any one sort of property. *Chicago, etc. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557. See 16 HARV. L. REV. 136. But privilege, license, and recording taxes need only be uniform in regard to the particular privilege or license taxed. *State v. Lathrop*, 10 La. Ann. 398. See COOLEY, TAXATION, 3 ed., 274-344. Now mortgages are generally held to be personal property and are taxed as such. *People v. Worthington*, 21 Ill. 171; *Glidden v. Newport*, 74 N. H. 207, 66 Atl. 117. *Contra*, *People v. Hibernia, etc. Society*, 51 Cal. 243. And they are properly taxed, though the land is also taxed to the full value. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Lick v. Austin*, 43 Cal. 590. On the other hand, mortgages are sometimes exempted altogether as included in the tax on land, or the amount of the mortgagee's interest is deducted from the value assessed to the mortgagor. *Crawford v. Linn County*, 11 Ore. 484, 5 Pac. 738; *Savings & Loan Society v. Multnomah County*, 169 U. S. 421. But so long as the mortgage is taxed as property; it must be assessed on the same scale as other property. Often, however, mortgage taxes are not taxes on property but privilege taxes. *Saville v. Virginia Ry. & Power Co.*, 114 Va. 444, 76 S. E. 954; *State v. Alabama Fuel & Iron Co.*, 66 So. 169 (Ala.). But when, as in the principal case, a recording fee is retained and the mortgages taxed are exempted from the general property tax, it seems that the tax is one on property rather than the privilege of recording.

TRUSTS — RIGHTS AND LIABILITIES OF THIRD PARTIES — CONSTRUCTIVE NOTICE BY DEPOSIT AS "TRUSTEE." — The plaintiff gave Morris money to invest for her. He deposited it in the name of "Morris, Trustee" with the defendant brokers, through whom he speculated on margins with it. In an action against the brokers for assisting, with notice, in diverting the plaintiff's property from the purpose for which Morris held it, the plaintiff was nonsuited on the ground that the addition of "Trustee" to the depositor's name did not put the defendant on notice of the plaintiff's equity. *Held*, that the non-suit was correct. *Titcomb v. Richter*, 89 Conn. 230, 93 Atl. 526.

Whenever a fiduciary relationship exists, a third person who knowingly aids the trustee in a breach of trust will be liable to the beneficiary. *Duckett v. Mechanics' Bank*, 86 Md. 400. Notice of the prior equity may be constructive, depending on the existence of facts sufficient to put a prudent man on inquiry. *Shaw v. Spencer*, 100 Mass. 382; *Leake v. Watson*, 58 Conn. 332. See *Jones v. Smith*, 1 Hare 43, 55. See 1 PERRY, TRUSTS, 6 ed., § 223. It is usually held that the word "trustee" is not mere *descriptio personae*, but gives constructive notice of prior equities. *Jeffray v. Towar*, 63 N. J. Eq. 530; *Isham v. Post*, 71 Hun (N. Y.) 184; *National Bank v. Insurance Co.*, 104 U. S. 54; *Third National Bank v. Lange*, 51 Md. 138. See *Ex parte Kingston*, L. R. 6 Ch. App. 632. See 15 HARV. L. REV. 160. A scattered practice among business men of making special personal deposits in their names as trustees should not destroy the *prima facie* notice that the word gives, especially when judicial recognition of this somewhat limited custom would assist trustees to misuse trust funds and would give official sanction to a common means of avoiding attachments. See *Anderson v. Kissam*, 35 Fed. 699. Accordingly, the principal case is opposed to both reason and authority. It will be interesting to see whether or not the Connecticut courts will carry their rule to its logical conclusion and allow a "trustee" account to be set off against a personal account. See *Bundy v. Monticello*, 84 Ind. 119; *National Bank v. Insurance Co.*, *supra*; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411.

WAR — ALIEN ENEMIES — EXPATRIATED CITIZENS OF BELLIGERENT COUNTRY AS PRISONERS OF WAR. — A German by birth who resided in England had received a formal discharge from German nationality under a law of 1870. (Grotefends Gesetzsammlung, p. 354, § 13.) Though he continued to live in England, he never became an English citizen. In 1913 a German statute was passed (1913 Reichsgesetzblatt-Deutschland, Nr. 46, §§ 8, 13) allowing former Germans or their descendants, upon certain conditions, to resume citizenship without returning to Germany. In August, 1915, he was interned as a prisoner of war under an order issued by authority of the Home Secretary and applied for a writ of *habeas corpus*. *Held*, that the application be denied. *Rex v. Liebmann*, 1915, 38 Wkly. Notes, 320, 50 L. J. 443.

The same decision was reached in an earlier case where the German had been automatically expatriated on account of an uninterrupted absence from Germany for ten years. In this case the same law which annulled the citizenship gave the privilege of resumption. *Ex parte Weber*, 1915, 31 T. L. R. 602.

By virtue of the King's prerogative, prisoners of war are denied a writ of *habeas corpus*. *Rex v. Schiever*, 2 Burr. 765; *The Three Spanish Sailors*, 2 W. Bl. 1324. But the court was, very correctly, unwilling to admit that such prerogative extends further. See *Jones v. Seward*, 40 Barb. (N. Y.) 563, 566-570. Cf. DESPAGNET, LE DROIT INTERNATIONAL PUBLIC, § 668. It did declare, however, that alien enemies interned in England were prisoners of war. While the law is clear as to who may claim the privilege of being a prisoner of war, it has not before been decided whether, under any conditions, an alien enemy may claim a greater privilege. See 2 MALLOY, TREATIES, SECOND HAGUE CONVENTIONS, 2281, articles 1, 2, 3, 8, 29, 31. One authority, at least, appears to deny that a non-combatant alien enemy may be made a prisoner of war. See DESPAGNET, LE DROIT INTERNATIONAL PUBLIC, § 545. No matter what the exigency may be, certainly no one can be made a prisoner of war who is neither combatant nor alien enemy. See *Johnson v. Jones*, 44 Ill. 142, 152; *Ex parte Mulligan*, 4 Wall. (U. S.) 2, 131. See also 6 WEBSTER'S WORKS, 427, 432. Now an alien enemy is one who owes allegiance to an adverse belligerent nation. See *Dorsey v. Brigham*, 177 Ill. 250, 256, 52 N. E. 303, 304. See CO. LITT., 129 b; 1 KENT, 73. But by the laws of Germany both prisoners were freed from their allegiance. See LAWS OF 1870, *supra*. And England recognizes the right and possibility of expatriation even in her own citizens. 35 & 36 VICT., c. 39; 33 & 34 VICT., c. 14, § 4. The prisoners, therefore, in the cases reported, were not alien enemies. But the court argued that as former Germans have privileges in resuming citizenship, not granted to foreigners, they have "not become entirely divested of the rights belonging to a natural born German." Yet special privileges of naturalization are granted to former citizens by many European countries. See CALVO, LE DROIT INTERNATIONAL, France, §§ 587, 597, Italy, §§ 604, 606, Belgium, § 612. It is difficult to see how such a privilege can bring under allegiance to a country an expatriated person entirely out of its jurisdiction.

BOOK REVIEWS

BRACON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE. Volume I. Edited by George E. Woodbine, Assistant Professor of History in Yale College. New Haven: Yale University Press. 1915. pp. xiv, 422.

We have here, at last, in sumptuous dress, the first volume of Professor Woodbine's long expected edition of Bracton. The value of this remarkable treatise to scholars has never been fully appreciated, owing to the unfortunate manner in which the text has been edited. The original edition, first issued by

Tottel, in 1569, was sumptuous, but uncritical. The edition edited by Sir Travers Twiss, in the *Rolls* series, was equally beautiful and at least equally uncritical. We have at last an edition which is to provide us for the first time with a scholarly text. That this work should have been left for an American scholar is no discredit to the scholarship of England; for, as Sir Frederick Pollock generously recognizes, the law of which it is the first flower is our law too.

This volume contains a preliminary discussion of the manuscripts and a justification of the author's choice. Two volumes of text and two volumes of translation, with a sixth volume containing the editor's introduction, will complete the work.

The author's critical apparatus consists of forty-six manuscripts now accessible to scholars; two, or possibly three manuscripts once known to exist cannot now be found, and are probably buried in some of the great private libraries. Each of the forty-six manuscripts is here examined carefully, described as to its size and external form, its completeness, and its collation. Not more than two or three of these manuscripts have ever before been collated in any of the previous editions of the work. The first task of the author was to fix the pedigree of every manuscript which could possibly be of use in establishing the text. For this purpose, a careful examination is made in several directions. The order of the quires as they occur in the different manuscripts is compared; but the editor finds that the omissions and misplacements found in several of the best manuscripts are almost entirely referable to a misplacement of the quires in one of the earliest and best manuscripts, which has served as their exemplar. This is the Digby manuscript, of which Maitland thought so highly that in his "*Bracton and Azo*" he named it as probably the best starting point for the new text.

Before entering upon the textual comparison, the editor notes the curious fact that the manuscripts were multiplied rapidly for a half century after the first publication of the treatise, and after that time no more were prepared. The length of the treatise and the changes in the law by legislation led to its being superseded at the end of a half century by the abridgments and imitations which took its place for the lawyers of the fourteenth and fifteenth centuries. During this half century there were innumerable variations in the surviving manuscripts. Many of these variations may be eliminated as common errors of copyists or individual idiosyncrasies of some particular owner, but every manuscript has its peculiar variations. None of those now existing are, the author thinks, closer to the original than its grandchildren, and perhaps separated by a greater distance. Many of the best of them were copied by several hands from several exemplars; like the Digby manuscript, in which six hands may be traced. The author differs from Maitland in his estimate of the value of the Digby manuscript. That some good manuscript was taken apart, and its parts divided among different copyists for the purpose of copying rapidly, as Maitland had conjectured, there was no reason to doubt; but that it was the autograph manuscript of Bracton himself which furnished the exemplar, further study proves unlikely. Indeed, two manuscripts at least must have contributed to the making of the Digby, since in one of the hands it presents a text which follows a different line from that of the other copyists. Most of the peculiarities noted by Maitland, and believed by him to show its closeness to the original, Professor Woodbine points out as common to this and other manuscripts. The Digby does, indeed, in his opinion, stand at the very head of one line of text; but he finds, on careful examination of the manuscripts, that we have at least three distinct lines of text, and that the Digby represents not the earliest but one of the later lines.

Professor Woodbine's internal study of the manuscripts begins with a careful collation of a number of passages, some long and some short, collated in all the available manuscripts. Starting with this careful comparison, the editor

finds sufficient evidence to make a preliminary classification of the manuscripts according to the one of the three lines of text followed. Many manuscripts follow now one and now another line, according to the exemplar used by the copyist; several exemplars were often used in making one copy.

Professor Woodbine explains, in one of the most illuminating descriptions in print, the work of the editor of an ancient manuscript: noting the sources of common error, the method of collation, and the method of discriminating between characteristic and accidental variations. The actual collation of the text of the passages chosen for that purpose occupies seventy-three pages of the volume; the grouping of the manuscripts, not in general, but in each of the collated passages, occupies the next fifty pages; and a graphical representation of the grouping requires fifty pages more. The editor then shows in graphical form, in a very interesting series of tables, the amount of difference from the standard text in each manuscript, placing in separate columns the errors due to imperfect copying and the errors which are plain mistakes. In this way the author is able to determine which are the carefully and which the carelessly written manuscripts; not that this, of course, determines the excellence of the text, for a text of the very highest correctness might be copied by a careless copyist, but because it gives a general line on the method pursued by the transcribers of the various manuscripts. Finally, the author makes a very careful study of the *addiciones*, as they occur in various manuscripts, partly to distinguish the additions made by Bracton himself from those which crept into the text after he had left it. The division of the treatise into books, as to which the manuscripts differed most fundamentally, the editor dismisses as unimportant for settling the text, because, as Maitland had already said, Bracton himself made no such divisions, although he probably contemplated making it upon the completion of his treatise.

The final conclusion of the author as to the pedigree of the manuscripts appears to be that one line starts from an original text first published by Bracton; that Bracton thereafter prepared and published a second edition, from which another line of manuscripts starts; and that a very early copyist, by comparison of the two editions, started a third line, which combines some of the characteristics of both. Of the earliest text he prefers on the whole the Bodleian manuscript (Bodley 170) called by him OB. This is in the late thirteenth century court hand and is subject to a correction by two or three other manuscripts of the same line. For the later text the Digby manuscript, also in Bodleian library, called by him CA, furnishes the best text, except where one of the copyists at the end has followed an exemplar of another line. Several manuscripts are available for correcting and controlling errors in the Digby. For the third, or composite line of manuscripts, there are two or three good exemplars. A text based upon these few manuscripts, and collated with half a dozen others, should furnish the nearest possible reproduction of Bracton's own words.

Of the work of the editor one can speak only in the highest praise. To Professor Woodbine's training, patient investigation, careful judgment, scholarly care, the reviewer can only render uncritical homage. Exactly to estimate the error in his conclusions — error must occur, of course, in every human accomplishment — no one in America has the critical knowledge. Has anyone in England? We wonder. The reviewer can say no more than this: where Professor Woodbine states his facts and conclusions in full, his opinions seem convincing; where his conclusions are given without a full array of facts, one therefore confidently believes them to be sound.

We shall probably never have another critical edition of Bracton. It is not too much to say of Professor Woodbine's work that, so far as this volume is concerned, we shall not need one.

J. H. BEALE.

EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS. Compiled by Albert Kocourek, Professor of Jurisprudence in Northwestern University, and John H. Wigmore, Professor of Law in Northwestern University. Volume I, Sources of Ancient and Primitive Law, pp. xvii, 702; Volume II, Primitive and Ancient Legal Institutions, pp. xiii, 704. Boston: Little, Brown and Company. 1915.

Professor Wigmore's enthusiasm and energy had already been the motive force behind four important series under the auspices of learned societies. To the Select Essays on Anglo-American Legal History, the Modern Criminal Science Series, the Continental Legal History Series, and the Modern Legal Philosophy Series, we now have added the Evolution of Law Series, which is by no means the least of these, whether intrinsically or in its possibilities, for the teacher of legal science.

As indicated by the preface, and especially by the eloquent and suggestive addendum to the preface, contributed by Professor Wigmore, the purpose of the series is to afford a collection of materials for the study of what Kohler calls "universal legal history" in such form as to permit of instruction in that subject in accordance with the methods that prevail in the modern law school. Regarding the "universal legal history" of the neo-Hegelians as a development of Maine's comparative legal history, or possibly both as a development of the Hegelian idealistic interpretation, the "working thesis" of the compilers is "the essential unity of human nature" (I, p. viii). "This," they say, "furnishes the distinguishing marks of the phases and stages of legal evolution and provides at least one of the important tests of legislative policy" (I, pp. viii-ix). They would agree with Fehr that "over and above race and nation there must be conditions of general validity governing the production of law. . . . The likeness of law in cases of the most striking unlikeness of race can only be explained by a common human basis."¹ Lawyers have not been content with the interpretation of the legal history of each people as a unique series. It is the business of the lawyer to find principles behind what are superficially unique instances. Thus, as philosophers have remarked, there is a natural affinity between the Hegelian philosophy and the historical school of law.²

Among the many signs of a new period of legal growth, perhaps this return to the fundamental idea of human nature as the basis of legal science, the idea which dominated in the great growing period in the seventeenth and eighteenth centuries, is not the least significant. Perhaps for the third time a law of nature is to be invoked to guide a rationalizing and liberalizing movement. But this time there will be no spinning out of an *a priori* law of nature from the head of a jurist. Rather it will be rested upon the solid ground of a universal legal history. Even if one might think that what the compilers style "the mechanical pantheism of Post" (I, p. viii) is hardly adequate to stand for the sociological theory of the present, and would like to see a collection of materials for a sociological legal history, such, for example, as Kantorowicz calls for,³ he can but rejoice not merely at having so convenient and complete a source-book for the study of legal beginnings made generally accessible, but even more at the success of the compilers in working their materials quietly but effectively into a plan which reveals a philosophical theory of legal history and a well-ordered system of legal philosophy.

In the first volume, under Part I, "General Literature Containing References to Ancient and Primitive Law and Institutions," there are extracts from the Iliad, the Odyssey, Plutarch (Theseus, Romulus, Lycurgus, Numa, Solon), Cæsar (the Britons, the Germans, the Druids), Tacitus, and the Njals Saga.

¹ Hammurapi und das salisches Recht, 136.

² Erdmann, History of Philosophy (Hough's transl.) iii, 328.

³ Rechtswissenschaft und Soziologie, 30-34.

Part II, "Modern Observations of Retarded Peoples," covers Australians, Eskimos, American Indians, Kafirs, and the Fanti of the Gold Coast. Part III contains in whole or in long and well-chosen extracts, Ancient Accadian Laws, Hammurabi, the Edict of Harmhab (Egyptian), the Laws of Gortyn, the Twelve Tables, Manu, the Salic Law, Ethelbert's Dooms, the Laws of Howel Dda. Part IV, "Ancient and Primitive Legal Transactions," contains trials, procedural formulæ, and accounts of the course of litigation from Egypt, Babylon, Greece (Demosthenes), Rome (Cicero and Gaius), and the Germanic peoples, followed by Egyptian, Babylonian and Assyrian documents.

The second volume, intended to be used with the first, is made up of extracts from writers on the history and philosophy of law and of social institutions. In the introductory chapter, Kohler on the evolution of law and Post on ethnological jurisprudence are followed by Tarde's theory of imitation and a critique thereof by Girard, and these by Del Vecchio's well-known "Universal Comparative Law," now translated into a fifth language. Part I, "Law and the State," has chapters on Forms of Social Organization, Evolution of the State, Omnipotence of the Ancient State, Chieftaincy and Kingship, Religion and Law, Evolution of Criminal Law, The Forms of Law, and Methods of the Law's Growth, with extracts, among others, from Kohler, Fustel de Coulanges, and Maine. Part II, "Persons," has twelve chapters, covering the beginnings of family law, slavery, and the Roman impairment of civil personality and loss of civic honor. Part III, "Things," has ten chapters, dealing with property, the origin of commercial institutions, primitive commercial law, barter and transfer, pledge, suretyship, the evolution of contract, sales and loans at Rome, interest, and succession. Part IV is made up of extracts from writers upon the history and evolution of procedure and the procedure of primitive or archaic law.

Much of the translation has had to be done by the compilers themselves, and in view of this burden, added to the difficult task of selection and compilation, not at random, but with a clear purpose and according to a matured plan, these volumes are indeed a notable achievement.

ROSCOE POUND.

VOTING TRUSTS. By Harry A. Cushing. New York: The Macmillan Company. 1915. pp. 226.

This is a book on a modern development of corporate law written by one who shows an intimate acquaintance with present commercial methods and with recent history of corporate management. Mr. Cushing's literary style is excellent, his citation of authorities is exhaustive, and he has given in compact form a clear and illuminating statement of the law of voting trusts not elsewhere to be found.

A discussion of this subject, Mr. Cushing says, in a period when not only concentration of property, but even combinations of mere influence have been subjected to severe criticism, naturally suggests a justification of what some still regard as an innovation of slight utility and of doubtful propriety. Such, however, the author considers hardly more appropriate than a defense of corporate organization itself and, he adds, "no other detail of corporate organization is so peculiarly the result of recent experience or more distinctive of the modern theory and practice in the correct reconstruction of corporate business" — a comment which derives considerable support from the recent decree of the federal court in the New Haven Railroad "dissolution" case, to which Mr. Cushing refers, by which three sets of voting trustees were created, each consisting of five members, who were made "officers of this court" for the purpose of carrying the decree into effect (p. 10). In some states voting trusts are

approved by statute (p. 94). In others they are supported by decisions of the courts, and their operation has secured to many corporations stability and continuity of policy and certainty of responsible management. "These substantial advantages outweigh the criticisms to which voting trusts have been subjected, and it is not to be expected that these advantages can be successfully ignored" (p. 99).

To the objection based on public policy that an elector may not separate voting power from beneficial interest Mr. Cushing gives but short shrift. Executors and trustees often have no beneficial interest in the stock upon which they vote; pledgees may have but slight interest; nominal owners in whose name stock stands have no interest at all and proxy holders need have neither interest nor nominal title. The separation of voting power and interest, Mr. Cushing argues, is therefore not the test of validity. "Even the cases holding the particular agreements then under consideration to be invalid, usually recognize the proposition that there may be a valid voting trust." *Bowditch v. Jackson Co.*, 76 N. H. 351 (1912). "Such agreements are not invalid *per se*. Their validity depends on the purposes they are designed to serve." *Thompson-Starrett Co. v. Granite Co.*, 86 Vt. 282 (1912). So Mr. Justice Holmes, speaking as Chief Justice for the Supreme Court of Massachusetts, said: "We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it." *Brightman v. Bates*, 175 Mass. 105 (1900).

These authorities present an interesting aspect of the workings of democracy which can be observed on a far wider stage than that of corporate law, but which can nevertheless well be studied in the management of corporations, for when so observed they are free from complexities and prejudices which in public affairs often prevent an unbiased conclusion.

The first and most important consequence of equality among citizens, Rousseau says, is that only the general will can direct the forces of the state according to the general good; for if the opposition of individual interests has rendered the establishment of societies necessary, it is the accord of these interests which has rendered it possible. It is thus solely through these common interests that society should be governed. When by the constitution of society the interest of each elector is directed toward the common interest the pyramid stands on its base. This is democracy.

A great difficulty with this form of government lies in the easy organization of majorities and the administration of public affairs for the benefit of the ruling organization. Nor does this process cease with the first step, for the ruling majority is itself subject to the same parasitic growth and this system has at times been carried so far that the governments of cities and states have often been subject to the will of a single individual. In public affairs this is control by the party machine, or unseen government as it is sometimes called — in Burke's phrase the union of the forms of a free with the ends of an arbitrary government. In corporate affairs this is the holding company or other combination of votes. In both fields the phenomena illustrate Rousseau's statements that "there is no government which tends so strongly and constantly to change its form as the democratic, nor which demands more vigilance and courage for its maintenance" and that "it is against the natural order of things that the majority should govern and the minority be governed."

The vice of all these intra-corporate organizations lies in the separation of the interest of the voter from the advantage of the whole body. By this separation the basis of democratic government is destroyed, the controlling organization votes in its own interest, often at the expense of the state, and all but the governing faction are as effectually deprived of participation as though forbidden to vote. This Mr. Cushing seems to admit, for he says, "the objection that a voting trust may produce results prejudicial to the holders of the

minority interest has been met in the later voting trust agreements by the specific provision that any stockholder might subject his shares to the trust" (p. 129). Surely the conflict between voting trusts and the statute under which the corporation is organized must appear when the shareholder is compelled to surrender his vote in order to secure equal participation in corporate benefits — though it is not very clear that even surrender would accomplish this result. At this point corporate democracy gives place to a new form of oligarchy. The evolution may be necessary. We have certainly traveled some distance in this direction, and it may be as Mr. Cushing says, that a voting trust has the advantage of providing an open, responsible management in place of less responsible organizations.

E. PARMALEE PRENTICE.

THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW.
 Edited by L. Oppenheim. Cambridge: University Press. 1914. pp. xxix,
 705.

The first part of this book, two hundred and eighty-two pages, contains a reprint of Professor Westlake's "Chapters on the Principles of International Law," which was first issued in 1894. The second part, nearly four hundred pages, contains the miscellaneous writings of Professor Westlake on international law.

While the definition of international law as "the science of what a state and its subjects *ought to do* or *may do* with reference to other states and their subjects" might not commend itself, the papers of Professor Westlake generally treat of what states and their subjects *actually do* with reference to other states and their subjects. His contact with affairs, moreover, tended to give a positiveness and incisiveness to his work.

The collected papers cover a period of more than fifty years, from 1851 to 1913. The first paper, presented in the Transactions of the Juridical Society, is upon the "Relations between Public and Private International Law," which furnishes an excellent résumé of the opinion sixty years ago. The chapter on commercial blockade assumes a much more radical position than has been acceptable to Great Britain, particularly in the twentieth century. The paper, "It is Desirable to Prohibit the Export of Contraband of War?" though written in 1870, gives ample support to the recent contentions of the United States, stating that to change a rule during hostilities "would be a clear breach of neutrality." Westlake's lecture on International Law on assuming the Whewell professorship in 1888 is conservative and seems scarcely to embody the positiveness of view which he later held. The chapter on the "Transvaal War," 1899, is an excellent presentation of the British case. When read with the present British attitude in mind, the pages written in 1899 on "Continuous Voyage in Relation to Contraband" show how far Great Britain has now departed from accepted opinion of a few years ago. The important chapter on "Title by Conquest" follows in the main the continental doctrine of succession. Some of the same principles recur in the chapter on the "South African Railway Case." Westlake takes the affirmative position in the chapter "Is International Law a Part of the Law of England?" There are papers on the Contraband of War, the Muscat Dhows, the Hague Conference, Holland and Venezuela, and the Pacific Blockade. There is a long chapter on the Declaration of London, which he calls "the greatest step yet made in the systematic improvement of international relations." The practical mind of Westlake is evident in the chapters on "Reprisals and War" and "Belligerent Rights at Sea." He realized that for a time at least states at war would be inclined to use against an enemy such resources as might be available.

Professor Westlake died April 14, 1913. Those interested in international law are to be congratulated that his successor, Professor Oppenheim, has made Professor Westlake's valuable contributions to international law so conveniently accessible.

GEORGE G. WILSON.

OUTLINE OF INTERNATIONAL LAW. By Arnold Bennett Hall. Chicago: La Salle Extension University. 1915. pp. v, 255.

The author explains that this volume is "designed solely for the general student and reader who is interested in the world problems of the day," and that it is "intended as a brief, non-technical statement of the underlying principles of international law." The first one hundred and six pages deal with international law both in time of peace and in time of war, and appear to give as much matter as a general reader is likely to be able and willing to master. An appendix presents sixteen pages of bibliographical references for the use of anyone who wishes to pursue the subject further. Other appendices give the more important conventions of the Second Hague Conference and a list of the ratifications and reservations. A final appendix gives the Declaration of London. As this last document has not yet been ratified by any country, there is a possibility that the reader should have been cautioned against relying upon it as a conclusive proof of international doctrine; but almost everyone who opens this book must have learned from the newspapers that the Declaration of London is a bruised and broken reed, and perhaps there is now no need of hanging a danger signal upon it.

EUGENE WAMBAUGH.

THE NEUTRALITY OF BELGIUM. By Alexander Fuehr. New York: Funk and Wagnalls Company. 1915. pp. 248.

A SKETCH OF ENGLISH LEGAL HISTORY. By Frederic W. Maitland and Francis C. Montague. Edited by James F. Colby. New York: G. P. Putnam's Sons. 1915. pp. x, 229.

THE SETTLEMENT OF ESTATES IN MASSACHUSETTS. By Guy Newhall. Boston: G. A. Jackson. 1915. pp. xxxi, 339.

MANUAL OF EMERGENCY LEGISLATION. Supplement No. 4 to August 31, 1915. Edited by Alexander Pulling. London: H. M. Stationery Office. 1915. pp. xxvii, 462.

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LABOR, CAPITAL, AND BUSINESS AT COMMON LAW

THAT labor, capital, and business are in some way related scarcely any one will dispute, but that a common law principle binds them together requires demonstration to lawyers no less than to laymen. For such a task less assistance is to be derived from the regular channels than might properly be expected, for lawyers as a class have not penetrated beneath the surface of the difficulties, nor, it must be confessed, have they shown any special aptitude for handling or success in dealing with them, if the results of the past twenty-five years may be accepted as a criterion. By comparison the activity and fertility of suggestion on the part of political economists, sociologists, and reformers of all classes have been so great that it is with some misgiving that one approaches the subject from a merely legal point of view. This very activity, however, has provoked a remonstrance from at least one jurist — Berolzheimer — who contends that:

“The exaggerated importance attached to ‘society’ and to ‘social ethics’ resulting therefrom, is . . . due to the fact that too many non-jurists occupy themselves with the philosophy of government and law, and therefore are disposed to replace the definite, though complex and difficult conception of government and law by the more elastic and vague one of society. ‘Society’ is more readily managed; it is like a lay figure upon which any sort of garment may be neatly fitted. The definiteness of legal concepts gives way to the foggy confusion of social-political, social-reformatory, and social-ethical discussions, fertile in proposals

that prove to be valueless and ineffective when philosophically tested. A return to legal and economic philosophy remains the sole scientific procedure."¹

Almost the only serious investigation at all connected with this field that has been made by lawyers has related to the regulation of "public" callings, — but this has been primarily a study of regulation, not of business, and as shown in a previous article,² the results as regards business are greatly impaired because of the circuitous reasoning employed: — A business is public, and it is "within the functions of government," therefore it may be regulated. It may be regulated, it is within the functions of government, therefore it is public. If it is under a duty to serve impartially it is public, and if it is public it is under a duty to serve impartially. "Private" business is under no duties at all — it is even beyond the reach of the legislature.

Such an employment of the word "public" is obviously useless in a study of business as such. The thing to be discovered is the inherent nature of business, and the relationship in which it stands to the public — whether it concerns the public or only a particular individual — whether it is a private or a communal interest. As Professor Pound, in his learned articles in this REVIEW dealing with Sociological Jurisprudence, has said:

"A legal system attains its end by recognizing certain interests, — individual, public, and social, — by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. . . . Undoubtedly the progress of events and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests. But they arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies."³

In other words, as we may take it, a high state of civilization is of itself indicative of a multitude of new relationships between the members of the community, which it is the business of law and

¹ THE WORLD'S LEGAL PHILOSOPHIES, Modern Legal Philosophy Series, vol. 2, p. 380.

² "Business Jurisprudence," 28 HARV. L. REV. 135.

³ 28 HARV. L. REV. 343, 344.

lawyers to recognize and adjust. In the simpler and more primitive conditions of communal association, the corresponding relationships are recognized as by instinct and the rights with which the community endows them are enforced by custom. But as the community grows, the resulting complexity of affairs produces a change, and the interdependency of the members becomes obscured at the very time that the claim of each upon all the others becomes more real as well as more vital. Instinct no longer suffices to produce a reaction in customary conduct. The discovery of the true relationships, the recognition of proper interests, and the statement in the form of law of the rights which the community concedes by virtue of this recognition, require an intelligent, yet sympathetic analysis of actual conditions, and this becomes the lawyer's task, and is the ultimate end of a legal system.

From its very nature the common law is peculiarly adapted to serve as the medium for the attainment of the ideal which Professor Pound has described, and because labor, capital, and business are so closely identified with the primal activities of civilized man, this is the field above all others in which the validity of the above analysis may be best tested and illustrated, and 'the one in which the real attitude and capacity of the legal system which we now enjoy may be most profitably examined.

In the former article a study was made of the "business" operation as such, with respect to its proper relationships. We there saw that in the nature of things and by the common law, in fact no less than in theory, all business is public. We found that business at common law consists in the undertaking and conduct of a community or public service for profit, and hence it is the duty of every one who takes upon himself a "public employment," that is, a business, "to serve the public as far as the employment extends."⁴ The duty arises from the undertaking, the profession, and not from the necessities of the community, as often supposed. To carry on a business is to exercise a privilege. The right of a person to do with his own as he chooses need not be disputed. But the business man deals with what is not his own. He emerges from his privacy, involves the fortunes of the community with his own, and by so doing assumes an obligation to the public. He ceases to be a private, and becomes a "common" or public personage.

⁴ Holt, C. J., *Lane v. Cotton*, 1 *Ld. Raym.* 646, 654 (1701).

In early times, perhaps more frequently than at the present day, many occupations were carried on for the particular benefit of the family; many, such as weaving, were carried on within the household. There were, for example, private carriers and public carriers; private inns and public inns; private mills and public mills; private tailors and public tailors; private smiths and public smiths. This accounts for the frequent occurrence in the reports of the terms "common" carrier, "common" inn, "common" mill, "common" tailor, "common" smith, and the like — expressions employed solely by way of indicating an express undertaking to serve the community and without any implication as to peculiar subjectability to legislative control. And so to-day if we followed the analogy and wished to distinguish business concerns from non-business concerns we would say "common bank," "common insurance," "common garage," "common steel works," "common stock-yards," "common water works," "common railroad," "common express," "common factory," "common store," "common warehouse," and so on.

In the article referred to, emphasis was placed upon business as such, as an institution, so to speak, or organ in the system of production and exchange, discharging a community function.⁵ The fact that businesses are carried on by individuals, sometimes acting singly and at other times in various forms of association — partnerships and corporations in common law countries and more varied

⁵ The article on Business Jurisprudence did not prescribe a treatment for any special problem of business, nor was it a diagnosis of the ills of business. It was a physiological rather than a pathological study of business itself, and the true meaning of that study is not that a particular evil is to be treated thus and so, but that no real treatment can be given any evil of business, nor (what is even more important) can business be kept in a state of health, unless its true nature is understood. It was indeed suggested that a consistent application of the principle that all business is public should tend to promote the solution of modern trade problems and especially that branch of them which has to do with business combinations. But the problems arising out of modern industry are more complex than commonly supposed. Epitomized in the term "Trust" they do, it is true, have to do with the grouping, correlation and co-ordination of businesses, and their duty to serve each other, no less than private consumers. But they also have to do with the time, manner and conditions of work, the employment of capital and the general relations of the business process to the community itself — facts quite generally overlooked.

The present study is similarly not intended as a prescription for any particular evil associated with labor or capital or the subject or condition connoted by the expression "labor and capital." It is primarily a study of the nature and especially the legal nature of "labor and capital."

forms elsewhere — was properly disregarded as an accidental circumstance. It was shown that at the common law as interpreted down to a comparatively recent date the mere fact of engaging in business implied a duty to serve all comers without unreasonable discrimination, an idea in marked contrast with those entertained to-day when we find the cases, especially those involving labor and capital controversies, teeming with such expressions as “a man’s business,” “his business,” “interference with his business,” “private business” and the like, — expressions implying a proprietary right in a given business to the exclusion of all communal interests.⁶ To-day only a limited number of businesses are regarded as public, and then only in the sense of liability to special legislative control, and not at all in the sense of being subject to duties under the common law based upon the mere fact of undertaking to serve the community. The courts to-day do not recognize that businesses as such are subject to any duty. The decisions are in great confusion on this account and our “public service” and “public utility” law is largely a law of pipes, rails and wires. If we can imagine a time when the citizen in his residence will open a faucet

⁶ Cf. *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 112, 113, 114, 30 Atl. 881, 885 (1894). “A man’s business is property. . . . Mr. Barr’s business of publishing the paper with the incidents of its circulation and advertising, was as much his property as were the type and presses upon which the paper was printed. . . . It was Mr. Barr’s personal right, without interference or dictation from any person or persons, to employ, in the prosecution of his business, such mechanical appliances as were safe and healthful, and to employ in the production of his paper, such persons and lawful means as he might choose. . . . This freedom of business action lies at the foundation of all commercial and industrial enterprises — men are willing to embark capital, time and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them from interference by those who are not interested with them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have come to the time when capital will seek other than industrial channels for investments, when enterprise and development will be crippled, when interstate railroads, canals and means of transportation will become dependent on the paternalism of the national government and the factory and the workshop subject to the uncertain chances of coöperative systems.”

Lockner v. New York, 198 U. S. 45, 53 (1905), is to the same effect: “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”

or valve to draw from some central reservoir his steam, gasoline or hot water, or any of the liquids consumed in his household; or by dropping a coin in a slot be able to receive instantly any of the articles of food or clothing to be found in the modern department store; or by pressing a button be able to witness the baseball game of the afternoon or hear the evening's operatic performance — one can readily understand that the popular and judicial conception of which community functions are private and which are public would undergo modification, and this quite regardless of whether the services were rendered over public or private rights of way or by invisible means. But it must be apparent that while this transference of the service from the point at which it originates to the place where it is enjoyed might aggravate the inconvenience of having it cut off or denied and excite a more strenuous assertion of a legal right to the service, it would not create the right nor make that public which was not public before.

All business is public, regardless of the disguise under which the function is performed and is subject in consequence to rights and obligations with respect to the community. And from this it must follow that the factors or constituent parts of business stand in this same public relation.

That capital is one of these factors will scarcely require argument. It is in truth the fund with which and to increase which business is carried on,⁷ the thing which the business man "turns over," as the phrase goes, in order to reap a profit. Indeed the records of the ancient trading communities from which most of the cities throughout the world have sprung, and many of which were in all probability contemporary with the more strictly agricultural settlements to be spoken of presently, furnish ample evidence of the general recognition and enforcement of this public interest.⁸ There were many trading towns in England — "*portubus supra mare, villis mercatoriis et burgis*" — whose founding antedates all records,

⁷ Cf. 2 MARSHALL, PRINCIPLES OF ECONOMICS, ch. 4, and app. E.

⁸ The connection between business and the very existence of communities has in fact been so close that one might almost be said to be the cause of the other. Compare Montesquieu's statement (2 ESPRIT DES LOIS, bk. 21, ch. 5) that "The history of commerce is that of the communication of people" with the classic remark of Chief Justice Marshall: "Commerce undoubtedly is traffic, but it is something more; it is intercourse."

where the Law Merchant prevailed⁹ and among which may be mentioned London, Bristol, and Norwich. In the thirteenth century these settlements were already seats of a bustling business activity. In such places we find strict laws against forestalling, regrating and engrossing, all of which were directed toward preventing one person from obtaining an unfair advantage over the others in the same occupation or interfering with the due course of trade to the injury of the public or the business men;¹⁰ there were arrangements for "common" buying, that is buying under and for the order of the commonalty, the product purchased being divided proportionally or in case of difficulty by lot.¹¹ As quaintly expressed

⁹ See ch. 1 of *LEX MERCATORIA* (12th or 13th century?), printed in *THE LITTLE RED BOOK OF BRISTOL*, vol. 1, p. 57 *et seq.* "*Lex mercatoria a mercato peruenire sentitur, et inde primo sciendum est vbi mercatum se tenet de quo huiusmodi leges proueniunt; vnde adueretendum est quod mercatum huiusmodi se habet in quinque locis tantum, scilicet in Ciuitatibus, nundinis, portubus supra mare, villis mercatoriis et burgis, et hoc ratione mercati vnde vltcrius est videndum, quod sicut mercatum se habet in v. locis, ita semper sequitur lex mercatoria siue lex mercati, videlicet quia in ciuitatibus et nundinis siue feriis quod idem est fiunt empiones et vendiciones mercandisarum continue, scilicet, vestium, victualium et quasi omnimodorum bonorum mobiliu; . . . Ad leges istas pertinent naturaliter omnia placita preter placita terre tantum. Sed si domini et partes placitantes maius voluerint deducere et prosequi placita de appellis in dictis locis coram eis inchoata in aliis curiis ad communem legem et recusare legem mercatoriam bene possunt et ita faciunt communius quam aliter per totum regnum.*"

¹⁰ *LEET JURISDICTION IN NORWICH* (Selden Society), pp. 30, 47, 63, 65. John Janne is amerced "because he forbars the men of the city from the purchase of tallow, whereby the market is diminished"; Ranulph, the fish-monger, "because he went outside the town by Carrow to meet a boat full of fish and there he bought it contrary to the proclamation against the heighening of the market of Norwich"; John de Gaywood, taverner, because he "forestalled so many eggs in the market that he filled 28 barrels at divers times and sent them out of the kingdom to foreign parts, and likewise forestalled butter and cheese to a large amount, whereby there accrued great dearness of victuals in the city and that for four years"; and Roger Calf because he was "wont to buy oysters by forestalment in divers boats, so that when one boat is at the Staith for the sale of (oysters) another boat or two shall be at Thorpe until the first boat is emptied and sold, and then the rest of the boats come up for sale; and whereas the common people (were wont) to have 100 oysters for 1½d., Roger sells them for 2d. or 3d. (elsewhere)." . . .

The above instances date from the 13th and 14th centuries.

¹¹ In *Sandwich* (2 *BOROUGH CUSTOMS*, Selden Society, p. 179) it was enacted "that if any merchant, neighbour or stranger brings any merchandise to the town or port, all of the town who were present at the sale of the goods, and likewise those whose share is claimed for them by those present there, although they themselves are absent, shall share the merchandise equally among themselves, whether for gain or for loss, provided those present claim a share in the purchase."

See 1 *GROSS, THE GILD MERCHANT*, pp. 135-138, to the effect that this was a common practice in England, Scotland, Ireland and Wales and for numerous examples.

in the records of Waterford, "The Maire and balliffs duryng the yere shold be commene bieres of al merchandise commyng unto the said citie, and to distribute the same upon al citsains and commynalte of the same, as they shall see behouffull."¹² The duty of impartial service to each in his turn was imposed alike on carriers and workmen, masters, wage earners and journeymen.¹³ The by-laws of the craft and merchant gilds are to the same effect, and frequently provided for the sharing of bargains, the segregation of distinct businesses, and other methods of control over the capital employed by one member in competition with another. Typical provisions from the elaborate code of the gild of Berwick-upon-Tweed, dating from the thirteenth century, are printed in the note.¹⁴

¹² 2 BOROUGH CUSTOMS (Selden Society), p. 167 (15th century).

¹³ BEVERLEY TOWN DOCUMENTS (Selden Society), pp. 56, 57 (A.D. 1467). . . . "It was ordered moreover that if any burgess of the aforesaid town wish to have and hire any carpenter or tiler, sawyer or panner, a master or a wage earner, viz. journeyman, or any other workman in the aforesaid town to do work for him, the aforesaid carpenter, tiler, sawyer, or panner, whether master or his wage-earner and workman, shall not refuse to come to the work of the aforesaid burgess and work with him, unless they have been previously retained for someone else's service and work; and any refusing to do so shall pay 6s. 8d. to the community of the aforesaid town, as often as he shall have been found guilty in that behalf before the governors of the aforesaid town." . . .

"Also, it was ordered that if any carrier, porter, or creeler of the aforesaid town shall be ordered, or have notice given him, by any burgess of the aforesaid town to carry merchandise or other things and goods of any kind belonging to the same burgess, he shall serve the same burgess first in such carrying, unless he shall have been before employed in carrying for another burgess of the aforesaid town, and then, after finishing his carrying for the first burgess he shall carry for the second, and not depart from carrying until he has finished all the carriage for the same burgess; and if he presume to do so he shall pay 6s. 8d. to the community aforesaid, as often as this shall be established with reasonable certainty before the Governors in the Gild Hall." . . .

¹⁴ SMITH, ENGLISH GILDS, ch. 18, p. 339. "All shall be as members having one head, one in counsel, one body, strong and friendly. . . . Whoever shall fall into old age or poverty, or into hopeless sickness, and has no means of his own, shall have such help as the Alderman, Dean, and Bretheren of the gild think right, and such as the means of the gild enable to be given. . . . If any brother die, leaving a daughter true and worthy and of good repute, but undowered, the gild shall find her a dower, either on marriage, or on going into a religious house. . . . While causes are being tried, no one shall speak, except the plaintiff and defendant, and their counsel, and the bailiffs who hold the court, under penalty of eight shillings. . . . Everey burgess worth forty pounds shall keep a horse worth twenty shillings. . . . No one shall grind wheat or other grain in hand-mills, unless through urgent need. The miller must have his share, — the thirteenth part for grain, and the twenty-fourth part for malt. . . . No one, not being a brother . . . shall cut cloths, save stranger-merchants in the course

It is a singular fact that at the very time when capital was becoming more fluid and the degree of communal interest in it actually greater and more clearly demonstrable, the old conception of this interest began to fade from view. To-day it is in the domain of capital that it is most commonly taken for granted that a cleavage must necessarily run through the strata of the community, separating it into "capitalist" and "proletarian" classes, each having no legal interest in the operations of the other. But it is in this field that the interdependency of the community is most evident and the foundation for such a claim is most completely wanting. It is well known that without the bank, business as conducted to-day would hardly be possible, and since the time of Ricardo, who had made a fortune in business at the age of twenty-five, before he began to write on economic and financial subjects, it has been recognized that "the real advantage of a bank

of trade. Such a one shall have neither Lot nor Cavil with any brother. . . . Any brother of the gild advancing money to a stranger-merchant, and sharing profits thereon, shall be fined forty shillings the first, the second, and the third time; and, if it be done a fourth time, he shall be put out of the gild. And in the same way shall any brother be punished who takes money from a stranger-merchant for such kind of trading. . . . If any one buys goods, misled by false top samples, amends must be made. . . . No butcher, while he follows that calling (*officium*) shall buy wool or hides. . . . Brokers shall be chosen by the commonalty of the town, and shall every year, at Michaelmas, give a cask of wine to the town, and their names shall be registered. . . . No huckster shall buy fish, hay, oats, cheese, butter, or any things sent to the borough for sale, before the stroke of the bell in the bell-tower of Berefrid. . . . Goods shall not be bought up before they reach the market. . . . No married woman shall buy wool; nor shall any burgess have more than one buyer of wool and hides. Whoever unreasonably ingrosses such goods out of the market, shall forfeit them to the gild, and pay a fine of eight shillings." . . . The affairs of the borough shall be managed by twenty-four discreet men of the town, chosen thereto, together with the Mayor and four Provosts. Whoever of the twenty-four, having been summoned over-night, fails to come to a meeting, shall pay two shillings. . . . Whoever buys a lot of herrings, shall share them, at cost price, with the neighbours present at the buying. Any one not present, and wanting some, shall pay to the buyer twelve pence for profit. . . . No woman shall buy (at one time) more than a chaldron of oats for making beer to sell. . . . Tanned leathers, brought in by outsiders, must be sold in open market, and on market day. . . . No one shall have more than two pair of mill-stones. . . . No brother of the gild ought to go shares with another in less than a half quarter of skins, half a dicker of hides, and two stones of wool. . . . Sea-borne goods must be bought 'at the Bray,' and must be carried away between sun-rise and sun-set, under penalty of a cask of wine. . . . No burgess nor out-dwelling brother shall buy or sell in the town any goods belonging to the gild, save on market-day. And no out-dwellers shall buy up victuals coming by ship to the town, under penalty of a cask of wine." . . .

to the community it serves commences only when it employs the capital of others," that "the deposits enable the bank to make advances to men who employ the funds with which they are entrusted in reproductive industry," and that "it is only through reproductive industry that the capital advanced by a banker can really be replaced."¹⁵ The preamble of the statute incorporating the first bank in Massachusetts and one of the earliest in America refers to the proposed institution as a "public utility" beneficial to the trading part of the community.¹⁶ Add to this a consideration of credit which to the merchant "is so delicate and tender, that it must be cared for as the apple of a man's eye."¹⁷ As Ihering has shown, there is the greatest difference in both principle and operation between borrowing by the business man and by the non-business man. The banker who gives credit to an individual (unless he takes security, which is really not an example of credit) takes great risks, but when he gives credit to the business man he in effect gives credit to the ability of such person to serve or to exploit the community as the case may be. The measure in which the merchant enjoys credit is "the criterion of his competence and importance in the mercantile world." With the merchant, as he says:

"... it is not a question of obtaining the thing for the purpose of satisfying one's own want, but for the purpose of selling it. The respectable merchant may receive credit without losing his standing, and he must do so; he would not be a merchant if he did not utilize it for his operations. The sale of his goods must furnish him the means with which he covers the purchase; he must buy more than he can pay for at once. Credit constitutes an essential and absolutely indispensable factor and lever of his business management;

"... credit operates with another man's capital. Of the sum X which the dealer on credit stakes on the card, only one-tenth X perhaps be-

¹⁵ Sir John Rahere Paget, Bart., K.C. "Banks and Banking," 3 *ENCYC. BRIT.*, p. 334.

¹⁶ *LAWS OF MASS.*, vol. 1, p. 115 (1780-1788). "An Act to establish a Bank in this State, and to incorporate the Subscribers thereto.

Whereas the establishment of a bank within this State will probably be of great public utility, and as it will be particularly beneficial to the trading part of the community, and many persons, under the expectation of an Act of incorporation from the Legislature of this Commonwealth, have accordingly subscribed thereto; and whereas William Phillips (etc.) in behalf of such subscribers, have applied for such an Act: Be it enacted (etc.)" Passed Feb. 7, 1784.

¹⁷ MALYNES, *LEX MERCATORIA*, p. 76.

longs to him, and the other nine tenths to B. If the undertaking succeeds, the whole gain accrues to him; if it fails, then the risk exceeding one-tenth X does not fall on him but on others." ¹⁸

As capital is the subject matter of business, and business itself the function by which the community is served, so labor represents the human energy and skill devoted by the members of the community to the performance of this service. The failure to make this distinction with respect to labor, the failure to note that it involves two things, one mere energy that may also be supplied by a slave or a machine and the other a member of the community whose well-being and integrity involves the very integrity and well-being of the community itself, has been the source of a vast confusion. But space forbids any attempt to elaborate this point, and no elaboration is believed to be necessary. The same citations in both this and the former article which support the doctrine that business is a public institution show that labor no less than capital was treated as a matter of public concern. The ancient rule that "it is the duty of every artificer to exercise his art rightly and truly as he ought" is in fact only modernized in the declaration of Chief Justice Holt, some two hundred years ago, that "if a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends; and for refusal an action lies, as against a farrier for refusing to shoe a horse." The term "common" laborer in the early law is analogous in every respect to the term "common" carrier. The famous Statute of Labourers did not distinguish between occupations so as to divide the community, as is done to-day, into two classes, wage earners and business men. Every one purporting to deal with the public was a "minister," "workman," "artificer" ¹⁹ or "servant," as the case might be.

At common law, then, labor and capital, no less than business, are public. But there is another factor which enters or may enter into business. We refer to land, which is treated for some purposes of economic reasoning not as capital but as something distinguished from capital and in present-day legal and political thought as unquestionably a private possession far removed from all considera-

¹⁸ THE LAW AS A MEANS TO AN END, The Modern Legal Philosophy Series, vol. 5, pp. 133-136, being translation from DER ZWECK IM RECHT.

¹⁹ Cf. *infra*, n. 65, where the *scrivener*, who seems to have combined the functions of scribe, notary, banker and broker, and the schoolmaster, are classed as artificers.

tions of public interest. Some obligation to the community in the conduct of business, it is the present-day fashion condescendingly to admit; but any suggestion that the individual does not have an absolute and uncontrollable right to his land is at once condemned as revolutionary and destructive of "ancient liberties." But if the principles which have been enunciated are sound and if they do in truth represent the spirit and substance of the common law they should apply to land also.

And they do apply to land. Indeed it is to the use and control of land that the principle of public interest has been most persistently asserted and applied. From the earliest times in democratic England as well as in the less favored nations of Asia and Europe, land was uniformly regarded as preëminently subject to considerations of the general welfare and communal interest. A little consideration of the Village Community will make this clear.

This institution is the favored theme in the writings of Sir Henry Maine²⁰ and has been the subject of learned investigations by Gomme, Seeböhm, Fustel de Coulanges and a host of other scholars from every part of Europe,²¹ more recently by Professor Vinogradoff.²² It prevails in India to-day;²³ five-sixths of the population of Russia now lives under it;²⁴ it has existed over a large portion

²⁰ ANCIENT LAW; VILLAGE COMMUNITIES IN THE EAST AND WEST; EARLY LAW AND CUSTOM.

²¹ See Bibliography appended to "Village Communities," 28 ENCYC. BRIT., pp. 68, 73.

²² See generally his VILLAINAGE IN ENGLAND, and ENGLISH SOCIETY IN THE ELEVENTH CENTURY.

²³ ROY, CUSTOMS AND CUSTOMARY LAW IN BRITISH INDIA, being Tagore Law Lectures, 1908 (Calcutta, 1911), pp. 19-20. "The Village Community and the Panchayet are two institutions which were instrumental in producing and preserving many customs. The former is the older of the two and 'is to be found in every part of the world where men have once settled down to an agricultural life.' The Indian village system had its foundation in the communal principle, the essential features of which are that, whilst the individual house-holder may be the supreme head of his own family, he is still bound, as a member of the community, irrespective of his creed or caste, to strictly conform to the village rules and usages regulating the internal economy or administration of the whole community. In the Punjab and the adjoining districts this village system is still found in its primitive vigour. Similarly this system is also prevalent among the Dravidian races in the South and among the Nairs of Malabar and Canara." See also "Village Communities in Western India," ASIATIC QUART. REV. (1868), p. 128, confirming certain views of Sir Henry Maine.

²⁴ SIR DONALD MACKENZIE WALLACE, RUSSIA, 1 ed., ch. 8, "The Mir or Village Community."

of Europe and Asia,²⁵ was in evidence in England until the passage of the Inclosure Acts and well into the nineteenth century²⁶ and was transplanted to America by the first colonizers in the form of the New England town.²⁷ Much attention has been devoted to showing, and divergent views have been expressed concerning, the origin of this institution and the race or people who devised it, but representing as it does the method universally adopted by men when they take a settled habitation and apply themselves to getting their livelihood from the soil, and being essentially the same wherever it exists, its surpassing interest for the lawyer lies in the fact that next to the family it is the most ancient and characteristic institution of civilized man, and forms an unequalled means of ascertaining what may be called the natural sentiments of mankind when applied to their common interests and what those interests are.

In the typical Village Community we find the families, with their own houses and yards ranged side by side along a roadway more or less in the middle of the territorial area occupied by the community. Land is classified. We see it divided into arable, meadow, marsh, pasture and woodland. There may be several fields of arable, each surrounded by a fence, called common fields — one planted in winter grain, another in spring grain and the other lying fallow. Each field is divided into ribbon-like strips, held in several ownership, often ten times as long as wide, varying in area in England from the oxgang or bovat of fifteen, the virgate of thirty and the hide of one hundred and twenty acres. A given householder may own several strips, but as a rule they do not lie together, but are interspersed among those of his fellows.²⁸

The meadow is not occupied in severalty, but strips are allotted

²⁵ SCHAEFFER, *THE SOCIAL LEGISLATION OF THE PRIMITIVE SEMITES* (Yale Univ. Press, Sept. 1915) ch. II.

²⁶ Four thousand such Acts were passed between 1689 and 1835. WEBB, *ENGLISH LOCAL GOVERNMENT, The Manor and the Borough*, pt. I, 118. See also 6 *ENCYC. BRIT.*, pp. 779, 782, article "Commons."

²⁷ MAINE, *VILLAGE COMMUNITIES*, 3 ed., p. 201.

²⁸ For detailed proceedings of such a community of three or four hundred souls on the Manor of Great Tew in Oxfordshire, comprising 3000 acres, for the years 1692, 1756, 1759 and 1761 (in which last year it changed the planting from a three to a nine-year course), see WEBB, *ENGLISH LOCAL GOVERNMENT, The Manor and the Borough*, pt. I, 80, 87. See also VINOGRADOFF, *ENGLISH SOCIETY IN THE ELEVENTH CENTURY*, pp. 475, 476.

at mowing time. The livestock is herded together, ranging over the waste and the fields not occupied by crops, each inhabitant owning his own stock and being entitled to pasture a definite number of animals in proportion to his holdings of land. The time of planting and harvesting is fixed by regulations binding on all and the same is true of all matters of common interest, including the rotation and character of crops, allotment of meadow, occupation of pasture, putting up and taking down of fences, the construction of mills, roads and other works of common utility. The rules and methods are often intricate, always ingenious. As an observer remarked who witnessed some of the processes of administration still carried on in the eighteenth century, they must indeed "have been great people who thought this out."

The administrative force or official is a council or board of selectmen, a head-man, reeve, *imam*, or similar functionary. In such a community in England and America we find the common driver or herdman, common swine-herd or hog-ringer, common tailor, common smith, common chimney-sweep, common mill, common cowhouse, common lookers, common oven, common helpers, common shepherds, common woodsmen, common boat,²⁹ town plow or common plow, town granary, town hall, town bull, town horse, town dog, and other domestic animals, the hayward and the fieldsmen.³⁰

The significance of such terms as *commune*, *communiter* and *communitas*, so frequently met with in the early records of the English towns and humble Court Baron and Court Leet, thus becomes apparent, and it is small wonder that Sir Martin Wright, at the close of his treatise on Tenures, was led to remark on the frequency of the words *la commune* — *tote la commune d'Engleterre* — *le commonaltie* — *tout le commonaltie* — *et communaute de la terre* — *communitas regni* — *commun de tout le royaume* — *common assent* — *common accorde* — etc., in the old statutes and expressed surprise

²⁹ I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, p. 625, n. 1.

³⁰ See generally WEBB, *supra*, pp. 47, 79, and compare *infra*, n. 33; also BADEN-POWELL, "A Study of the Dakhan Villages, their Origin and Development," JOURNAL OF THE ROYAL ASIATIC SOCIETY, 1897, p. 239. The staff of artisans remunerated by *haks* or fees levied on cultivated land and residential sites, is said to include assayer, priest, tailor, water-carrier, headman's messenger, gardener, musicians, oil-seller, carpenter, blacksmith, shoemaker or tanner, barber, washerman, potter and astrologer, etc.

at the tenacity and fondness of our ancestors for the word *commune*.³¹ But there is no real occasion for surprise. We have only to reflect that the gifts and apportionments of William the Conqueror were fitted into the Village Community system; that the holdings of the lords were often intermixed with those of the villagers and all held by the same title; that it both preceded and survived the "manorial system" and feudalism under which it was submerged but not destroyed,³² in order to appreciate that these are conceptions which are to be reckoned with to-day despite the difficulty which we have in realizing that the civilization under which we live in addition to its newness is "a rare exception in the history of the world." This observation applies to America no less than to Europe, for as suggested above and shown at some length in the note, the Village Community flourished in the new world as it had in the old.³³ It would

³¹ Quoted in I MEREWETHER & STEPHENS, HISTORY OF BOROUGH AND MUNICIPAL CORPORATIONS (London, 1835), p. 442.

³² See generally VINOGRADOFF, GROWTH OF THE MANOR, pp. 361, 362; MAITLAND, DOMESDAY BOOK AND BEYOND, pp. 519, 520.

³³ In Charlestown, Massachusetts, John Penescot has a dwelling house, yard and garden, and three acres of arable land in the "line feilde"; Robert Cutler, a dwelling house and garden plot and two acres of arable land in the "east feilde," one acre of meadow in the "high feilde meade," "milch cowes comones one and a haulfe," one acre of meadow "in the meade at Wilsones Pointe," 10 acres of wood land in "mistick feilde," and 63 acres in "water feilde"; George Bunker has "one little house with a garden plot" and twenty-one scattered tracts of arable, meadow, marsh and woodland as follows: two of one acre; three of two; four of three; two of four; three of five; two of six; one of seven; two of ten; one of seventy; and one of two hundred seventy acres; also "comones for fiftene milch cowes". — CHARLESTOWN LAND RECORDS (Record Com.), pp. 10, 28.

Salem had its common meadow, common woodland and common pasture. Both there and in Plymouth "it was long customary in town meeting to assign lots where men should mow for one year or a longer period." In 1636 certain lands were "reserved for the Commons of the towne to serve it for wood and timber." The cattle were driven in the morning to the great Cattle Pen, at the gate of which the town herdsman stood waiting to drive them afield and return them in the evening to each owner either in his private yard or at the common cow houses. There were instances of the town cow, town sheep, town dog and a town horse. Artisans were impressed to help at harvest time. "Village Communities of Cape Ann and Salem," JOHNS HOPKINS UNIVERSITY STUDIES, July and August, 1883.

The Town Records of Boston, Dorchester, Charlestown and Plymouth, and the colonial records of Massachusetts and New York, among others, contain an abundance of further evidence along the same lines. See also Macey's Account of Nantucket, Massachusetts Historical Collections, vol. 3, 1st series, p. 155 (A. D. 1794).

An interesting confirmation of the world-wide range of the village community may be found in the records of controversies arising out of Spanish land grants in New Mexico. See, for example, Bond v. Barela's Heirs, 229 U. S. 488, 491 (1913), and the

be difficult in fact to name a single phase of ancestral practice that is not found repeated in one or more of the colonies. A bond of

further statement of fact below in 16 N. Mex. 660, 666, 120 Pac. 707, 708 (1911); *United States v. Sandoval*, 167 U. S. 278 (1897); *Rio Arriba Land & Cattle Co. v. United States*, 167 U. S. 298 (1897); and *United States v. Pena*, 175 U. S. 500 (1899), in all of which cases, however, the presence and nature of the institutions were apparently unrecognized either by court or counsel. In *Bond v. Barela*, the original giving of possession to the settlers is described by the officer appointed to the task as follows: "I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned. . . . And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition . . . at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them, also, as a means of good economy, their common pastures, water and watering places and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances: and for their greater quietude, peace, tranquillity and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows":

In *United States v. Sandoval*, *supra*, pp. 278, 287, the corresponding official reports: "I measured the whole tract of it from north to south and then proceeded to lay off and provide the several portions, with the concurrence of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose, in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible I caused them to draw lots, and each individual drew his portion. . . . a large portion of land (remains) to the south, which is very necessary for the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the care and trust of this matter, giving to each one . . . the amount he may require and can cultivate." . . .

In *United States v. Pena*, *supra*, pp. 500, 504, the alcalde gave the people to understand "that the pastures, forests, waters and watering places are in common."

The following record of the allotment of meadow land in the Town of Plymouth for the year 1633 is of much historical and legal interest. PLYMOUTH COLONY RECORDS, vol. 1, pp. 14, 15. "Orders about mowing of Grasse for the p^{nt} Yeare, 1633. July 1.

"INPR. It was agreed that M^r Will(iam) Collier mow the medow ground lying between y^e west side of the brooke at Mortons Hole, & to the ground of Jonathan Brewster.

"2. That Capt(ain) Standish mow the end(es) of the grownd(es) belonging to Edward Bumpasse & Will(iam) Latham, instead of that M^r Collier hath, & he formerly mowed.

kinship unites the Babylonian *ugaru*, the Hebrew *migrash*, and the Russian *Mir*, with Boston Common.³⁴

As might be expected, the underlying significance of the principles and ideas which have been set forth has been variously interpreted. Maine would see in them a reflection of notions of family interdependency, collective ownership and subjection to a patriarchal power;³⁵ Pollock and Maitland, individualism *in excelsis*,³⁶ and Vinogradoff "communalism" and "equality."³⁷ But however

"It. That Franc(es) Sprague mow at the Eagle, & about his owne ground where he mowed last yeare.

"It. That Will(iam) Basset mow at the end(es) of his owne ground.

"It. The watering place & thereabout for M^r Fogg & M^r Weston, M^r Combs, together wth that M^r Weston, Joh(n) Fans had last yeare.

"It. For Goodman Cutberd at Wellingly, & y^t he mowed the last yeare.

"It. For Joseph Rogers that w^{ch} he mowed last yeare.

"It. To Joh(n) Wynslow, Allerton, M^r Fuller, Wid^o Wright, & Joh(n) Adams that w^{ch} M^r Gilson mowed last yeare, & the rest adjoyning unmowed.

"It. To Lieutenant Holmes that w^{ch} is against his ground.

"It. To Stephen Tracy wthin his owne ground.

"It. To Manasseh Kempton that at the Iland Creeke abutting upon Stephen Tracies ground & Edmund Chandlers.

"It. To Tho. Prence that w^{ch} was mowed last yeare for M^r Hatherly & Manasseh Kempton, at Jones River.

"It. To M^r Smith y^t he mowed last yeare.

"It. To M^r Williams y^t w^{ch} Fr. Eaton cutt last yeare, except y^t at the upp^r path, wth some by him at home.

"It. To Christopher Wadsworth & Will(iam) Wright where they mowed last yeare, & at the upp^r path where Franc(es) Eaton mowed last yeare.

"It. For the stock of cattle belonging to the pore, where they cutt last yeare.

"It. For Edw. Wynslow that against his own ground, & from the marsh over against Slowly House up the river.

"It. That M^{rs} Warren & Rob^t Bartlet mow where they did last yeare, & the marsh adjoyning, as high as Slowly Howse.

"It. That George Sowle mow for a cow neere his dwelling howse.

"It. That M^r Hopkins & Tho. Clarke . . . where they mowed last yeare, except George Sowles cow, as before appointed."

³⁴ SCHAEFFER, *supra*, ch. II. The *fallahin* or peasants of modern Palestine are said to hold their pasture lands and threshing floors in common.

³⁵ MAINE, *EARLY HISTORY OF INSTITUTIONS* (London, 1875), p. 2. "There is also fresh evidence that the more backward of the outlying Slavonic societies are constituted upon essentially the same model (village community); and it is one of the facts with which the Western world will some day assuredly have to reckon, that the political ideas of so large a portion of the human race, and its ideas of property also, are inextricably bound up with the notions of family interdependency, of collective ownership, and of natural subjection to a patriarchal power."

³⁶ I *HISTORY OF ENGLISH LAW*, p. 623.

³⁷ *VILLAINAGE IN ENGLAND*, pp. 237, 238: . . . "Even when the shifting, 'ideal' share in the land of the community had given way to the permanent ownership by

this may be, it seems at least to be evident that wherever men have collected in communities under conditions of equality under the law (a condition formerly more or less restricted but now in theory at least almost universal), they have insisted on freedom of economic opportunities, have found that the greatest liberty of all was obtained by the management and enjoyment collectively of a considerable portion of property and have placed emphasis on "use" and not on "possession." This attitude has not been found inconsistent with differences in wealth, or with the enjoyment by each of the result of his own efforts, but on the contrary has been considered the means by which such enjoyment might be best effectuated.³⁸ Nor has society been reduced thereby to a dead level; there have always been "all sorts and conditions of men." The history of the Village Communities proves conclusively that almost as soon as communities are formed, the principle is recognized that the land is charged with obligations for the benefit of the whole, just as when a man enters trade he is to carry on that trade under the ancient law of England with due regard to the 'general welfare. A comparison of the early history of Village Communities and the early history of the trading towns in England shows that the same principles of law and theories of public interest governed both.

It is clear, therefore, that trade, labor, capital and even land have been treated as matters of common, that is, public, interest over a large portion of the globe, that land indeed is still so treated by a large portion of mankind, and that the ideas reflected in this treatment were early embodied in the common law. But in order to show that these facts have a present interest, it is necessary to go further.

Within the memory of men now living novel ways and means of

each member of certain particular scattered strips, this permanent ownership did by no means amount to private property in the Roman or in the modern sense. The communal principle with its equalising tendency remained still as the efficient force regulating the whole, and strong enough to subject even the lord and the freeholders to its customary influence. By saying this I do not mean to maintain, of course, that private property was not existent, that it was not breaking through the communal system, and acting as a dissolvent of it. I shall have to show by-and-by in what ways this process was effected. But the fact remains, that the system which prevailed upon the whole during the middle ages appears directly connected in its most important features with ideas of communal ownership and equalised individual rights." . . .

³⁸ Compare KORKUNOV, *GENERAL THEORY OF LAW, Modern Legal Philosophy Series*, vol. 4, pp. 251-253.

communal existence have sprung up, and conceptions such as have been described are to-day remote from our thoughts. The principles of conduct which naturally follow from their recognition are disregarded in fact no less than in theory, and we live under conditions that appear to have no resemblance to or connection with those that have gone before.³⁹ We are not however without our censors and apologists, and many explanations of the changes in conditions and in legal interpretation and theory have been advanced.

The explanations of the changes in conditions are only less numerous than the solutions that are suggested for the problems to which they give rise, and vary from capitalism, division of labor and invention of machinery to abuses on the part of those in power. Capital, however, appears both as a cause and a consequence as the radius of business operations extends beyond the possibilities of simple barter, and represents the savings of the community available for reproduction. Machinery stands in the same double relation, and it is quite impossible to say whether the economic and social changes have led to the invention and installation of mechanical devices or whether the converse is the truth. We find division of labor in all ages and under all conditions of existence, in the Village Community, the medieval city and the trading town no less than in our modern civilization. From Plato downward the beneficence of division of labor has been extolled and since Darwin's time economists and sociologists have dwelt with fondness on the biological analogies.⁴⁰

The changes in the law have also been variously explained. It is said with much ingenuousness "that our ancestors when they came into this new world claimed the common law as their birthright and brought it with them except such parts as were judged inapplicable to their new state and condition."⁴¹ Another favorite explana-

³⁹ For an analysis of these conditions as seen by a foreign jurist, see PIC, *TRAITÉ ÉLÉMENTAIRE DE LEGISLATION INDUSTRIELLE* (4 ed., 1912), p. 14.

⁴⁰ As e. g. by Marshall, *supra*, p. 241.

⁴¹ *Commonwealth v. Knowlton*, 2 Mass. 530, 534 (1807). See also *Carew v. Rutherford*, 106 Mass. 1, 14, 15 (1870).

Cf. COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 870-890, and the guarded discussion of the police power. Dealing with the regulation of prices, the learned author says: "The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of

tion has to do with the adoption of American constitutions. But we have shown in the previous study how and why the old common-law idea of business was lost sight of, and that need not be repeated here. In this connection the difficulties were shown into which the laws of business have been brought through the attempt to use the old laws after this idea had fallen into desuetude. How lately the common-law theories were held and how easily the current might have been kept in its old channel by a firm adherence to first principles, is evidenced by the cases in the note.⁴² The independence. Since then it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty." This statement is often cited as authority for the proposition that the adoption of the American constitutions worked a transformation in the laws. But the statement is not authority for that proposition and the idea itself is an illusion. The fact is that one of the most drastic laws of this kind ever enacted was passed by New York after the Declaration of Independence on the recommendation of the Continental Congress to all the States. See *e. g.* LAWS OF NEW YORK, ch. 43 (1780), entitled "An Act for a General Limitation of Prices, and to Prevent Engrossing and Withholding in this State." Other States possessed similar acts.

⁴² *Boston and Roxbury Mill Corporation v. Newman*, 12 Pick. (Mass.) 467, 477 (1832). Putnam, J.: . . . "But it is said that the analogy (turnpikes) fails, when applied to laying bare the flats, in order to get the water power for mills, because the public have no right in respect to the manufactories, as they have to travel upon the turnpike roads. But the public may be well said to be paid or compensated in the one, as well as in the other case; and are benefited by the one improvement as well as the other. Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? 'But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll.' If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? And are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and that kind of employment, is prevented from its exercise? This becomes a matter of interest which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works."

Columbus Mills v. Williams, 11 Ired. (N. C.) 558, 561 (1850): Pearson, J.: . . . "Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a *dry question of law*; and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some *public good*.

same causes, however, operated in the cases of labor, capital, and land as in the case of business and the same results have been produced.

For relief from the harsh phases of modern and especially industrial life, some yearn for a return to former conditions,⁴³ while others would reconstruct society after plans of their own. In the search for guiding principles Berolzheimer and other civilians would invoke the aid of legal and economic philosophy. But the English and American lawyer will neither forget nor disregard the lessons of experience and will turn with renewed eagerness to the long record of the common law. The old conditions have passed away, never to return, and the changes that have occurred were in the main natural and inevitable and due to the growth of acquaintance and intercourse by and among peoples, the spread of knowledge, the decay of tribal and racial prejudices, the expansion of ideas and the increase in desires and the demand for the means of satisfying them.⁴⁴ The Village Community was bound to pass away, as to-day it is in the process of breaking up in Russia despite the belief of Russian scholars that in the *Mir* they have the key to the mitigation of the proletarianism that is said to menace the western world.⁴⁵ The Inclosure Acts, whatever individual motives may

Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body, than upon a private citizen."

Hazen v. Essex Company, 12 Cush. (Mass.) 475, 477 (1853). Shaw, C. J.: . . . "The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain. See St. 1825, c. 148, incorporating the Salem Mill-Dam Corporation; Boston and Roxbury Mill-Dam Corporation v. Newman, 12 Pick. 467. The Acts since passed, and the cases since decided on this ground, have been very numerous." . . .

⁴³ Cf. THOROLD ROGERS, SIX CENTURIES OF WORK AND WAGES, ch. 15.

⁴⁴ Cf. CUNNINGHAM, GROWTH OF ENGLISH INDUSTRY AND COMMERCE, Early and Middle Ages, p. 533. . . . "Both in rural and in industrial areas the household was ceasing (18th century) to be the unit of organization, and market considerations were becoming paramount; in towns the change is marked by decay of gilds; in rural districts by the extinction of villainage." See also VINOGRADOFF, VILLAINAGE IN ENGLAND, pp. 180, 181.

⁴⁵ See WALLACE, RUSSIA, pp. 107, 587; HECKER, RUSSIAN SOCIOLOGY, Columbia University Studies, vol. 67, no. 1 (Nov. 1915).

have been, were necessitated by economic considerations⁴⁶ and the small industries represented by the gildsmen, where every man if not the master of was at least closely identified with a complete economic cycle and in physical control of the complete turnover of his investment, were certain to succumb. The irresistible character of the forces at work is evident from the fact that they are still active. We need only refer to the swelling urban populations, the Trust, the department and chain store, the mail-order establishment, and the operation and effect of modern advertising. But although conditions have changed, and doubtless will continue to change, the principles of law controlling as between man and man have not changed and are to be found to-day the same as in past ages, in the common law.

At common law the relations of capital, labor and business are public in every detail and not alone in respect to "the public safety, the public health and the public morals." The problem presented has to do with the relations of the community to those of its members who work, and of those workers to the community which they serve. It is not confined to the manufacturing industries as De Tocqueville seems to have assumed,⁴⁷ but is associated with *business*, and finds illustration in the bank and the department store, with their complements of clerks, no less than in the factory and the mine with their swarms of wage earners and the railroad with its thousands of employees. All of these are engaged in a public occupation at common law, but because the courts have looked upon business as private, and have otherwise approached the subject from a singularly narrow point of view, little progress has been made in the solution of the legal problem to which the phenomena give rise.

It is idle, therefore, in the face of these facts, to speak of "*my* business" and "*his* business" in the literal sense in which those words are employed in the cases where they occur. The notion is

⁴⁶ See 6 ENCYC. BRIT., pp. 779, 782, article "Commons."

⁴⁷ See 2 DEMOCRACY IN AMERICA, ch. 20, entitled "How an Aristocracy may be created by Manufactures," and in which he shows that the natural tendency of the manufacturing system is to produce a condition of society in many respects more severe than any that has preceded it. "The friends of democracy," he says, in conclusion, "should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrate into the world, it may be predicted that this is the gate by which it will enter."

foreign to the conceptions of the period covered by the Village Community and the craft and merchant gilds. It is out of harmony with the common-law theory of business and contradicted by the actual facts of present-day business life. When a man undertakes a community service — a business (as at the present time he may freely do, unless he requires the assistance of the rest of the community by eminent domain or other grant of special privilege) — he thereby limits the freedom of the remainder of the community by occupying to that extent the field of service which was before left open, excluding others therefrom, and dominating a position which might perhaps be “better supplied when he had made it empty.” That he is bound to exercise his calling “rightly and truly as he ought” and “to serve the publick as far as the employment extends,” are maxims of the common law made necessary by the fact that the community is entitled to its *quid pro quo*.⁴⁸ When the men of Plymouth were aggrieved by the ill grinding of their corn by a child “that has no descretion” and sent a committee to inform Captain Church that they would “not allow of that lad to be ye Towns miller,” and that if he expected to hold the privilege of the stream he should carefully observe the conditions or “ye Town will take some other method to have their work done”;⁴⁹ when they complained of the decay and disrepair of the grist mill and voted that “if the owners of sd mill will make sutable provision that ye sd mill may be repaired by ye next Town Meeting or in some way that ye Work may be Done in some short Time but if Delayed and noe Effectual Care be taken by that Time Then the Town will give liberty to some person or persons to sett up a mill to Doe ye Town Work”;⁵⁰ when the town of Boston granted liberty to set up a pump and to repair the well and ordered “that in case any of the neighbours refuse to contribute to the charge of the sayd pump and well, itt shall bee in the power of those that have disbursed monyes for the same, to deny any others fetching water att the pump”;⁵¹ when the men of Boston granted liberty to erect a mill and provided that the “Towne will not allow any other common mill to be erected except the necessary occasion of the Towne shall require

⁴⁸ Cf. Fairfax Y. B. 8 Ed. IV. 18, pl. 30.

⁴⁹ RECORDS OF TOWN OF PLYMOUTH, vol. 2, 192 (A.D. 1719).

⁵⁰ *Ibid.*, 198.

⁵¹ BOSTON TOWN RECORDS (Rec. Com.) 141 (A.D. 1657).

it";⁵² when they granted permission to Captain Breedon and his associates to erect a wharf and highway and to enjoy the profits for twenty-one years provided that "it shall bee in the liberty of any inhabitant to come in as a partner in the same worke within six monthes after finishing the said worke, they paying their equall proportion of charge";⁵³ when the humble Lord's Court of Manchester as late as the nineteenth century presented and fined mill owners for letting their cotton factories get into dirty condition⁵⁴ — in all these cases we find the sense of communal right and obligation illustrated and the right itself enforced. That the members of the community have no interest in how profits from community services shall be divided, no right to participate in the rendering of that service, no control of the time, manner and conditions under which that service shall be performed, are seen to be at best modern ideas.⁵⁵ And when we take into consideration the special legislation

⁵² *Ibid.*, 74 (A.D. 1643).

⁵³ *Ibid.*, 156 (A.D. 1660).

⁵⁴ WEBB, ENGLISH LOCAL GOVERNMENT, *supra*, p. 110.

⁵⁵ When the handicaps under which they labored are taken into account, the ingenuity and effectiveness with which early communities dealt with their special economic problems seem to compare very favorably with that shown in modern times. See e. g. the "Rotation," i. e. order of grinding, in "Brehon" Laws — *Feineachas* — (fifth century) 4 ANCIENT LAWS OF IRELAND, pp. 217, 219. . . . "Eighteen days complete are in the rotation at the mill. Monday *is due* to the well, Tuesday to the pond, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. The next Monday *is due* to the pond, Tuesday from the well to the pond, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. Monday *is due* to the pond, Tuesday from the pond downwards, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. This is when it is rotation. But when it is a *case of price*, it is ten 'screpalls' *that are charged* on the well, and ten *on the land* from the well to the pond, and thirty 'screpalls' on the pond, and ten on the *land-pond* downwards, all which amount to sixty 'screpalls' if it be arable land; if it be not arable land it is one-half of this, i. e. five 'screpalls' on the well, and five from the well to the pond, and fifteen on the pond, and five from the pond downwards, all which amount to thirty 'screpalls.' What is the reason that it is equal amount that is upon the lands when it is a rotation, excepting the pond, and that it is not equal amount when it is price (i. e. *money that is paid*)? The reason is, the men of the lands got their choice whether they would have rotation, or pay price, and the choice they took was rotation: one-third goes to the land and the things which belong to it, and one-third to the science of the artisans, and one-third to food and to rude labour, i. e. a sixth to each.

Monday to the well, a pleasant deed,
Tuesday following to the pond,
Wednesday, Thursday, prosperous assignment,
Are given to the artisans;

with which modern communities surround business, the protective tariffs, the corporation laws with their guaranties of individual immunity from the consequences of failure or mismanagement, the bankruptcy laws and receiverships by which the community wipes off at a stroke the results of particular business adversities and absorbs the loss by distributing it over the whole range of industry, the inappositeness of such expressions as "*his* business," "*his* capital," "interference with *his* business" becomes all the more apparent. "Capitalist" and "capitalism" also are but vague or figurative expressions, conveying no definite idea and capable of as many connotations as there are persons to employ them.

The fact is that labor bears the same relation to business that capital does, but at the present time the workers are nowhere recognized in the cases as having a definite legal relation to and legal right in the business process. They are subject to dismissal with or without cause, have no voice in the management, no right to promotion, no right "to see the books," no right in fact but that of taking or refusing the wage that is tendered them.⁵⁶ In theory at

Friday and Saturday, fine the arrangement,
Are assigned to the attendance,
This is the peaceable ordering,
The proper distribution of the first week.
Monday and Tuesday, sweet remembrance,
To the lands as far as the pond,
And from the pond out,
A different one does not occur.
Wednesday, Thursday, of wonderful work,
In this week go to attendance;
Friday and Saturday, of mention least,
To the artisans who superintend."

See also MAITLAND, DOMESDAY BOOK AND BEYOND, p. 144. . . . "Sometimes the ownership of a mill is divided into so many shares that we are tempted to think that this mill has been erected at the cost of the vill. In Suffolk a free man holds a little *manerium* which is composed of 24 acres of land, 1½ acres of meadow and 'a fourth part of the mill in every third year': He takes his turn with his neighbours in the enjoyment of the revenue of the mill. We may even be led to suspect that the parish churches have sometimes been treated as belonging to the men of the vill who have subscribed to erect or to endow them. In Suffolk a twelfth part of a church belongs to a petty *manerium* which contains 30 acres and is cultivated by two bordiers with a single team. When a parish church gets its virgate by 'the charity of the neighbours,' when nine free men give it twenty acres for the good of their souls, we may see in this some trace of communal action."

⁵⁶ *Adair v. United States*, 208 U. S. 161, 174 (1908). "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common

least, labor everywhere, no matter how the question is presented, is considered only as a matter of contract.

To-day it is chiefly under the head of labor difficulties — strikes, lockouts and boycotts — or under the head of the constitutionality of legislation designed to deal with the problems of Labor and Capital that we meet with the topic in the reports if we except the subject of business in its more external aspects — combinations “in restraint of trade,” monopolies, etc. — which has occupied such a large portion of the attention of American courts during the last quarter of a century.

At the outset a marked lack of discrimination in the use and choice of materials which already lie at hand and the application of rules whose meaning is supposed to be understood, is to be noted. Cases like *Bohn Manufacturing Co. v. Hollis*⁵⁷ and *Mogul S. S. Co. v. McGregor*,⁵⁸ which have to do with the combination of businesses or the relations of businesses to each other, are not distinguished from cases like *Pickett v. Walsh*,⁵⁹ *Temperton v. Russell*⁶⁰ and *Lawlor v. Loewe*,⁶¹ which have to do with the relations of the workers to business, or cases like *Gregory v. The Duke of Brunswick*,⁶² which has nothing at all to do with business. Lately a new term, “competition,” has been pressed into service without legal definition, only to make confusion worse confounded. The ancient legal term *damnum absque injuria* is being employed in novel senses.⁶³ That

good and the general welfare may require, it is not within the functions of government — at least in the absence of contract between the parties — to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.”

⁵⁷ 54 Minn. 223, 55 N. W. 1119 (1893).

⁵⁸ 21 Q. B. D. 544 (1888), 23 Q. B. D. 598 (1889).

⁵⁹ 192 Mass. 572 (1906).

⁶⁰ [1893] 1 Q. B. 715.

⁶¹ 209 Fed. 721 (1913); *affirmed* 235 U. S. 522 (1915).

⁶² 13 L. J. C. C. P. 34 (1843).

⁶³ *Damnum absque injuria* is a technical phrase, and properly used, implies either a conflict and compromise between equal rights, or right on one side and rightlessness on the other. Inasmuch as the courts look upon business as a purely private matter and regard a strike as an interference with it, it is evident that consistency and frankness require not the application of the principle of *damnum absque injuria*, but the statement that “This is legal damage, but we will deny relief.”

what is lawful when done by one can be unlawful when done by many is discussed on the assumption that the individual may be a match for one, but helpless against several, overlooking the fact that the converse may also be true, and the further fact that much may depend on the rules and regulations by which the matching is controlled.⁶⁴

There are evidences, however, of changing views and a gradual recognition of the fact that, if the economic, social and legal premises which underlie the decisions are sound, many of the decisions which justify strikes under certain conditions are unsound and that those which prohibit them absolutely can at least lay a greater claim to consistency. Law never considers power among those who are *sui juris*. It is a question of right and wrong, the antithesis of force, and only comes into existence when brute strength and power are made to submit to the peaceful and persuasive voice of reason. *Damnum absque injuria* has to do with that which has a direct relation to the advance of one's own or the public's legal right and interest and the principle cannot be invoked to justify interference with the right and interest of another party. "A man can damage me and not do an unlawful act (*injury*), as if the sheriff arrests me, this is damage because he restrains me of my liberty, but this is not unlawful. So if an artificer gets more customers than another of the same art — as a money broker or a schoolmaster who has more pupils than another, because he is more learned — this is damage to the other but not unlawful because every one ought to prefer himself. . . ." ⁶⁵

A strike cannot be justified on the ground of *damnum absque*

⁶⁴ Cf. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439 (1911); also the reasoning of Bowen, L. J., and Lord Esher, M. R. in *Mogul S. S. Co. v. McGregor*.

⁶⁵ Y. B. 12 HEN. VIII, 3 pl. 3: Brook, J.: "et ho(mm)e poit fair(e) dam(mage) a moy, et ne fair(e) injury; come si le Vic(ont) m(e) arreste, c(eo) est dam(mage), p(ur) c(eo) q(ue) il me restrain(e) de ma libertie, mes c(eo) n'est injury. Issint si un artificier acquir(e) a luy plusieurs customers que autr(e) de mesme l'art; come Scrivener, ou Schoolmaster qui ad plusieurs disciples que aut(re), p(ur) c(eo) q(ue) il e(st) plu(s) erudite, c(eo) e(st) dam(mage) a l'aut(re), m(e)s nemy injury, p(ur) ceo que chescu(n) doit preferr(e) luy m(esme), et n'e(st) punissable. Come si l(e) S(eig)n(eu)r bate s(on) villein, ou l(e) bar(on) sa fe(mm)e, ou on bate un ho(mm)e utlage ou traitr(e), ou pagan, ils n'auront acc(ion), p(ur) ceo que ils ne sont p(as) abl(e) de suir action: mes icy il ad pris non chie(n) et coment que soit chose de plaisir, uncore j'ay propiete en ceo."

For other examples see 1 ROLL ABR. 107 pl. 11, 12, 13, 15; Y. B. 11 HEN. IV, 47 pl. 21; Y. B. 22 HEN. VI, 14 pl. 23; cf. Y. B. 7 ED. III, 50 pl. 25.

injuria or as lawful "competition" without at the same time admitting an interest of the strikers in and to the business. A general social interest is not enough, for a right based on such an interest can never exceed the bounds of peaceful persuasion.

A strike is not merely a simultaneous quitting of work in the exercise of one's own right not to work. The object of a strike is to exert such a compulsion as will compel surrender. A leading Massachusetts case ⁶⁶ frankly states the matter as follows:

"Speaking generally a strike to be successful means not only coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many if not in most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. . . .

"The effect of this (the action of the strikers) in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. . . .

"Further, the effect of complying with the labor union's demands apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. . . ."

This doctrine naturally required limitations if the semblance of law was to be preserved and the court effected the compromise by limiting the "right" to the particular employer with whom the dispute existed,⁶⁷ thus greatly weakening, if not neutralizing, the decision's seeming measure of altruism. But, as intimated, this inconsistent and unsatisfactory handling of labor controversies by the courts is coming to be recognized by the courts themselves. In

⁶⁶ *Pickett v. Walsh*, 192 Mass. 572, 581, 584 (1906).

⁶⁷ *Pickett v. Walsh*, *supra*, pp. 587, 588: . . . "In our opinion organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. . . . It is settled in this Commonwealth by a long line of cases that a defendant is liable for an intentional and an unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business." . . .

a late federal case dealing with a threatened boycott, Judge Hough, while stating that it was useless to parade the decisions bearing on such controversies, because reconciliation was impossible, went on to say:

" . . . In the United States Courts for this circuit, *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, is controlling. It accepts the New York cases fully, piously regrets the injuries committed, and writes the epitaph of litigation such as this by declaring that, when equal rights clash, equity is helpless. This is true; it would have been just as true to point out that the result of legalizing strikes, lockouts, and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and accomplish their main purpose while inflicting all necessary 'incidental' injury."⁶⁸

The Coppage case⁶⁹ recently decided by the Supreme Court illustrates perfectly the present legal conception of labor, and of its relation to capital and to business, and it would be difficult to find a case showing greater confusion in the law or one showing more clearly that this confusion is due solely to the inability to recognize the public nature of labor and capital. The question presented was whether an employer could require or "coerce" an employee as a condition of securing or continuing in employment to enter into an agreement not to become or remain a member of a labor union. The Supreme Court had already held in the *Adair* case⁷⁰ that the employer could *discharge* an employee for that reason or for no reason, and unless the cases were distinguishable or the *Adair* case was to be overruled there was no occasion for extended discussion. The Kansas court in sustaining the statute involved had distinguished the *Adair* case, but there was a vigorous dissent by one of the Justices, who said that:

"The law obviously was not passed because any person seriously believed its enforcement would result in real benefit to the laboring men or to labor unions. It is like the old soldier's preference law, and similar enactments, 'that keep the word of promise to our ear and break it to our hope.' After reading the majority opinion, members of labor unions may rest for a time under the delusion that the legislature, in the exercise

⁶⁸ *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 121 (D. C., S. D., N. Y., 1914).

⁶⁹ *Coppage v. Kansas*, 236 U. S. 1 (Jan. 1915).

⁷⁰ 208 U. S. 161 (1908).

of the police power, has reached out its strong arm to shield the laboring man from the attempts of his employer to deprive him of the right to become and continue a member of a labor union, and that the construction placed upon the act by the court has made the legislation effective to accomplish the purpose, but a perusal of former decisions of this court will cause the delusion to disappear." ⁷¹

The statute was declared unconstitutional by the Supreme Court in a majority opinion in which the *Adair* case was followed and reaffirmed, but two Justices, who may be designated as the minority Justices, and a single Justice filed separate dissents arguing in favor of the constitutionality of the law. The minority argued that the *Adair* case was distinguishable — that here the legislature had simply made a certain kind of condition in a contract illegal — a type of legislation of which there were many examples and from which this case was not so dissimilar as to require the statute to be held unconstitutional; but no effort was made to make any practical distinction between the two cases. The single Justice, who had dissented in the *Adair* case, dissented in this one, and for the reason that:

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by a law in order to establish the equality of position between the parties in which liberty of contract begins." ⁷²

But the majority and the minority Justices, like the Judges in the court below, were evidently unwilling to rest their decision on technical grounds and the discussion took a wide range in which the rights of an employee to join a union, the rights of employers to organize, the comparative rights of employer and employee as contracting parties and the inequality of the position, the public interest in trade unions and the menace to the personal rights of laborers were adverted to, but no issues were joined under any of these heads. All of the Justices assume that they are dealing with a contractual relation. To the majority this statute has no conceivable relation to the police power, and so "interference" with the employer's rights is without precedent and unwarranted. The minority hold that the statute does not interfere with the liberty of

⁷¹ 87 Kan. 752, 760 (1912).

⁷² 236 U. S. 1, 26-7 (1915).

contract any more than some other statutes which have either been held or would undoubtedly be held good.

The decision is important. As the minority observed, it not only invalidates the legislation of Kansas but necessarily decrees the same fate to like legislation of other states of the Union, comprising altogether nearly half the population of the United States. But its importance does not lie so much in its immediate as in its remote effects, and in the things which are left to be decided rather than in those which are decided. The underlying difficulty lies in the opposite conceptions of public interest, and the same is true of *Pickett v. Walsh* and most of the other labor cases. In *Pickett v. Walsh* the court looks at capital as the private interest of a few individuals and at labor as the private interest of a few other individuals, which interests conflict or compete, whereas in fact, and at common law, labor and capital cannot compete or conflict. So in the *Coppage* case the difficulties the Justices meet are due to their failure to distinguish between the rights of an individual who hires men and of an individual who is hired as contrasted with the communal right with respect to the capital and the labor. The essential question is not whether a laborer has a right to join an organization or a business man to hire on any terms he chooses, but it is whether the community has any interest in the labor and capital applied to business. The fact is that the members of the community, who perform its business functions, are but as "links in a long chain" into which the very spirit of progress fashions them. If one link has no claim against the other links, no interest in their integrity, no right to insist that each perform its function "as it ought," the whole basis for the association ceases to exist and the association itself becomes farcical and absurd.

To-day the situation of the dispensable members of businesses is in these respects, as we have seen, one of rightlessness under the law, and often it is claimed of economic subjection, resembling in this respect the condition of the serfs of the middle ages "who did not know in the evening what they were to do the next day."⁷³ The serf as known in England had many rights, he was not a slave,⁷⁴

⁷³ BRACTON, *DE LEGIBUS ANGLIAE* (Ed. London, 1640), p. 26: "Est enim purum villenagiu(m), à quo praestatur servitiu(m) incertum & indet(er)minatu(m), ubi sciri non poterit vespere, quale servitium fieri debet manè, vz. ubi quis facere tenetur, quicquid ei praeceptum fuit."

⁷⁴ Compare POLLOCK AND MAITLAND, *1 HISTORY OF ENGLISH LAW*, p. 429. VINOGRADOFF, *VILLAINAGE IN ENGLAND*, pp. 43 *et seq.*, 152.

but so far as his means of livelihood were concerned he might have been better off if he had been a slave, for then it would have been necessary for his lord and master to supply him with the means of sustenance.

From this review it will be seen how far the solution of the problems of labor and capital lies from "doing something" for labor or from schemes of profit sharing dictated by selfish or even humanitarian motives. It is not a matter of coddling, mollifying, or favoring any particular person or group of persons, but is solely concerned with discovering, recognizing, and respecting the rights of the members of the community, each in his degree. So long as any problem of labor or capital or business is treated in law merely as a problem between individuals, the common law cannot be enforced and the real evils which produce those problems cannot be remedied except by legislation.

It will also be seen how large a measure of correct principle is reflected in the legislation of the time — minimum wage and factory laws, workmen's compensation acts and forms of social insurance — so large in fact as to suggest to enlightened "Capitalism" and Trade Unionism that much of the time and energy spent in testing the constitutionality of these laws in the courts might better be expended in legislative committee in the endeavor to perfect them. It remains for those charged with the interpretation of the law to respond in equal degree to the demands of modern conditions, and the pity is that they have not done so. To believe that the common law is not adequate for every need is to fail to grasp the history of the common law and to understand what the common law is. It was by the steady and peaceful process of enlightened decision that the English judges swept away the condition of villainage which society had outgrown and accomplished by the processes of law what was only achieved by a revolution in France and signalized by "a flourish of trumpets" in the emancipating decree of 1789.⁷⁵ The common law is a living, a growing and an adaptable

⁷⁵ VINOGRADOFF, "Villainage," 28 ENCYC. BRIT., pp. 81, 84: . . . "It is a fact of first-rate magnitude that in the 15th century customary relations on one hand, the power of government on the other, ripened, as it were, to that extent that the judges of the king began to take cognizance of the relations of the peasants to their lords. The first cases which occur in this sense are still treated not as a matter of common law, but as a manifestation of equity. As doubtful questions of trust, of worship, of testamentary succession, they were taken up not in the strict course of justice, but as

system, not something completed and stored away in a by-gone age from which our immediate ancestors selected the choice portions for our guidance, and the earlier definitions of it by the lawyers and masters are also the best: "And Sir, the law is founded on reason, and that which is reason is law."⁷⁶ "Custom which runs through the whole land is the common law,"⁷⁷ and "what thing is custom of the land but the law of the land."⁷⁸ "Reason is the life of the law; nay the common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's naturall reason."⁷⁹ Blackstone's statement that "the common law is the perfection of reason" can thus be accepted without reservation in the sense that the perfection of reason is the common law. To say that reason is the common law and that custom is the common law is indeed to say the same thing, because what is customary is that which is accepted as reasonable under the circumstances and is to that extent the law. In the process of centralization and concentration of law, particular customs must necessarily yield to general customs. And it is in the course of such a process that the interpretation and administration of a system of law are in danger of being dehumanized. Some imagination must be employed to bring to consciousness the myriad relations of everyday life that may be governed and controlled by a brief and highly concentrated statement of principle. It is in meet-

matters in which redress was sorely needed and had to be brought by the exceptional power of the court of chancery. But this interference of 15th century chancellors paved the way towards one of the greatest revolutions in the law; without formally enfranchising villeins and villein tenure they created a legal basis for it in the law of the realm; in the formula of copyhold — *tenement held at the will of the lord and by custom of the manor* — the first part lost its significance and the second prevailed, in downright contrast with former times when, on the contrary, the second part had no legal value and the first expressed the view of the courts. One may almost be tempted to say that these obscure decisions rendered unnecessary in England the work achieved with such a flourish of trumpets in France by the emancipating decree of the 4th of August, 1789."

⁷⁶ Vampage, Y. B. 13 HEN. VI, 21 pl. 60: "Et Sir, le Ley est fond(e) de reason, et ceo q(ue) est reason est Ley."

⁷⁷ Littleton, Y. B. 8 Ed. IV, 18 pl. 30: "Custome q(ue) courge p(ur) my tout le terre est common Ley."

⁷⁸ Newton, Y. B. 22 HEN. VI, 21 pl. 38: "Quel chose e(st) custo(m)e de t(er)r(e) q(ue) le Ley de t(er)r(e). See also Fortescue, Y. B. 35 HEN. VI, 53: "Donq common reason, qui est comon Ley est, que," etc.

⁷⁹ CO., INST., 97 b.

ing this test that courts and lawyers have shown their greatest weakness.

"The jurists of whom Ihering made fun," says Professor Pound in another place, "have their counterpart in American judges who insist upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts. On the other hand, the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life. Wholly abstract considerations do not suffice to justify legal rules under such a theory. The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than of furnishing self-sufficient premises from which rules are to be obtained by rigid deduction."⁸⁰

A justification of that uncompromising adherence to a theory of contract, to which exception is taken in the foregoing passage, is supposed by some at least to be found in the statement of Sir Henry Maine "that the movement of the progressive societies has hitherto been a movement from *status* to *contract*,"⁸¹ a statement which has received currency and been accepted as proof that it is such movement that makes societies progressive. How slight a foundation exists for such a position we have seen. In every community there are necessarily two relationships, one of individuals to each other and one of each to all the rest, that is, the community. Contract only deals with one — the relation between individuals. The other is represented by *status*. A contract, after all, is only an agreement to which the law attaches obligations under special circumstances, and, therefore, it does not explain obligations to say that the matter is a contract. The law has no difficulty in attaching obligations to a great variety of relations — they are "implied," as it is said, or "imposed by law." To impose particular obligations on particular persons in particular situations is not necessarily to enter upon an evening-up process. In the case of the ordinary contract between parties who are capable of contracting at all, the law does not impose any obligations upon one which are not imposed equally on the other, but in the relation of employer and employee the law has interposed and

⁸⁰ 26 HARV. L. REV. 140, 146.

⁸¹ MAINE, ANCIENT LAW, p. 165.

still interposes in a great variety of ways, sometimes on the side of the employer, as by the fellow-servant rule, and sometimes on the side of the employee, as by the industrial insurance laws, anti-truck acts and many varieties of factory legislation. To foreclose the discussion with the statement that the case is one of contract is, therefore, to end the argument at the point at which it should begin.

In the Village Community, in the old trading towns, the relationships between the individual and the community were visible and apparent, recognized by all and enforced by custom. So far as these customs were general they represent the common law. "The modern analyst," says Maitland, "may insist that 'the custom of the manor' is not 'law,' but mere 'positive morality'; but let him admit that it is positive morality conceived as law and little is left to quarrel over save words."⁸² The extension of the radius of business operations, the removal of the seats of governmental authority to distant points, resulted in the destruction of these customs and therefore they did not find expression in the written law. Again, it was only by slow degrees that the villain peasantry among whom these customs so largely prevailed obtained recognition in the king's courts. In fact during the period of rapid expansion and growth, of abounding fields of opportunity, the need itself for the enforcement of many of the customs passed away and indeed we find statute after statute falling into disuse on this account.

Yet it must be obvious that as population increases, cities grow in size and the struggle for existence becomes more and more intense with its consequent demands for larger or more efficient units, higher types of leadership and the highest order of skill, we return to a condition that is relatively the same as that which confronted the Village Community and the old trading town. The need for emphasis upon the relation of the individual to the community and the community to the individual again becomes apparent and must be impressed upon the ministers of the common law. The community has the right to insist on law and order in industry no less than outside of it,⁸³ but it is vain to expect order and at the same time to deny law. Industrial order can come only when the means

⁸² 1 SELECT PLEAS IN MANORIAL COURTS, p. 163.

⁸³ Cf. WEBB, INDUSTRIAL DEMOCRACY, pp. 244, 245.

are provided by which all these grievances based on a just conception of communal interest which are now left to settle themselves outside the pale of the law may be disposed of within it. This is a task well within the bounds of possible accomplishment for the reason that once the nature of business and the attitude of the common law toward it are understood not only by the courts but by the workers and by business men, there will be a natural tendency on the part of all parties to govern themselves accordingly, and the number of grievances will in consequence diminish. The decisions dealing with labor, capital, and business will themselves command increasing respect by mere force of the consistent application of intelligible principles, for the chaos and uncertainty that characterize this branch of the law to-day are largely due to the disregard of the fundamental principle of the common law that labor, capital, and business are all parts one of another, and collectively, we might almost say, are the community itself.

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DRASTIC PLEDGE AGREEMENTS

IN this article are considered: the restrictive safeguards against misuse of the pledge which circumscribed the common law pledgee; to what extent these limitations have been and may be overcome by agreement in the modern instrument of pledge; instances in which broad powers therein conferred have suggested to the grantee opportunities for improper advantage to himself, and how the courts have interposed to prevent fruition of such schemes.

The duties imposed by law on a pledgee, with respect to security left with him, are designed to prevent loss, fraud or oppression.¹ Thus, by way of example, he must keep the pawn and not use it,² unless it would be the better for use.³ He may not sell it before default,⁴ and no evidence of custom to the contrary can justify him in so doing;⁵ nor may he repledge it.⁶

In early times, the pledge could not be foreclosed except under judicial process,⁷ and this rule still prevails in other systems of law.⁸ It has long been authoritatively adjudged, however, in our own, that the pledgee, on default, may sell the pledge, without judicial intervention, at public sale;⁹ provided, in the case of obligations not maturing at a time certain, he makes demand for payment, and in all cases, also makes demand for redemption, 1

¹ Union Trust Co. v. Rigdon, 93 Ill. 458, 468-9 (1879).

² JONES, COLLATERAL SECURITIES, 3 ed., 598, § 501; Lawrence v. Maxwell, 53 N. Y. 19-22 (1873); Union Trust Co. v. Rigdon, *supra*, p. 465.

³ 1 CHITTY'S BL. COMM., 19 London ed., 451 n.

⁴ Commonwealth v. Althause, 207 Mass. 32, 42, 93 N. E. 202, 204 (1910).

⁵ Markham v. Jaudon, 41 N. Y. 235 (1869); Oregon, etc. Co. v. Hilmers, 20 Fed. 717 (1884).

⁶ Warfield v. Adams, 215 Mass. 506, 515, 102 N. E. 706, 710 (1913); Skiff v. Stoddard, 63 Conn. 198, 218, 26 Atl. 874, 880 (1893); Wood v. Fisk, 109 N. E. (N. Y.) 177 (1915).

⁷ Cortelyou v. Lansing, 2 Caines Cas. (N. Y.) 200, 202 (1805), per Chancellor Kent; Wilson v. Little, 1 Sandf. (N. Y.) 351, 357 (1848); Smith v. Shippers' Oil Co., 120 La. 640, 658, 45 So. 533, 539 (1907).

⁸ Cortelyou v. Lansing, *supra*.

⁹ Wheeler v. Newbould, 16 N. Y. 392, 401-2 (1857); JONES, COLLATERAL SECURITIES, 3 ed., 724, § 602. ✓

giving reasonable notice of time and place of intended sale.¹⁰ But if the debtor cannot be found, or for other reason this demand or notice cannot be given, it is still the law, that the pledge must be realized on through judicial order.¹¹

Nor may every species of security be sold, even now. The creditor holding an obligation secured by *choses in action*, such as notes, non-negotiable bonds or mortgages, may sell the principal indebtedness, and the securities will pass with it as an incident. He may not, however, dispose of the *choses in action* apart from the obligation they secure; his duty is to collect them.¹²

Finally, the pledgee, standing in a relation of trust to the pledgor, is affected by the rule that a trustee may not purchase, directly or indirectly, at his own sale.¹³

All this is apt to hamper a desirable use of the pledge and unduly to retard quick collection of the debt. Accordingly, it has become customary to make special contracts removing these disabilities; giving the pledgee the right to use the collateral security as his own, being responsible only for return of a like amount of the kind deposited; allowing public or private sale, free from right of redemption, without demand, notice or advertisement; authorizing the pledgee to bid as any other bidder would, to purchase at market price and to account only for the proceeds obtained, less expenses.¹⁴

The validity of such instruments will first be considered. As a general rule, such agreements are enforceable to the extent that they

¹⁰ *Franklin Nat. Bank v. Newcombe*, 1 App. Div. 294, 297-8, 37 N. Y. Supp. 271, 273-4 (1896), per Van Brunt, J.; *affirmed*, 157 N. Y. 699, 51 N. E. 1090 (1898); *Chouteau v. Allen*, 70 Mo. 290 (1879); JONES, *COLLATERAL SECURITIES*, 3 ed., 728, § 607.

¹¹ *Wheeler v. Newbould*, 16 N. Y. 392, 400 (1857); *Bates v. Wiles*, 1 Handy (Ohio) 532, 535-6 (1854).

¹² *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415 (1910); *Wheeler v. Newbould*, *supra*, pp. 398-9.

¹³ *Stebbins v. Michigan, etc. Truck Co.*, 212 Fed. 19, 29 (1914); *Glidden v. Mechanics' Nat. Bank*, 53 Oh. St. 588, 599, 42 N. E. 995, 997 (1895); *Appleton v. Turnbull*, 84 Me. 72, 80, 24 Atl. 592, 594 (1891). But, see, *Fidelity Ins., etc. Co. v. Roanoke Iron Co.*, 81 Fed. 439 (1896).

¹⁴ For examples of such notes, see, *McDougall v. Hazelton Tripod-Boiler Co.*, 88 Fed. 217, 218-9 (1898); *Dibert v. D'Arcy*, 248 Mo. 617, 626-8, 154 S. W. 1116, 1118 (1913); *Williams v. United States Trust Co.*, 133 N. Y. 660, 661, 31 N. E. 29 (1892); *Smith v. Shippers' Oil Co.*, 120 La. 640, 654, 45 So. 533, 538 (1907); *Torrance v. Third Nat. Bank of Pittsburgh*, 210 Fed. 806-7 (1914).

fairly facilitate collection of the creditor's due.¹⁵ When, however, they provide for a forfeiture of the security, they are, like all other agreements for a penalty, invalid, on grounds of public policy.¹⁶

But such agreements, even when upheld, are regarded by the courts with suspicion and dislike. Their attitude is thus expressed by Judge Taft:

"A court of equity scrutinizes with great care the contracts made between pledgee and pledgor, as to the transfer of title to the pledgee, and does not hesitate to set aside such a contract if there is any ground for thinking that it is a harsh contract, and one brought about by the position of vantage that the pledgee occupies with reference to the pledgor."¹⁷

It may be questioned whether this is not too strong a general statement; though correct if applied to the facts in that case, which involved an attempt to require payment of an exorbitant sum for the redemption of securities.

In *Ohio National Bank of Wash. v. Central Construction Co.*,¹⁸ a secured note allowing immediate sale on non-payment, or sale within ten days after unsuccessful demand for additional collateral, was described as harsh and incongruous in its provisions,¹⁹ and the intimation was, that giving the right to sell at stock exchange, or own bank, at public or private sale, without notice of any kind, of time, place, or manner of sale, with power in the pledgee to become purchaser, ought to be declared void.²⁰

Notwithstanding, however, such agreements may appear in some aspects harsh and drastic, the courts should, and do, attempt to carry out rather than strike down such compacts, preserving the rights of the pledgor by strict construction and by requiring exercise, in his behalf, of the utmost good faith.

Passing, then, from consideration of questions of validity, to inquiry into the justifications for strict construction, one reason given is, that ordinarily the pledgee frames the pledge instrument,

¹⁵ *In re Mertens*, 144 Fed. 818, 821 (1906); *affirmed*, as *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 38 (1907); *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, 774 (1893).

¹⁶ *West v. Guaranty Trust Co. of New York*, 83 Misc. 609, 145 N. Y. Supp. 634 (1914); *Smith v. Shippers' Oil Co.*, 120 La. 640, 658, 45 So. 533, 539 (1907).

¹⁷ *Ritchie v. McMullen*, 79 Fed. 522, 557-8 (1897).

¹⁸ 17 D. C. App. 524 (1901).

¹⁹ *Ibid.*, p. 543.

²⁰ *Ibid.*, p. 544.

and therefore the general principle that ambiguous words are construed against the user, applies. Bankers and brokers have regular printed forms of "collateral notes" the language of which, if equivocal, is to be read unfavorably to the draftsman.²¹ In *Torrance v. Third National Bank of Pittsburgh*,²² the Court, Judge Gray writing the opinion, decided that makers of a joint and several note, pledging security which they owned jointly, for payment of the note, "or any other liabilities of the undersigned . . .", authorized use of the collateral security only for obligations jointly incurred, and hence not in settlement of indebtedness incurred as indorsers. The Court, after saying that the terms of a pledge, "must be construed with a certain measure of strictness,"²³ added that it was for the bank which framed the pledge to have made the meaning insisted upon by it clear "by . . . making the clause read: 'any other liability or liabilities of the undersigned or either of them.'"

A second reason for interpreting such instruments rigorously against the pledgee is, that a trust created and defined by contract will be viewed favorably to the beneficiary.²⁴ Affecting equities of redemption, it must "be construed benignantly for the debtor — as benignantly for him as may consist with security of the creditors."²⁵

Courts not only scan such instruments with great strictness,²⁶ but are alert to discern a waiver of right to proceed according to the letter of the contract. Mere indulgence may detract from the creditor's rights, and no consideration is necessary for the waiver.²⁷

²¹ *Union Nat. Bank v. Forsyth*, 50 La. Ann. 770, 778, 23 So. 917, 920 (1898); *Mt. Vernon Refrigerating Co. v. Wolf Co.*, 188 Fed. 164, 168 (1911); writ of *certiorari* refused, 225 U. S. 711 (1912).

²² 210 Fed. 806 (1914).

²³ *Ibid.*, p. 808.

²⁴ *Dibert v. D'Arcy*, 248 Mo. 617, 647, 154 S. W. 1116, 1125 (1913).

²⁵ *Sparhawk v. Drexel*, 22 Fed. Cas. 860, 866 bot. right col. (1874).

²⁶ For example, see, *Smith v. Shippers' Oil Co.*, 120 La. 640, 45 So. 533 (1907), where promise in note was limited by attached agreement respecting collateral; *Warfield v. Adams*, 215 Mass. 506, 102 N. E. 706 (1913), 7th par. syl., holder in collateral agreement confined to first holder. *Contra*, *Mulert v. National Bank of Tarentum*, 210 Fed. 857 (1913); *Commonwealth v. Althause*, 207 Mass. 32, 93 N. E. 202 (1910), right given to "use" collateral security pledged, means, use as pledge, and not to sell, before default. See, also, *Kennedy v. Broderick*, 216 Fed. 137 (1914).

²⁷ *Toplitz v. Bauer*, 161 N. Y. 325, 331-2, 55 N. E. 1059, 1060-1 (1900); *Hill v. Alber*, 261 Ill. 124, 103 N. E. 612 (1913).

It is to be doubted whether provisions favorable to the pledgee, waived or suspended, can be restored to him, in absence of agreement that waiver of one default shall not be deemed a waiver of successive defaults. The pledgee gets his right to act upon default or within a reasonable time thereafter, and, in the absence of agreement, cannot exercise his power at other times. If the power can be restored to him at all, it must be only upon definite and reasonable notice of intention to avail himself of it.²⁸

Supplementary to canons of construction and waiver unfavorable to the pledgee, probably the most important of all the rules enforced in behalf of the pledgor is that requiring of the pledgee the strictest good faith in performance of the agreement on his part, and the insistence that he cannot shelter himself behind a bare literal compliance with the powers conferred, but must exercise them for the benefit of the pledgor as well as for himself.²⁹ This is particularly true where the pledgee is enabled by agreement to become purchaser. As well expressed in a recent case, he is still "‘trustee to sell’ not to buy, though with the privilege of buying, if fairly sold."³⁰

The foregoing principles of strict construction, waiver and good faith have been variously applied in decisions relating to time, place, advertisement, notice, announcement and method of sale, and obligation of pledgee, when purchaser, to account for full value of securities.

The courts jealously guard the obligor's right to receive effective notice and are astute in finding it to exist, unless it has been taken away in unmistakable terms. Thus, should a pledgee be authorized to sell on default "in the best way he could," this would not relieve him of the duty to exercise the power only upon reasonable notice to redeem and of the time and place of the prospective sale. A mere general notice to the debtor of intention to sell would be insufficient.³¹

Clearly this must be so; since, for the debtor to be present at the sale in person or by agent, is a protection, the benefit of which

²⁸ *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576 (1913).

²⁹ *Turner v. Metropolitan Trust Co. of City of New York*, 207 Fed. 496, 501 (1913); *Bon v. Graves*, 216 Mass. 440, 446, 103 N. E. 1023, 1026 (1914); *King v. Boerne State Bank*, 159 S. W. (Tex.) 433 (1913).

³⁰ *Dibert v. Wernicke*, 214 Fed. 673, 681 (1914).

³¹ *Goldsmidt v. First Methodist Church*, 25 Minn. 202 (1878).

such notice would not ensure him. Even if unable himself to buy, knowing with certainty a reasonable period in advance, the exact hour and place of sale, he can attract buyers, or, failing in that, at least make sure that the sale is so conducted that the security will, if it can, pay his debt and realize a sum in addition. As to such possible surplus, the pledgee would represent the pledgor exclusively.³²

But great as is the value of notice to the pledgor, advertisement and disclosure at the sale are additional safeguards of equal efficacy. Notice to the pledgor brings into play the efforts of which he is capable. Advertisement, and, to a lesser degree, full disclosure at the sale, enlist the aid of the public in his interest. It is not to be presumed that because one of these rights is waived, others equally essential and quite distinct, are also abandoned. Where each is important, nothing is to be taken away by inference. Thus, suppose a bank's form of note authorizes sale without notice and permits the bank to purchase if the sale be public; the bank, purchasing at an unadvertised auction sale, will not have properly acquired title. The pledgor's waiver of notice means notice to him, and there has been no surrender by the pledgor of his right to the general notice or advertisement contemplated by a public sale.³³

Now what kind of an advertisement must this be? Obviously, one which will accomplish the purpose for which it is intended. A common form consists of a statement in the public press that the sale is "for the account of whom it may concern," describing the security and giving the time, place and manner of sale, supplemented by announcement, if sale is to be had on the stock exchange, that the floor is open at such time to the public. But such notice is not sufficient: it should disclose, also, the principals for whom the property is being sold; that it is being sold to foreclose a pledge, and for a named amount.³⁴

This suggestion is usually met with loud outcry from bankers and brokers, who asseverate that such disclosure is not usual and needlessly bares matters they regard as confidential. But their

³² *Harrison v. Friend*, 1 N. P. (Ohio) 39, 41 (1893).

³³ *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 327, 342, 81 S. W. 171, 172, 177 (1904); *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 281, 56 S. W. 1117, 1119 (1900).

³⁴ *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 278, 56 S. W. 1117, 1118 (1900).

complaint loses sight of the essential nature of the transaction, which, as before stated, is one involving a relation of trust. If the public is informed that some well known institution or person has taken A's security in pledge, such knowledge helps to excite interest in the sale. If it further appears that a considerable sum has been advanced on the assumed worth of the pledge, this tends to appreciate the value of the pledged security in the eyes of the public. While, of course, the lender may have relied largely on the financial strength of the maker of the obligation and but little on the security, yet the converse may be true, and only by knowing all the facts can the public make up its mind which is probably the case. Notoriety as to who are the parties to the transaction, the amount involved and the security, is more important for the borrower (and perhaps for the lender) than secrecy would be.

Value is, after all, frequently matter of opinion and taking securities in pledge is an expression thereof by an expert. Then, too, so far as value is based on deductions from facts, the public realizes it can obtain from the principals full information respecting the nature of the security which may not be obtainable from the agent or broker conducting the sale. The business convenience of the seller must, therefore, yield to his higher duties as trustee for the bailor. No usage or custom to the contrary may alter the rules of law ensuring a fair sale.

When it comes to the sale itself, a similar oral notice is necessary.³⁵ Chancellor Walworth, as early as 1844,³⁶ adduced as additional reason why announcement should be made that the pledge is for a particular debt and the names of pledgor and pledgee given, the fact that if other sales of the same class of security were made at about the same time, the pledgor would thus know which transaction disposed of his; so that, if the price offered were higher, he might have the advantage of it.

There are cases which, at first reading, may seem opposed to the view above stated, respecting necessary disclosures in advertisement and crying of sale, but they do not seem persuasive. Thus, in one,³⁷ it appeared that the pledgor had known of the bid,

³⁵ *Ibid.*, at 156 Mo. 281, 56 S. W. 1119; *Dibert v. D'Arcy*, 248 Mo. 617, 646, 154 S. W. 1116, 1124 (1913); *Dibert v. Wernicke*, 214 Fed. 673, 682 (1914).

³⁶ *Dykens v. Allen*, 7 Hill (N. Y.) 497, 500 (1844).

³⁷ *Earle v. Grant*, 14 R. I. 228, 230 (1883).

approved of the sale and waited four years before bringing his bill to redeem. The ground of decision, therefore, really is, that defects in method of sale may be waived by conduct amounting to ratification.

In another case, where broad language was used,³⁸ a statute provided that sales should be "in the manner and upon notice to the public usual at the place of sale." In view of the statute, the local custom not to make announcement became relevant. Such sporadic and exceptional decisions, however, cannot dim the great lights of fair dealing and frankness.

It scarcely seems necessary to mention that adequately to protect the pledgor the place of sale must be strictly in conformity with the agreement,³⁹ notice and advertisement, if any are required, and so far as possible, in a public place.⁴⁰ For, what does notice avail, if one be misled into attending at the wrong time or place, or be denied entrance? "Public sale" connotes full opportunity for the public to be present.⁴¹ Countenance departures from the standard requirements of a public sale, and it soon ceases to be such, — a difference in degree becomes a difference in kind.

Coming now to a consideration of the time at which a sale may be had, it seems as if some courts had overstepped the limits of proper effort to protect the pledgor and had, by requiring delay, in effect made a new arrangement for the parties. According to a number of cases, the pledgee may not sell at a time unfavorable

³⁸ *Bell v. Mills*, 123 Fed. 24, 28 (1903).

³⁹ In *Manning v. Heidelberg*, 153 App. Div. 790, 793, 138 N. Y. Supp. 750, 753 (1912), a note allowed the pledgee to become buyer at broker's board or public auction. Purchase at a curb sale was declared not within the power and void.

⁴⁰ In *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 277, 56 S. W. 1117, 1118 (1900), advertisement of place of sale was the east door of the court house. A sale conducted by reason of cold inside this door, which was of glass, was declared invalid, although many bidders were present, including a representative of the pledgor (he stating he was there to protest, not to bid).

⁴¹ *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 327, 330, 81 S. W. 171, 172, 173 (1904). Should the instrument allow public or private sale or at broker's board, with permission to pledgee to purchase if at public sale, this would not entitle him to purchase at broker's board, unless at a time when the floor is open to the public. It would seem the result would be no different if the security were one which could be sold only at broker's board, if sold where, or at a time when, the public was not admitted. The power would not in terms be conferred by permission to purchase at public sale. But, see, *Sparhawk v. Drexel*, 22 Fed. Cas. 860, 867 (1874). The case might have been decided on the ground that the sale was ratified. *Brown v. Ward*, 3 Duer (N. Y.) 660 (1854).

to the pledgor, if abundantly secured.⁴² These seem opposed to the weight of authority and to correct reasoning.⁴³ The pledgee, it is true, is trustee for the pledgor; but the trust is defined by the instrument of pledge. It is inequitable that the pledgee should not have satisfaction of his debt when due, and that the pledgor should compel involuntary extension of the loan.⁴⁴ Besides, what is abundant security to-day may soon become worthless, and then the pledgee is likely to complain and ask release, because the security was not made to bring its claimed value. The statement in a number of cases and text books, that the sale should not be forced for barely enough money to secure payment of the debt,⁴⁵ appears to have originated in a *dictum* in *Sparhawk v. Drexel*,⁴⁶ as follows:

"They are not to frustrate any just expectations of a surplus by forcing sales for barely enough money to secure themselves."

But the pledgor, when he makes his agreement, takes into account the possibility of an unfavorable market and of the lender particularly needing reimbursement at such time. The bailor, therefore, has no "just expectations of a surplus," if recourse to sale must then be had. The creditor may, in certain instances, and under certain circumstances should, adjourn the sale;⁴⁷ but he is entitled to collect his debt when due, and not obliged to sell from time to time, in the expectation of a rising market. That he is bound to use the same measure of care a prudent man would in selling his own securities, is too broad a statement; it is correct so far as concerns method of sale, limited by the terms

⁴² *Muhlenberg v. City of Tacoma*, 25 Wash. 36, 57, 64 Pac. 925, 932 (1901); *Foot v. Utah Commercial, etc. Bank*, 17 Utah 283, 294, 54 Pac. 104, 106 (1898).

⁴³ *Union Nat. Bank v. Forsyth*, 50 La. Ann. 770, 777, 23 So. 917, 920 (1898); *King & Co. v. Insurance Co.*, 58 Tex. 669, 674 (1883); *Williams v. United States Trust Co.*, 133 N. Y. 660, 31 N. E. 29 (1892); *Newsome v. Davis*, 133 Mass. 343, 348 (1882); *Whitin v. Paul*, 13 R. I. 40, 44 (1880).

⁴⁴ *Franklin Nat. Bank v. Newcombe*, 1 App. Div. 294, 37 N. Y. Supp. 271 (1896).

⁴⁵ *Foot v. Utah Commercial, etc. Bank*, 17 Utah 283, 294, 54 Pac. 104, 106 (1898); *Moses v. Grainger*, 106 Tenn. 7, 11, 58 S. W. 1067, 1068 (1900), quoting COLEBROOK, COLLATERAL SECURITIES, § 118.

⁴⁶ 22 Fed. Cas. 860, 867 (1874).

⁴⁷ *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 284, 56 S. W. 1117, 1120 (1900), citing PERRY, TRUSTS; *Perkins v. Applegate*, 27 Ky. L. Rep. 522, 524, 85 S. W. 723, 724 (1905).

of the instrument of pledge, but is not correct if applied to the time when sale is to be had.⁴⁸

In this connection, it is to be said, however, that if the security is divisible without injury, the pledgee should sell no more than may reasonably appear to be enough to satisfy the debt. His duty is to sell in small lots, if (as is usually the case) the security will thus bring a better price.⁴⁹ A prospective purchaser may lack means or inclination to bid on a large block of securities and yet offer a considerable sum for a part. Wider competition and attendant higher sale price are thus created. If the pledge is susceptible of sale in small lots, the advertisement, notice and announcement should indicate sale in such manner, with the idea, above suggested, that arousing interest tends to increase what will be realized.

Suppose, now, the pledgee has satisfied all the preceding requisites for proper sale and desires to become a bidder. He must to his own self be true. His duty is at once to bid what he considers the fair value of the pledge.⁵⁰ This follows from a just appreciation of the meaning and purpose of an instrument permitting the pledgee to buy. There are times, when, by reason of his intimate knowledge of the worth of the security, or because of his greater financial strength, he would offer more than the bidding public. Under such circumstances, it would be regrettable if he were forced to stand by, because of prohibition to become purchaser, and see the security sacrificed.⁵¹ Frequently, however, the pledgee succumbs to the temptation of getting a bargain at his *cestui's* expense, and, forgetting his duties, instructs his broker or agent to acquire ownership of the pledge, and to do this by beginning to bid at a low figure.

Occasionally this conduct has not met with the reprobation and failure it deserves. Thus, in *Manning v. Shriver*,⁵² although the

⁴⁸ *Newsome v. Davis*, 133 Mass. 343, 347-8 (1882); *Exchange State Bank v. Taber*, 145 Pac. (Idaho) 1090 (1915).

⁴⁹ *Fitzgerald v. Blocher*, 32 Ark. 742, 746-8 (1878); *Olcott v. Bynum*, 17 Wall. (U. S.) 44, 62 (1872); *Bowen v. Bowen*, 265 Ill. 638; 107 N. E. 129 (1914). But, see, *Newsome v. Davis*, 133 Mass. 343, 348 (1882).

⁵⁰ *Dibert v. D'Arcy*, 248 Mo. 617, 656, 154 S. W. 1116, 1128 (1913).

⁵¹ *Turner v. Metropolitan Trust Co. of City of New York*, 207 Fed. 495, 500 (1913); *In re Mertens*, 144 Fed. 818, 822 (1906).

⁵² 79 Md. 41, 43-4, 28 Atl. 899, 900 (1894). See, also, *Farmers' Nat. Bank of Annapolis v. Venner*, 192 Mass. 531, 534, 78 N. E. 540, 541 (1906), where it appeared

pledgee would have offered, under competitive bidding, \$7.50 a share, he was able, as sole bidder, to buy the security for a dollar a share. It further appeared that shortly before the sale, the pledgor had offered to surrender the pledgor's note of \$2,500.00 on transfer of 350 shares of the stock hypothecated, thus placing his estimate of value at practically \$7.50 a share. It was adjudged, nevertheless, that he could not be held to account on the basis of the bid he would have made under competition. This seems wrong and, it is submitted, is not the law. Equity should here, as always, look to the substance and not to the form. The pledgee should account, in absence of acquiescence in the sale by the debtor, for the value of the property; not for what it may have brought.

The cases holding a pledgee responsible for more than his bid are not numerous, but their reasoning is incontrovertible.⁵³ An interesting analogy is afforded by the recent holdings in the federal courts to the effect that the purchase at judicial sale, by a stockholders' reorganization committee, of the assets of an insolvent corporation at upset price, does not disprove recital of actual and far greater value, when subsequently transferred by the committee to a new corporation.⁵⁴

One or two cases seem to have gone half-way and to have permitted transfer by private sale without notice, after an invalid purchase at public sale, and accounting on the basis of amount received at the private sale.⁵⁵ Such a conclusion, where the pledgee is expressly authorized to buy, seems faulty, as authorizing a disposition of the gauge in excess of the power given. This is, to deal with the pledge at public or private sale; the right is to do either, not both; and the true deduction would be, that if the power is once invoked, it is exhausted. Should, however, the relation that the bank, as sole bidder, bought pledged bonds at a less price than paid in sales shortly before and after the one in question.

⁵³ *Dibert v. Wernicke*, 214 Fed. 673, 682 (1914); *Perkins v. Applegate*, 27 Ky. L. Rep. 522, 525, 85 S. W. 723, 725 (1905); *Phares v. Barbour*, 49 Ill. 370, 374 (1868); *Rush v. First Nat. Bank of Kansas City*, 71 Fed. 102 (1895), 85 Fed. 539, 543-4 (1898); *Sitgreaves v. Farmers', etc. Bank*, 49 Pa. St. 359, 364 (1865).

⁵⁴ *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482 (1913); *Stebbins v. Michigan Wheelbarrow, etc. Co.*, 212 Fed. 19 (1914); *Central Imp. Co. v. Cambria Steel Co.*, 210 Fed. 696 (1913); *Investment Registry, Ltd., v. Chicago & M. E. R. Co.*, 212 Fed. 594 (1913); 27 HARV. L. REV. 467, 486. But, see, *In re Howell*, 215 Fed. 1 (1914); *Heinze v. McKinnon*, 205 Fed. 366 (1913).

⁵⁵ *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 343, 81 S. W. 171, 178 (1904). *Glidden v. Mechanics' Nat. Bank*, 53 Oh. St. 588, 600, 42 N. E. 995, 998 (1895).

of pledgor and pledgee survive an improper purchase by the pledgee, a later private sale can be had only after all formalities prescribed by law have been complied with.⁵⁶

Mistaking one's rights under an instrument of pledge is sometimes a serious matter. An example is afforded by two recent decisions in different jurisdictions, arising out of the same transaction. A bank pledgee, holder of notes for \$45,000.00, secured by the personal obligation of two surety makers, and \$90,000.00 of unlisted mortgage bonds of the principal maker, which had been unused except for the purpose of collateral security to the loan, sold the bonds to itself without notice, as sole bidder, on the New Orleans Stock Exchange, for \$1,800.00. If necessary to acquire ownership, it would have bid the amount of the debt, or perhaps more. The bank insisted that the sale so made was valid, and, treating the bonds as its own, free from any equity of redemption, transferred them and the note they had secured to a syndicate, whose agent foreclosed the mortgage securing the bonds, bought in the property, and sued the two surety makers, allowing a credit of \$1,800.00. Recovery was denied in both instances, under somewhat different processes of reasoning.

In *Dibert v. Wernicke*,⁵⁷ the surety sued, was given an equitable right of set-off for the real, as opposed to the bid, value of the bonds. The same result was reached by reasoning that the sale of the bonds by the bank to the syndicate under a claim of ownership amounted to a conversion, and that this defense was available to the surety without the necessity of tender, when sued upon the debt.⁵⁸ Still another ground for freeing the surety from liability was, that the sale on the Exchange, that to the syndicate, and its subsequent dealings with the security, taken together, constituted such an incumbrance upon his immediate right of subrogation as to discharge him.⁵⁹

In *Dibert v. D'Arcy*,⁶⁰ a suit by the syndicate agent against the assignee in insolvency of the other surety to compel recognition of the claim on the bonds, the holding was that the bonds would not be treated as issued nor as a debt in excess of the sum they

⁵⁶ *Leahy v. Loddell, Farwell & Co.*, 80 Fed. 665, 671 (1897).

⁵⁷ 214 Fed. 673, 682 (1914).

⁵⁸ *Ibid.*, p. 682.

⁵⁹ *Ibid.*, p. 684.

⁶⁰ 248 Mo. 617, 658, 662, 154 S. W. 1116, 1128, 1130 (1913).

secured, but only as intended to create a lien to the extent of the principal obligation.⁶¹ It was also held that the syndicate manager would have to account for what he had agreed to bid as the fair value of the property on foreclosure of the mortgage securing the bonds, — an amount exceeding the debt for which he sued.⁶²

Both cases held that the sale on the New Orleans Stock Exchange by the bank to itself was invalid, but did not alter the relation of pledgor and pledgee; in other words, that despite the sale, the bank still remained the pledgee. It is submitted, however, that the cases supporting this general conclusion in the event of invalid sale are all instances in which the instrument of pledge did not authorize the pledgee to become purchaser. Where, as in the facts upon which the Dibert cases are based, the instrument authorizes the pledgee to buy, it would seem that such dealing with the pledge would not be void, being made under color of right, but voidable only, and of itself constitute an incumbrance on the surety's immediate right of subrogation, discharging him then and there.

At all events, these cases establish that if the pledgee makes an unauthorized or dishonest sale to himself, and thereafter elects to stand on it, by suing the principal debtor or surety and allowing him credit for the amount realized, or by transferring the security as owner, not pledgee, to a third person, he may, in a case not involving ratification, release the surety, and will be liable to account to the principal maker for the fair value of the securities, or be chargeable with their value as for a conversion.⁶³

So, it appears that the "cut throat" instruments of pledge, now in common use, frequently do not accomplish all that their holders desire. The effort to deprive the pledgor of safeguards tending to bring about a fair sale of his property is met by the courts with persistent opposition. Should an instrument be drawn obviating the requirement of notice to the debtor, the necessity of advertising and giving of notice at the sale of amount and nature of the pledge, the parties to it, allowing a sale in bulk of property readily divisible, authorizing the pledgee to bid like any other bidder free

⁶¹ But, see, *contra*, *Turner v. Metropolitan Trust Co. of City of New York*, 207 Fed. 495, 500 (1913).

⁶² 248 Mo. 617, 656, 154 S. W. 1116, 1128 (1913).

⁶³ See, also, *Wagner v. Kohn*, 225 Fed. 718 (1915).

from a trust obligation, and, if purchaser, to account only for the sale price, less expenses, it seems likely that such an instrument would overreach itself and fall into the prohibited class of agreements for a forfeiture.

In conclusion, it will be apparent that the pledgee is bound, at his peril, to exercise the arbitrary powers given in the modern instrument of pledge in the utmost good faith.

Murray Seasongood.

CINCINNATI, OHIO.

THE UNIFORM PARTNERSHIP ACT—A REPLY
TO MR. CRANE'S CRITICISM

[Concluded]

DOES THE ACT ADOPT THE AGGREGATE THEORY OF PARTNERSHIP?

THE second general criticism of the Act is that though the intention of the draftsmen was apparently to proceed on the aggregate theory, "the Act does not adopt either the entity [legal person] or aggregate view of the nature of the partnership," and that, therefore, "in matters not expressly covered by any provision of the Act, and which depend upon the nature of a partnership, different results will be reached by different courts, and so we shall not attain the uniformity sought for by the Act."⁴⁰

In support of the criticism Mr. Crane takes up first the definition of a partnership in Section 6, arguing that as worded it is not inconsistent with a court's treating the partnership as a "legal person." The Act, as stated, defines a partnership as "an association of two or more persons." Mr. Crane alleges that "an association may or may not be treated as a legal person," and that therefore the word is "ambiguous."⁴¹ To this it may be answered, that if the common law proceeded on the assumption that every association of two or more persons for any purpose created a separate legal person, then it would have been necessary to add to the definition the words: "but the association shall not be considered a separate legal person"; but as our common law proceeds on the principle that an association of two or more persons does not *primâ facie* create a separate legal personality, it is not necessary that the words quoted should have been added to prevent the courts drawing the inference that a partnership is a legal person. Indeed, all that Mr. Crane subsequently contends is that in other sections of the Act the draftsman has unconsciously treated the partnership as a legal person and therefore a court, in a state adopting the Act, would be justified in holding that a partnership is a legal person in view of the fact that the legal personality of the

⁴⁰ 28 HARV. L. REV. 774.⁴¹ *Ibid.*, 770.

partnership is not expressly denied in the definition. The force of this last argument can only be judged by examining each of the sections which he asserts show an unconscious adoption of the legal-person theory.

One of these sections is the 25th, already referred to as expressly stating that "a partner is co-owner with his partners of specific partnership property." Mr. Crane's argument is, that as under this section a partner can only possess, use, or assign partnership property for a partnership purpose, and as on his death his rights in the property pass to his partners,⁴² "The nature of co-ownership by the partner under this Act is not such as to exclude the legal personality of the partnership, but on analysis appears rather to be in harmony with that theory than any theory which denies the legal personality of the partnership."⁴³

It is not clear why the fact that the partner can only use partnership property for the common benefit of himself and his associates, or only assign for their collective benefit, implies the assumption that the rights in the property which the partner can and does lawfully exercise inhere not in him but in a fictitious legal person. He apparently agrees with the Commissioners that a partnership should have the rights, and no more than the rights, over specific partnership property given in Section 25. The point at issue between those who sustain the theory on which the Act is drawn and the advocates of the legal-person theory is whether these rights shall be regarded as being possessed by the partner, or whether the partner, while having a right to exercise them, shall be regarded as doing so as an agent acting on behalf of a legal person "formed," to use the words of Dean Ames' definition of partnership, "by the association of two or more persons for the purpose of carrying on

⁴² A partner's interest in the partnership, as distinguished from his right as co-owner of specific partnership property, is defined in the Act as "his share of the profits and surplus." See Sec. 26. This interest may be assigned (Sec. 27), and may be charged with the payment of his separate debts on application to a competent court by any separate creditor who has obtained a judgment. See Sec. 28, which is based on Sec. 23 of the English Partnership Act.

⁴³ 28 HARV. L. REV. 773. Mr. Crane also says that "One partner could not recover against third persons for injury to his rights as co-owner of partnership property." 28 HARV. L. REV. 773. There is no reason under the wording of the Act why such recovery should not be had. They are his rights by the express words of Sec. 25. If Mr. Crane means that only nominal damages should be recovered, that, of course, is correct.

business with a view to profit." If this last conception is the one which it is desired to express then the Act will properly declare, as it is declared in both the drafts prepared by Dean Ames, that "the legal title to partnership property is vested in the firm." On the other hand, if it is desired to express the idea that the rights of the partner to possess and assign partnership property for the benefit of himself and his associates shall vest in him, then, it is submitted, the proper way to express this idea is to say, as in Section 25 of the Uniform Act: "A partner is co-owner with his partners of specific partnership property holding as tenants in partnership," while at the same time making the legal incidents of the tenancy the rights which Mr. Crane admits a partner should have; but which he, as an adherent of the legal-person theory, would regard as the rights of a partner acting as agent of the partnership legal person.

Another section which Mr. Crane refers to is Section 2, the section containing definitions.⁴⁴ It is there provided that the word "person" when used in the Act, includes "individuals, partnerships, corporations, and other associations." With equal propriety one might argue that "individuals," who are also declared in the definition to be included under the word "person," are made collectively a legal person. The fact is that the definition indicates nothing in respect to the theory on which the Act is drawn, being equally in accord with the aggregate or with the legal-person theory. The definition was inserted, as it has been inserted in other Uniform Acts, for the purpose of overcoming a confusion which has arisen solely as the result of the conception that a group of persons conducting a common enterprise should be regarded as having the enterprise conducted for them by a fictitious legal person. A corporation, for instance, is usually regarded as a legal, but not a natural person, or an aggregate of natural persons united for a common enterprise. Therefore, when an act uses the word "person" it is doubtful whether corporations are included. There is also a possibility that some court might regard a partnership, or any other association, as an artificial legal person. The word "person" is often used in the Uniform Partnership Act. In each case groups of persons, whether associated as a corporation, partnership, or any other form of association, as well as persons acting separately are intended. The definition

⁴⁴ 28 HARV. L. REV. 770.

also made it possible to shorten the definition of partnership in Section 6. As we have seen, two or more persons carrying on as partners a particular business may associate themselves with others, in another enterprise, and, instead of entering the second association as separate individuals, they may enter it as a partnership group. In the same way a corporation may be a member of a partnership unless its becoming a member is an *ultra vires* act, a matter with which the law of partnership has nothing to do. But partnerships, corporations, or other associations rarely as such become members of a partnership. It would, therefore, have been unfortunate to have been compelled to say in defining a partnership that it was an association of two or more persons, partnerships, corporations, or other associations, because of the bare possibility that some court might hold the word "persons" as not including two or more persons acting in association.

Other sections which Mr. Crane thinks show an unconscious adoption of the legal-person theory are those in which the word "partnership" is used. These are Sections 8, 9, 18, 21, and 35.⁴⁵ Section 8 (1) speaks of partnership property. Section 8 (3) enables the partnership to take title in the partnership name. Section 9 (1) makes every partner the agent of the partnership. Section 18 (a) makes it the duty of a partner to contribute to losses sustained by the partnership. Section 18 (b) requires the partnership to indemnify the partner in respect of certain payments. Section 12 speaks of a fraud by a partner on the partnership. Section 21 makes the partner accountable to the partnership. Finally, Section 35 speaks of the partner's power to bind the partnership. Mr. Crane's contention is that to be consistent with the theory of the definition given in the Act, the term "co-partners" should have been used instead of "partnership," and he further adds that the use of the word "partnership" illustrates "the difficulty, if not impossibility, not only of writing and talking about partnership, but of formulating its rights and obligations without treating it as a legal person."⁴⁶

It is submitted that in making this argument Mr. Crane again assumes that it is not possible to disassociate the activity of the members of an association when working for their common ends from their other activities, without giving to the association as

⁴⁵ 28 HARV. L. REV. 770-771.

⁴⁶ *Ibid.*, 771.

such a group personality. It is hardly necessary to emphasize again the fact that this assumption is without foundation.

Mr. Crane fails to distinguish between co-ownership of property used in the business of the co-owners and that not so used. He contends that the consistent opponent of the separate legal-person theory should not say "partnership property" but "partners' property." But partners may hold property in common without intending to use the property in the partnership business. The term "partners' property" might be held to include such property. On the other hand, the term "partnership property" brings before the mind the property of the partners which they have devoted to the business and therefore expresses the exact idea intended.

Again, Mr. Crane points out that Section 18 (b) requires the partnership, and not the co-partners, to indemnify the partners in respect of certain payments. But if the word "co-partners" instead of "partnership" had been used, a result not intended would have been had. The claim of the partner is not against his co-partners as a separate creditor of each of them, but is a claim against the partners, including himself, associated in partnership; and this joint liability as partners can be and is spoken of as a partnership liability, without involving the assumption that the liabilities of the partnership are the liabilities of a distinct legal person.

In speaking of a fraud by a partner on a partnership, Mr. Crane says: "If partnership means merely 'all the partners' this involves a partner committing a fraud on himself." As he regards a fraud by a man on himself as impossible, he concludes that the use of the word "partnership" in the section referred to must denote a legal person. But partnership means something more than "all the partners." It means all the partners as associated to carry on a particular business. As a matter of fact, a partner may so act as to harm himself, as well as his partners, in so far as their mutual enterprise is concerned. Considered in relation to all his interests he may have derived a benefit from his actions, or at least have acted under the belief that he would derive such benefit; but considered in relation to the common enterprise he has harmed himself in the same way that he has harmed his partners, and reparation is due not to his partners, but to himself and partners as associated in the given business enterprise. It, therefore, is

accurate to say he has defrauded the partnership; but there is no implied or other recognition that the rights and liabilities of the partnership are the rights and liabilities of a separate legal personality.

Mr. Crane says that the section which enables real estate to be conveyed to the partnership in the partnership name "makes the partnership as such the subject of rights and thus a legal person." If a partnership is a legal person, then allowing it to obtain property in its own name is not contrary to the theory that it is a legal person. But if a partnership is not a legal person, then allowing the partners to obtain title by conveyance in a name under which their mutual business is carried on does not make their business in legal theory the business of a fictitious legal person. The formalities to pass title are merely rules of thumb. There is no reason why several persons should not become co-owners of property by any formality which the law declares sufficient for that purpose.

This completes our examination of the sections of the Uniform Act on which Mr. Crane bases his conclusion that the "Act does not explicitly adopt either the entity [legal person] or aggregate theory of partnership," and that "It ought to be very difficult for an open-minded court carefully analyzing the whole Act to hold that a partnership is not vested with rights and obligations, and therefore a person before the law."⁴⁷ It is submitted that there is no warrant for this conclusion; but that, on the contrary, the adoption of the Act makes it impossible for a court to hold a partnership a legal person, in view of the definition in Section 6, and the express statement in Section 25, that the partners, and therefore assuredly not a fictitious legal person, are co-owners of partnership property holding as tenants in partnership. The theory on which the Act is drawn may be wrong, but a reading of its provisions will show that the Commissioners have adhered to the aggregate theory, dominant in our partnership cases, and have not adopted the legal-person theory.

THE MATTER OF FRAUDULENT CONVEYANCES

Mr. Crane's third criticism is that the Act does not contain any section on fraudulent conveyances; that "in omitting to deal with this subject, the Act leaves unanswered questions as to which there

⁴⁷ 28 HARV. L. REV. 773-774.

has been probably greater conflict of authority than on any other point of partnership law," and therefore herein "signally fails of its avowed purpose to make uniform the law of partnership."⁴⁸

No one familiar with the cases can doubt for a moment that the whole subject of fraudulent conveyances is in much confusion, and that conveyances by partners are no exception to this statement. The drafts prepared by Dean Ames did not contain a section on the subject. The First Draft which the writer prepared on the aggregate theory did contain such a section, and the section was retained in each subsequent draft until the Eighth. The Committee on Commercial Law and the Conference of Commissioners devoted much time to the discussion of the subject of the section. These discussions, while they greatly improved the form of the section, convinced the Commissioners that instead of treating the subject in the Partnership Act, a more satisfactory solution of the difficulties presented would be had if the Commissioners prepared a Uniform Act on Fraudulent Conveyances, treating in that Act fraudulent conveyances by partners. They have therefore directed their Committee on Commercial Law to prepare and submit for their consideration a draft of such an Act.

One bad result of legal fiction, as has been already more than once shown, is that it prevents an examination of the real issue involved and the facts on which it should be decided, by compelling in a given case a particular decision. Law thus tends to become the expression of preconceived theories rather than of life and its needs. This bad result, as illustrated by the result of the fiction that a partnership is a legal person, is shown by a consideration of the four situations given by Mr. Crane in which the question whether the conveyance by the partners of partnership property is fraudulent may arise and on which authorities are in conflict.

These are:

"(1) The firm being insolvent applies its assets, or part of them, to pay a debt of the partners not a partnership debt.

"(2) The firm being insolvent applies its assets, or part of them, to the payment of separate debts of one or more partners.

"(3) The firm being insolvent transfers its assets to a partner.

"(4) The firm being insolvent divides its assets among the partners."⁴⁹

⁴⁸ 28 HARV. L. REV. 777.

⁴⁹ *Ibid.*, 774-775.

Now under any theory of partnership there is no possible justification for the second and third conveyances. A man owes a debt he cannot pay. He has property which he owns in common with others. Without paying his debt, he gives away this property to pay a debt of one of his co-partners, which is the second situation; or he gives his property to one or more of his co-owners without imposing on them any trust for the benefit of his creditors, which is the third situation. The first and fourth situations, however, present a problem of no small difficulty. The question involved is whether two or more persons having made *inter se* a contract to create a fund which shall be owned in common and devoted to the payment of joint debts contracted in carrying on a particular business, should be allowed after insolvency mutually to rescind that contract and so deal with their common property as to affect the relative amounts which different classes of their creditors will receive. This, like other questions of our commercial law, should be settled only on careful examination of actual business conditions. The theory that a partnership is a legal person, leading necessarily to one conclusion, prevents any real examination of what is practical and just in view of the actual conditions under which partners carry on their business.

ANSWERS TO CRITICISMS OF SPECIFIC SECTIONS

In addition to the criticisms already discussed Mr. Crane at the close of his article points out alleged defects in several sections.

In re Section 8

Section 8 (3) provides that where the title is in the partnership name any partner may convey title to such property by a conveyance executed in the partnership name. He suggests that in the interest of the title searcher these provisions "should be accompanied by such amendments of the laws regulating the acknowledgment and registration of deeds as are necessary to make it appear on the record that the person executing the deed in the partnership name is a partner and is authorized to convey."⁵⁰

It is not necessary to amend existing laws in relation to acknowledgments to enable a partner signing the partnership name to

⁵⁰ 28 HARV. L. REV. 779.

set forth that he is a partner. Indeed it is difficult to see how he could acknowledge the signature without doing so. As to the suggestion that he should be required to set forth that he is authorized to convey, to adopt it would burden the conveyance with an unnecessary formality and, therefore, one which might uselessly raise a litigable question in case it was omitted. The declaration is useless because Section 8 (3) expressly provides that the partner's act in signing a deed conveying the property in the partnership name binds the partnership, even where the conveyance is not an act for carrying on the business of the partnership in the usual way, if the grantee or a person claiming through such grantee is a holder for value without knowledge that the partner in making the conveyance has exceeded his authority.

In re Section 9

Section 9 (1) provides that the act of every partner "for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership." Mr. Crane suggests that instead of the words quoted the wording of the English Partnership Act should have been followed, which provides that "Any act," by a partner, "for the carrying on in the usual way the business of the kind carried on by the firm," binds the partnership.

The question raised by the suggestion, which was much discussed both by the Committee on Commercial Law and by the Commissioners, is: To what end should the inquiry of the court be directed when it has to decide the scope of a partner's apparent authority? Should the inquiry be: How did the partnership business appear to be carried on? or, How are businesses of the kind carried on by the partnership usually carried on?

It was argued in favor of the second view, as Mr. Crane has argued, that to declare that the inquiry should be: "How is this partnership apparently carried on?" imposes an undue burden on the third person to learn the habits of this particular firm. On the other hand, it was contended that the wording of the English Act was susceptible of the interpretation that a partnership was bound, if the act was a usual act in the business of the kind carried on by the partnership, even though it was apparent that this particular partnership did not carry on the business in that manner. The

argument which finally led the Commissioners to adopt the present wording was that it emphasizes the fundamental reason why a partnership is ever bound by an act of a partner not authorized by his co-partners, namely, that partners are bound because they have held him out to do that class of acts. The question therefore which should be determined in each case is, was it an act for apparently carrying on in the usual way the business of the partnership of which he is a member? Again, even if the contract was not one for carrying on in the usual way the business of the kind carried on by the firm, the partnership should be held, if it was a contract for apparently carrying on in the usual way that particular partnership; a matter which would be more than doubtful if the wording suggested by Mr. Crane had been adopted.

In re Section 16

Section 16 relates to "Partners by Estoppel." Mr. Crane doubts whether the section as worded overrules the case of *Thayer v. Humphrey*.⁵¹ In that case A., being in business by himself, held out B., with B.'s consent, as his partner. The court held that creditors of the ostensible firm had priority over other creditors of A. on the assets that A. treated as assets in his business. Mr. Crane points out that in fact the court rested its decision on the ground that there existed a partnership by estoppel, thus making the liability to those who dealt with A. on the faith of B. being his, A.'s, partner, a partnership liability, and that by Section 4 the law of estoppel is expressly made applicable under the Act.

When a contract is made on the faith of a representation that A. is a partner, the contract may be made as in *Thayer v. Humphrey* by one man, or it may be made by two or more persons not in partnership, or by two or more persons who are actual partners. In the first two cases there being no partnership liability, only a joint liability should result. It was the express desire, therefore, of the Commissioners to word the section so as to render such a decision as *Thayer v. Humphrey* practically impossible. It is submitted that the section as worded accomplishes the desired result.

Section 16 is divided into two paragraphs. The first relates to the claims of those who deal with one or more persons on the

⁵¹ 91 Wis. 276, 64 N. W. 1007 (1895).

faith of the representation that B. is their partner; the second, with the claims of those who deal with B. Paragraph (1) concludes:

“(a) When a partnership liability results, he [the person represented to be partner¹] is liable as though he were an actual member of the partnership.

“(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.”

The paragraph thus clearly recognizes that in some cases a partnership liability results from the contract and in some cases it does not. If in cases where B. consents to be held out as a partner, or holds himself out as a partner, and the contract is made by A., or by A. and C., two persons who are not partners, a partnership liability results by estoppel, to what cases does clause (b) apply? To contend that clause (a) applied in a case like *Thayer v. Humphrey* would be to contend that no case can arise under clause (b).

Paragraph (2), as stated, deals with those cases which arise when the person represented to be a partner in any existing partnership or with one or more persons not actual partners attempts to contract for the real or ostensible partnership. The paragraph declares: “Where all the members of the *existing partnership* consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.” For a court to say that a partnership could under this wording exist by estoppel, and that therefore, in a case like *Thayer v. Humphrey*, a partnership obligation would result, because both A. and B., all the members of the partnership by estoppel, consented, which the court would have to hold to follow that case, the words “existing partnership” must be held to mean, “existing in fact or by estoppel.” It is conceivable that such meaning might be given if it were not that the same expression “existing partnership” is used in the first part of the paragraph, and also in paragraph (1) to contrast a partnership in fact with a partnership by estoppel. The first two lines of paragraph (2) read: “Where a person has been thus represented to be a partner in an existing partnership, *or with one or more persons not actual partners.*” So also in paragraph (1): “when a person . . . represents himself, or consents to another representing him to any one, as a partner in an existing

partnership *or with one or more persons not actual partners.*" Thus the term "existing partnership" is clearly indicated not to include the case where A. holds out B. as a partner. In that case a joint liability as expressly distinguished from a partnership liability results, and a decision similar to *Thayer v. Humphrey* in this second class of cases, as in the class of cases covered by paragraph (1), would be manifestly inconsistent with the wording of the section.

In re Section 18 (h)

This clause provides that "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners." Mr. Crane suggests that the case where an equal division exists should be provided for. A contract made by one of two partners against the protest of the other is not made by a majority. The implication from the section as worded, therefore, is that such a contract, the third person knowing of the protest, would not be a partnership contract.

In re Section 35

Notice of Dissolution in Case Business of Partnership is Unlawful

Two of Mr. Crane's criticisms relate to matters arising when a partnership is founded to carry on or carries on an unlawful business. Under existing law and under the Act, notice of dissolution does not have to be published, if the dissolution is caused by the unlawfulness of the business, to prevent a partner being held liable for a contract made for the carrying on of the business by a co-partner without his authority with one who does not know of the dissolution.

Two classes of cases may arise: One where the business from the start is wholly unlawful; the other where, being lawful, it becomes unlawful, or unlawful to carry it on in partnership. In the following case typical of those falling under the first class the adoption of the Act does not change existing law. A. and B. enter into a partnership to sell liquor at retail in a prohibition state. A. contributes the glasses and the furniture of the room; B., the room or place of sale. Under the Act, the object of the business being wholly unlawful, the partnership is dissolved the moment it is created. B., contrary to his express understanding with A., buys more glasses

in the name of A. and B., intending to use them in the illegal establishment. Under existing law and under the Act the person selling the glasses is not a creditor of A., A. not having authorized the contract, and, of course, he has no claim prior to other creditors of B. on B.'s right in the original glasses or other stock used in the illegal trade. Mr. Crane believes that the Commissioners should have so drawn the Act as to change existing law, and give to the person selling the glasses on B.'s order the right, not merely of a joint creditor of A. and B., but of a partnership creditor of A. and B., and therefore a priority over the separate creditors of A. and B., on the assets used in the wholly illegal business. He says that "The root of the difficulty is in the conception of the illegal contract as a nullity, instead of as an actual contract subject to a personal defense as between the parties to it."⁵² With submission, the Act as drawn does not consider the contract in the case put as a nullity. The difference of opinion between the Commissioners and Mr. Crane is whether the law shall or shall not give to those who deal with one of two persons carrying on together a business organized and conducted for a wholly illegal purpose advantages which it gives partnership creditors: First, priority over other creditors joint or separate in certain of the assets of which they are co-owners; and, second, the right to regard themselves as creditors of joint debtors although the contract was made by one of the so-called joint debtors without the authority of the others. It is believed that the Commissioners in not changing existing law in the case put were right; and this for two reasons: First, that the innocence of the person who has extended credit as to the wholly illegal nature of the business is a matter often not subject to certain proof; and, second, that as the right of partnership creditors to priority in partnership assets is due to the right of each partner to have the joint assets applied to the payment of the joint debts, and not to any equity inherent in the claims of the joint creditors, where the business is wholly illegal the law is not required to foster the industry by recognizing the partners' equity.

The second case in which Mr. Crane believes that the Act should change existing law arises where the partnership business, once lawful, becomes unlawful, or it becomes unlawful to carry it on in partnership. Thus, A. and B. are in a lawful business and the busi-

⁵² 28 HARV. L. REV. 782.

ness becomes unlawful. Under the Act dissolution occurs, but the affairs of the partnership are wound up in an orderly manner. Suppose, however, neither A. nor B. having published notice of dissolution, or mailed such notice to those who have extended credit to the partnership, B., without A.'s authority, makes a contract in the name of the partnership for the further carrying on of the business, the person with whom the contract is made being unaware that the partnership has been dissolved or that its former lawful business has become unlawful. Under the law and under the Act the third person is a separate creditor of B. Here again Mr. Crane thinks the Act should change the law and make the third person not only a joint creditor of A. and B., but a partnership creditor of A. and B. with priority in partnership assets. He says: "One may well be bound to take notice of so public an event as war, but it seems an injustice in cases where the third person does not know of the foreign residence of a member of the firm with which he believes himself to be doing business, to refuse him a remedy against all members of the firm resident in his own country who might have given him notice."⁵³

He also supposes this case: A. and B. are partners in the liquor business, accustomed to buy liquor from a third person resident in a distant state. The people of the city where the firm is located prohibit the sale of liquor by voting "no license." A., without the knowledge of B., continues the business, buying more liquor in the partnership name from the seller resident in the distant state. Mr. Crane believes that B., to avoid being held on the contract, should have given notice of dissolution to the third person. Irrespective of whether wholesale liquor merchants are ever ignorant of a matter so vital to their business as a vote for or against license in a territory where they have been making sales, it may be admitted that both cases given by Mr. Crane, the facts being as he represents, are illustrations of real hardship on the innocent third person. On the other hand, it must also be borne in mind that to fasten liability on the partners who have not authorized the contract is a very real hardship on them. Under Mr. Crane's suggested alteration of the law they would be penalized for not taking a precaution against the partner doing, not only an act which they have not authorized, but which has, by positive municipal law,

⁵³ 28 HARV. L. REV. 782.

become unlawful. It may, of course, be pointed out that it is a hardship to make a partner liable for a contract of his co-partner which he has not authorized, where the contract has been made after dissolution, the dissolution taking place by the will of the partners, and yet the law in this case makes him liable if no notice has been given of the dissolution in the manner prescribed by law. This is true; but a strong reason in that case for imposing the liability on the partner is that otherwise he might escape liability on contracts which were burdensome by declaring that the partnership had been dissolved by the expressed will of one of the parties, something which it would in many cases be impossible for the third person to disprove. When, however, the partnership is dissolved because the business has become illegal, if the law allowed a third person, who was ignorant of the fact that the business had become illegal, to hold the partners who had not authorized the contract if they had not given notice of dissolution, it would be very easy for the third person to assert his ignorance, and often difficult to disprove the assertion. Thus the same kind of reason — difficulty of disproving a fact easily alleged — which leads to the conclusion that partners should give notice of dissolution in the ordinary case of dissolution, leads to the conclusion that partners should not be required to give notice where dissolution is caused by the business becoming unlawful. The writer therefore believes that, as in the first case, where the business of the partnership was wholly illegal from the start, the decision of the Commissioners not to change existing law is correct.

In re Section 38 (1)

Section 38 (1) declares that a partner on dissolution has a right as against his co-partners to have the partnership property applied to discharge its liabilities. Mr. Crane says: "It should be expressly stated that such rights may be enforced by the representative of a deceased partner."⁵⁴ It is submitted that this is not necessary. The right given in the section is an equitable one for the protection of a property interest, which property interest passes on the death of a partner to his personal representative. It is hardly conceivable that any court would deny the right of a person on whom the property interest devolved to protect it.

⁵⁴ 28 HARV. L. REV. 784.

In re Section 40 (h)

Mr. Crane is of the opinion that the Act, in spite of the Bankruptcy Act, and the almost universal current of authority at common law to the contrary, should have been so drawn as to permit the partnership creditors to share equally in the separate assets of the partner. He makes the usual argument in favor of this change in the law, namely, that the rule giving separate creditors priority on separate assets is not in accord with any theory of partnership. This argument has force, because, at least under the theory on which the Uniform Act is drawn, a partnership creditor is just as much a creditor of a partner as a separate creditor. Those who support the dominant rule do not deny this. All they say is that as the partnership creditors have to be given a priority on partnership assets, to which priority they are not entitled by any equitable superiority of their claims, it is only equitable that a similar priority on separate property should be given to the separate creditors. This "equitable" argument either appeals or not. Once stated, no additional arguments can strengthen or weaken it. It does not appeal to Mr. Crane. It did not and does not now appeal very strongly to the present writer. But he has been forced to recognize that it is an argument which does appeal to the great majority. Each year the members of his law class are overwhelmingly in favor of giving the separate creditors priority on separate assets. A majority of the Committee on Commercial Law of the Commissioners on Uniform State Laws were in favor of such action, and an overwhelming majority of the Commissioners voted for the provision as it stands in the Act after full discussion. Mr. Crane says: "It is not to be expected that a state such as Connecticut, whose highest court after the fullest consideration deliberately departed from the conventional rule, will return thereto in order to secure uniformity."⁵⁵ On the contrary, the writer's experience would lead him to believe that the members of the legislature of that state would not hesitate to let the separate creditors have that first chance at separate assets which the partnership creditors must be given on partnership assets, and that the majority of the members of the bar of that state would have no objection to their doing so. However this may be, it is certain that the Act could not pass

⁵⁵ 28 HARV. L. REV. 785.

in most states did it contain the change suggested by Mr. Crane. To which may be added that had the Act given partnership creditors equal rights with separate creditors on separate assets, those advocating its passage in almost all the states would not only be asking their legislatures to change a settled rule of law, but to adopt a different rule than that of the Bankruptcy Act. In the great majority of cases where partners are insolvent, the distribution of their estates takes place under the Bankruptcy Act, and in these cases the rule of distribution provided for by that Act would be followed, without regard to the provisions of any state law. In the few cases in which the state court directs the distribution, the rules of distribution should not be different than under the Bankruptcy Act. The extent of a creditor's rights should not depend on the tribunal in which he seeks to enforce them.

In re Section 40 (i)

Section 40 (i) provides: "Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order: 1. Those owing to separate creditors; 2. Those owing to partnership creditors; 3. Those owing to partners by way of contribution."

Mr. Crane says that these rules of distribution introduce three changes into the law as it is established by the weight of authority. Irrespective of whether the Act establishes a rule against that followed by the majority of the conflicting cases—a matter not easily determinable—the writer admits that it was the intention of the draftsmen and the members of the Conference to establish the three so-called changes of which Mr. Crane complains.

One consequence of the wording of the clause criticized will be that the claim of a partner who has paid partnership debts, for contribution on the separate estate of his co-partner, is postponed until all other separate creditors have been paid. Mr. Crane believes that such claim of the partner for contribution should be on an equality with the claims of the separate creditors. It is submitted that the partner, by paying the partnership debts, should be held to have stepped into the right of the partnership creditors against the separate assets of the insolvent partner. He should not obtain, however, in respect to that estate a better position than the person whose claim he has paid. Indeed, if he were

allowed to do so, the rule giving priority to separate creditors on the separate estate would be to that extent nullified. It would thus appear that Mr. Crane's criticism is really the result of his objection to the rule that gives priority to the separate creditors.

Another consequence of the clause as worded is that a partner's claim on a matter unconnected with the partnership takes precedence over the claims of the partnership creditors. Mr. Crane objects to this on the ground that it permits the partner to compete with his own creditors. In a sense he is permitted so to compete, but not for his own advantage. If the claimant partner is solvent and will not pay the partnership creditors, they may attach his claim against the co-partner, put him into bankruptcy, or begin insolvency proceedings against him. This, however, is not the normal situation. If there are partnership creditors making claims on the estate of the insolvent partner it is invariably because, not only one, but all the partners are insolvent. In such case the contest is between the partnership creditors and the separate creditors of each partner. Suppose A., B., and C. are partners, and insolvent. A., on a matter outside of partnership transactions, owes B. \$1,000.00. Under the Act this claim of B. is an asset of his separate estate which may be worth something to B.'s separate creditors and, when they are paid, to the partnership creditors. Did the Act follow Mr. Crane's suggestion the claim of B. would be of no benefit to his separate creditors because, by supposition, A.'s estate is not sufficient to pay all his separate and all his partnership creditors. Here again the Act as drawn prevents the partnership creditors from obtaining part of the separate estate of a partner — in this case the estate of the claimant partner — until his separate creditors are satisfied.

Lastly, Mr. Crane objects to the preservation of the priority of the separate creditors where there is no partnership estate and no solvent partner. In this much mooted question the Commissioners have followed the opinion of the late Judge Lowell in *Re Wilcox*.⁶⁶ In that justly celebrated opinion the leading judicial authority on bankruptcy showed that the exception to the general rule of priority of the separate creditors on separate assets, for which exception Mr. Crane contends, would be ineffective because there is nothing to prevent the separate creditor from creating a

⁶⁶ 94 Fed. 84 (1899).

partnership fund by paying a nominal sum for some worthless claim of the partnership. The exception cannot be justified on principle unless the entire rule giving priority to the separate creditors on the separate estate is considered unsound. It is, of course, true that where there is no partnership property the priority of the partnership creditors on partnership property is of no benefit to them. But neither is the priority of the separate creditors on separate estates of any benefit to them when there are no such assets. Furthermore, the decision in the Wilcox case is now being generally followed as representing the correct interpretation of the present Bankruptcy Act.⁵⁷

In re Section 43

This section provides: "The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding-up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary."

Mr. Crane's first objection to this section is that it treats the surviving partner as a debtor. He correctly says that a surviving partner (and he might have added, any winding-up partner) is a fiduciary, and that he is so treated in Sections 21, 25 (2), and 42. But it is submitted that the section, as worded, is not inconsistent with the principle that the winding-up partner is a trustee. It merely provides when the right to demand an account accrues.

Again, Mr. Crane objects to the right to demand an account accruing on dissolution. If the right to demand an accounting does not accrue at once on dissolution, when does it accrue? If we say in a reasonable time, the question of what is a reasonable time raises in each case a litigable question. The winding-up or surviving partner is a trustee, but he is not a trustee for the continuous management and care of property, neither are the beneficiaries nominally women and children, but business men, his partners or the executors of his partners. The time for the tolling of the right to demand an account depends on the wording of the local Statute of Limitations affecting trusts.

Finally, Mr. Crane says that a winding-up partner (trustee) should not be required by the court to account while he is proceed-

⁵⁷ Matter of Hull, 34 Am. B. Rep. 447 (1915), and cases cited, 448, 449.

ing as rapidly as may be to sell the partnership property and pay the debts. But why not? Why should not a man who is admittedly holding property for another be obliged to render an account? Suppose A. and B. are partners. A. dies. B. may properly take some time to sell the partnership property and pay the debts; but that is no reason why A.'s executor should not at once demand from B. an account of the partnership property, the debts due, and the estimated value of A.'s interest. Indeed, there is every reason why he should make such a demand. Mr. Crane apparently supposes that the word "account" as used in the section means that the account shall show a sum of money which the winding-up partner admits he owes the other partner or his executor. There is, of course, no warrant for this supposition. A trustee may submit an account showing the property which he holds as trustee, but unless he admits that he has received money or property which should be paid or conveyed to the person to whom the account is submitted, the submission of the account does not make him a debtor. The argument, therefore, that "if a court grants an accounting it must in due course make a decree, holding the partner who as a result of the accounting proves to be a debtor to his co-partner or co-partners liable in a certain amount, although some assets of the partnership cannot immediately be exactly appraised, and as to any of the assets the amount of the appraisements may not be realized,"⁵⁸ is based on a mistaken idea of the necessary nature of an account. Ultimately, when the partnership property is sold and the debts paid, the court will make a decree directing the payment of the sum then properly due the plaintiff; but no such decree could be properly made before the property of the partnership has been sold, unless there had been a neglect to sell amounting to a breach of trust.

Neither is it true, as asserted by Mr. Crane, that "if the action accrues at once, . . . and if assets are received by a partner at a time subsequent to the dissolution by a period longer than the statutory period, there is no enforceable obligation."⁵⁹ The section deals with the rights of a partner or his legal representative against two classes of persons, winding-up partners and surviving partners, whether such surviving partners are carrying on the business, winding it up, or doing nothing. It does not deal

⁵⁸ 28 HARV. L. REV. 787.

⁵⁹ *Ibid.*, 787.

with the right of a partner against a non-winding-up partner where all the partners survive. Where the property is received by a winding-up or surviving partner more than the statutory period, if any, after dissolution, the claim is barred, as it should be barred, if the partner making the claim has never insisted on an account. On the other hand, if an account had been filed, either voluntarily or as a result of a court's decree, the statute is tolled and the court would decree the trust obligation in respect to it.

In re Section 35

Relating to Dormant Partners and Notice on Dissolution

When Mr. Crane's article appeared the evident time and care spent on its preparation warranted the writer in calling the attention of the Committee on Commercial Law of the Commissioners on Uniform State Laws to his criticisms. Those parts of his article which relate to the nature of a partnership, the consistency of the Act as drawn with the aggregate theory, and the omission of a section on Fraudulent Conveyances dealt with subjects to which, as indicated, the Committee and the Conference of Commissioners had given exhaustive consideration. Those members of the Committee who have examined his criticisms of specific sections just discussed, mainly for the reasons given by the writer, do not believe they are well founded.⁶⁰ We all agreed, however, that Mr. Crane had discovered a matter which it was desirable to change. Section 35 relates to the power of a partner to bind his co-partners by contracts made after dissolution. There is a possibility, although the possibility is very remote, that under the section as printed in the original official copy of the Act a dormant, by which is meant a secret and inactive, partner might be bound to a person who extended credit to the partnership after dissolution, unless notice of dissolution had been given or published. There is also a bare possibility that, in the absence of publication of notice of dissolution, a person who extended credit to the partnership after dissolution might hold all the partners, although such person never heard of the partnership prior to dissolution. It was, of course, not the intent of the Commissioners in drafting the section to produce these results. The Committee called the matter to the

⁶⁰ The Committee reported this result of their examination of the criticisms to the Conference of Commissioners held at Salt Lake City.

attention of the Conference of Commissioners held in Salt Lake City last August, and the Conference gave the Committee power to re-draft. The section as re-worded by the Committee is given in the note, and all of us who have spent time and labor on the Act are under obligation to Mr. Crane for calling the matter to our attention.⁶¹

CONCLUSION

Mr. Crane concludes his article with this sentence: "While the Act contains improvements in the law of many states, it is submitted that no state should adopt it without eliminating the defects which have been indicated."⁶² The writer has prepared this article to

⁶¹ Section 35 (Power of Partner to Bind Partnership to Third Persons After Dissolution) (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3).

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place provided the other party to the transaction:

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(a) Unknown as a partner to the persons with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been published as provided in Paragraph (1bII).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

⁶² 28 HARV. L. REV. 789.

show that the defects alleged do not exist. The section in which a defect may be said to have existed in the first official draft of the Act has already been corrected.

Of course, the real reason why a legislature would adopt the Act is not that it is not vulnerable to all criticisms contained in Mr. Crane's article, but that the Act itself will, to a great extent, unify the law of partnership and make certain existing uncertainties, and that where it will change existing law the changes will be improvements. The necessary limitations of space make it impossible for the writer to touch on these matters in this article; but the interested reader will find that he has dealt at some length with what he believes to be the many advantages of the Act in the June number of the Yale Law Journal.

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SURETYSHIP LAW AS AFFECTED BY THE RISE OF SURETY COMPANIES.
— One of the peculiarities of the law of suretyship is the favor shown to the surety and the readiness with which he is released from his obligation. With the recent development of surety companies as a business enterprise the question is now frequently raised whether the same leniency will be shown toward sureties for profit. The Michigan court has decided that a corporate surety is not discharged by an extension of time given to the principal debtor by the creditor unless actual harm to the surety is proved. *People v. Traves*, 154 N. W. 130. A recent Missouri case held that stockholders who signed a note of the corporation as accommodation indorsers were not released by the surrender of security by the creditor to the corporation. *Mercantile Trust Co. v. Donk*, 178 S. W. 113.¹ The court argued that the indorsers as shareholders had received the whole benefit of the loan to the corporation for which the note was given, that they were thus sureties for compensation, to which the ordinary technical rules protecting accommodation sureties did not apply.

The great weight of recent authority agrees that sureties for profit should be treated differently from accommodation sureties, but it is not always made clear what defenses of the surety are affected by this

¹ For a more complete statement of these cases, see RECENT CASES, p. 342.

distinction. In regard to the construction of the surety's contract a difference in treatment is well established. The contract of the accommodation surety must be construed strictly, and doubts resolved in his favor.² But the contracts of sureties for profit are treated like insurance policies, and are construed most strongly against the surety.³ This distinction is justified by the fact that while the accommodation surety usually has little to do with drawing up his contract, those engaged in suretyship business formulate their agreements themselves, hedging their liability about with numerous carefully calculated conditions and restrictions. One noticeable effect of this liberal construction is seen in cases involving the rule that the surety is discharged when his risk has been materially increased by any transaction between the creditor and the principal,⁴ a defense which seems generally to be given to the surety for profit also.⁵ The test here is a broad one and depends partly on what was contemplated by the parties. As a result of the broad construction of contracts of business sureties, this defense may often not be available in cases where it would give the accommodation surety a complete defense.⁶

The discharge of the surety by a binding agreement between the creditor and the principal for an extension of time, — which defense was denied to the surety for profit in the Michigan case, — is frequently said to rest on the principle that a variation of the contract between the cred-

² *City of Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218; *State v. Dayton*, 101 Md. 598, 61 Atl. 624. Thus a change in the membership of a partnership absolutely discharges a surety for the partnership obligations. *Byers v. Hickman Grain Co.*, 112 Ia. 451, 84 N. W. 500; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867.

³ *American Surety Co. v. Pauly*, 170 U. S. 133; *Tebbetts v. Mercantile, etc. Co.*, 73 Fed. 95; *City of New Haven v. Eastern Paving Brick Co.*, 78 Conn. 689, 63 Atl. 517; *Van Buren County v. American Surety Co.*, 137 Ia. 490, 115 N. W. 24; *Brandrup v. Brazier*, 111 Minn. 376, 127 N. W. 424; *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358; *Bank of Tarboro v. Fidelity, etc. Co.*, 128 N. C. 366, 38 S. E. 908; *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754; *Cowles v. United States Fidelity, etc. Co.*, 32 Wash. 120, 72 Pac. 1032; *United American, etc. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 994. *Contra*, *American Surety Co. v. Koen*, 49 Tex. Civ. App. 98, 107 S. W. 938. See *Loneragan v. San Antonio, etc. Co.*, 101 Tex. 63, 77, 104 S. W. 1061, 1067.

⁴ "Their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such." *Tebbetts v. Mercantile, etc. Co.*, *supra*, 97.

⁵ *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *Mayhew v. Boyd*, 5 Md. 102; *Fidelity Mutual Life Association v. Dewey*, 83 Minn. 389, 86 N. W. 423. See *Reese v. United States*, 9 Wall. (U. S.) 13, 22. See BRANDT, SURETYSHIP AND GUARANTY, § 439. See 21 HARV. L. REV. 63; 16 *ibid.*, 511.

⁶ An extension of time to the principal debtor, though not in itself a defense to the surety for profit, might be so great as to cause a material increase in the risk, and so discharge the surety on this ground.

⁷ See, for example, *United States Fidelity, etc. Co. v. Golden, etc. Brick Co.*, 191 U. S. 416; *Atlantic Trust, etc. Co. v. Town of Laurinburg*, 163 Fed. 600; *People v. Bowen*, 153 N. W. 672 (Mich.); *Lakeside Land Co. v. Empire State Surety Co.*, 105 Minn. 213, 117 N. W. 431; *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358. In *Young v. American Bonding Co.*, 228 Pa. St. 373, 77 Atl. 623, the surety for profit was discharged by a material increase of the risk. In *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314, the court seems to indicate that nothing but actual injury will discharge the surety for profit.

itor and the surety will release the surety.⁷ But this defense is really equitable in its nature, based on the duty of the creditor not to interfere with the surety's equitable right of subrogation.⁸ This is shown by the fact that the surety is discharged only if the creditor knew of the suretyship relation when he granted the extension;⁹ though it is enough if he first learned of it after the contract with the surety was made.¹⁰ This strict rule grew up at a time when the modern surety companies were unknown, in order to protect those who became surety from motives of charity.¹¹ It has often been criticised.¹² In ordinary cases the surety has no need for his right of subrogation; and this interference with it, which entirely discharges him, even if the extension is but for a day, does not cause him the slightest actual injury, since he is protected to exactly the same extent by his direct right of reimbursement against the principal. And it is submitted that in such cases all who engage in suretyship as a business venture should be required to prove actual prejudice before an extension of time will release them. A number of cases have reached this result,¹³ but their reasoning is not entirely clear. They seem to say that as a matter of construction the surety's obligation is broad enough to cover the extension. If this were the explanation, it would be imma-

⁷ "At law it seems to have been thought that the discharge of the surety by such giving time to the principal was founded on a variation of the contract between the creditor and the surety." *Pooley v. Harradine*, 7 E. & B. 431, 433. *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179. See BRANDT, SURETYSHIP AND GUARANTY, 3 ed., § 376.

⁸ *Gibbs, C. J.*, in *Orme v. Young*, Holt, N. P. 84, 86: "This defense is borrowed from a court of equity: there, if day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a court of equity and demand to sue in the name of the creditor. Now if the creditor have given time to his debtor, the surety cannot sue him." *Samuell v. Howarth*, 3 Meriv. 272; *Pooley v. Harradine*, 7 E. & B. 431; *Peake v. Estate of Dorwin*, 25 Vt. 28. See *Polak v. Everett*, 1 Q. B. D. 669, 673. See 12 HARV. L. REV. 426.

⁹ *Nichols v. Parsons*, 6 N. H. 30; *Kaighn v. Fuller*, 14 N. J. Eq. 419.

¹⁰ *Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 Ch. 142; *Lauman v. Nichols*, 15 Ia. 161. See BRANDT, SURETYSHIP AND GUARANTY, 3 ed., § 41. The same is true even though the suretyship relation itself did not arise until after both the principal and the surety became bound to the creditor. *Rouse v. Bradford Banking Co.*, [1894] A. C. 586.

¹¹ "The deep solicitude of the law for the welfare of voluntary parties who bound themselves from purely disinterested motives never comprehended the protection of pecuniary enterprises organized for the express purpose of engaging in the business of suretyship for profit." *Rule v. Anderson*, 160 Mo. App. 347, 358, 142 S. W. 358, 362.

¹² *Cockburn, C. J.*, in *Swire v. Redman*, 1 Q. B. D. 536, 542: "It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety, — in the immense majority of cases not damaging him to the extent even of a shilling, — must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems . . . consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature." *Blackburn, J.*, in *Polak v. Everett*, 1 Q. B. D. 669, 674: "Whether that was a good or a just principle originally, is a matter which it is far too late to think about now. I must own I have had considerable doubts about the justice of that principle."

¹³ *United States Fidelity, etc. Co. v. Golden, etc. Brick Co.*, 191 U. S. 416; *United States v. United States Fidelity, etc. Co.*, 178 Fed. 721; *United States v. United States Fidelity, etc. Co.*, 172 Fed. 268, 178 Fed. 692; *People v. Bowen*, 153 N. W. 672 (Mich.); *Philadelphia v. Fidelity, etc. Co.*, 231 Pa. St. 208, 80 Atl. 62. *Contra*, *United States v. American Bonding, etc. Co.*, 89 Fed. 925. In *United States v. United States Fidelity, etc. Co.*, 172 Fed. 268, 178 Fed. 692, the principal debtor went into the hands of a receiver before the end of the extended period, but the surety was not discharged.

rial that the extension was actually prejudicial, yet it is said that this added fact would discharge the surety. It seems, therefore, that the courts have really modified the strict defense of extension of time, as applied to surety companies.

When the creditor has security, as in the Missouri case, or a preferred claim against the principal, the surety's right of subrogation has real value, and may enable him to recover a larger amount from the principal than he could through his right of reimbursement. Here an interference with the right of subrogation by an extension of time, or by a surrender of the security,¹⁴ does cause the surety potential injury. But even in such cases the expediency of absolving business sureties from their obligations, without proof of actual damage, is at least an arguable question.

It is important to point out that the distinction in these cases is not between corporate and individual sureties, — as is often loosely stated,¹⁵ — but between persons, natural or artificial, who make a business of suretyship, and those who do not. And it is conceived that one who, not in the suretyship business, occasionally assumed the obligation for a small compensation, should fall within the latter class and be entitled to all the defenses which are available to sureties generally.¹⁶ In this respect, the Missouri court seems to have gone too far in applying the stricter liability of professional sureties to stockholders who go surety on a corporation note. For, assuming that the stockholders received compensation indirectly through the benefit to the corporation,¹⁷ they were not engaged in suretyship as a business.

THE DACIA CASE. — The condemnation of this vessel by the French Prize Court involves an ancient problem of international law as to the validity of transfers of belligerent merchant ships to neutral ownership during hostilities, or in anticipation thereof. The Dacia was formerly owned by the Hamburg-American Line, a German company. After war broke out, the German owners offered the vessel for sale rather than that it should remain idle in an American port. It was accordingly bought in December, 1914, by a citizen and resident of the United States and transferred at once, under the Ship Registry Act of August 18, 1914,¹

¹⁴ *Pearl v. Deacon*, 3 Jur. N. S. 879; *Kirkpatrick v. Howk*, 80 Ill. 122. *BRANDT, SURETYSHIP AND GUARANTY*, § 480. Thus the surety is discharged although the creditor first learned of the suretyship relation after the contract with the surety was made. *Guild v. Butler*, 127 Mass. 386. And it is immaterial that the creditor first acquired the security after the surety became bound. *Holland v. Johnson*, 51 Ind. 346; *Plankinton v. Gorman*, 93 Wis. 560, 67 N. W. 1128.

¹⁵ See, for instance, *Young v. American Bonding Co.*, *supra*, 228 Pa. St. 373, 380, 77 Atl. 623, 626.

¹⁶ In the principal Missouri case, even admitting that the sureties did receive consideration, yet they were not engaging in the business regularly for profit, with the risks and conditions neatly calculated, and therefore should have been allowed the ordinary technical defense.

¹⁷ This does not seem to involve a disregard of the corporate fiction as has been suggested. 16 UNIV. OF MO. BULLETIN, No. 34, p. 47. Whether benefit moved to the stockholders by a loan to the corporation is purely a question of fact.

¹ 38 STATS. AT LARGE, pt. 1, p. 698.

to the American flag. Loaded with cotton consigned to Bremen, the ship started for the neutral port of Rotterdam, its first port of call. Under both British and French proclamations, cotton was not contraband at that time;² no question of contraband cargo was therefore involved. The vessel was seized as a lawful prize by a French warship acting under the rule of the Declaration of London.³ Article 56 of that Declaration provides, in part, that "the transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed."⁴ The Prize Court gave its judgment of condemnation on August 4, 1915. *The Dacia*, 42 Clunet 887. As usual in reports of French prize cases, the real *ratio decidendi* is difficult to find among the mass of concurrent grounds of decision, rather casually advanced. However, the court seems to base its decision on the fact that the seller's motive was to avoid the consequences of enemy ownership, which the Declaration of London forbids.

A complication is here introduced by the fact that the United States has declared itself not to be bound by the Declaration of London during the present war. On August 6, 1914, the United States inquired of each of the belligerents whether it would adopt the Declaration for use during the war.⁵ Great Britain, France, and Russia thereupon replied that they would do so, with the exception, however, of some of the most important concessions to neutrals.⁶ The United States then replied that it would not regard the Declaration as binding and that it would insist on its previous rights under international law.⁷ This attitude of our government seems thoroughly justifiable, for the Declaration is not a mere codification of existing international law, but a compromise, the resultant of mutual and interdependent concessions. Consequently, the Declaration should stand or fall in its entirety.⁸

With the Declaration of London out of the way, the rights of the parties are left to international "common law."⁹ There have, in general, been two contesting doctrines regarding the transfer of merchant vessels to neutral hands. The rule always strongly asserted and followed by the United States is that a sale by a belligerent to a neutral buyer is

² The French list of contraband in force at the time of the sailing and capture of the *Dacia* was that of Jan. 2, 1915. U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 21-22. The British list in force was that of Dec. 23, 1914. *Ibid.*, 15-16.

³ Ambassador Herrick to the Secretary of State, Sept. 3, 1914; to be found in U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 7-8.

⁴ BRIT. BLUE BOOK, MISC., No. 4 (1909), 59; WILSON & TUCKER, INTERNATIONAL LAW, appendix xii, p. 460. By the following article "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," subject to the provisions of art. 56.

⁵ U. S. DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE, May 27, 1915, 5.

⁶ *Ibid.*, 6-8.

⁷ *Ibid.*, 8.

⁸ This is recognized in art. 65 of the Declaration: "The provisions of the present Declaration must be treated as a whole, and cannot be separated." BRIT. BLUE BOOK, MISC., No. 4 (1909), 90.

⁹ For general references to this subject see: HALL, INTERNATIONAL LAW, 5ed., pp. 505-507; BONFILS, DROIT INTERNATIONAL PUBLIC, §§ 1344-1349 (1), inc.; 4 CALVO, LE DROIT INTERNATIONAL, §§ 2327-2338; 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed., pp. 735-739.

valid if complete and without right of repurchase.¹⁰ This rule has usually been followed by England also.¹¹ It is subject in both countries to numerous presumptions and exceptions.¹² On the other hand, the French rule, as text-writers have thought, is that no transfer during the war is valid as against the belligerent right of capture.¹³ As early as 1704 a French edict had adopted this rule. It was followed by similar regulations in 1744 and 1778.¹⁴ While this seems to be the French rule, the matter is not so clear as is commonly thought. In the case of *Le Haabet v. l'Heureux*¹⁵ a transfer during hostilities was involved, and although counsel argued that the regulation of 1778 was conclusive, the court took pains to rest its decision on the fact that a complete *bonâ fide* sale had not been proved. The latter reason would be sufficient for condemnation even in an American court. It is also remarkable that in the Naval Instructions of 1870 the French Minister of Marine, in declaring substantially the American doctrine, seemed to ignore the existence of the decree of 1778.¹⁶ Whatever the French rule may be, it is sufficient here to say that the United States has never recognized

¹⁰ See Fuller, C. J., in *The Benito Estenger*, 176 U. S. 568, 578, 580; Clifford, J., in *United States v. Lilla*, 26 Fed. Cas. No. 15600, at p. 945, 2 Cliff. 169 (1863). Also see Story's note in 2 Wheat. (U. S.), appendix 30.

¹¹ *The Ariel*, 11 Moore P. C. 119. See also Sir W. Scott in *The Bernon*, 1 C. Rob. 102. *BRITISH MANUAL OF NAVAL PRIZE LAW* (T. E. Holland, 1888), § 19.

¹² A belligerent public ship may not be transferred to a neutral during war, for instance. See *The Minerva*, 6 C. Rob. 396, 399 (Sir W. Scott); *United States v. The Etta*, 25 Fed. Cas. No. 15060; *The Georgia*, 7 Wall. (U. S.) 32, 7 MOORE, *DIGEST OF INTERNATIONAL LAW*, 415 (1868). There is at least a strong presumption against *bona fides*, when the transfer was in a blockaded port. *The General Hamilton*, 6 C. Rob. 61 (1805). There is an almost conclusive presumption against validity when the vessel is retained in the same trade as before. *The Jemmy*, 4 C. Rob. 31 (1801), by Sir W. Scott. Also, when the continued employment of the same master is stipulated for. *The Omnibus*, 6 C. Rob. 71 (1805). The transfer is absolutely invalid when there is a reservation of an interest. *The Sechs Geschwistern*, 4 C. Rob. 100. Or when made *in transitu*. See *Vrow Margaretha*, 1 C. Rob. 336 (cargo only involved). But liens are treated as immaterial. *Dictum* in *The Ariel*, 11 Moore P. C. 119, 135 (Privy Council, 1857). See also *The Francis*, 8 Cranch 418 (1814), holding the converse, that a neutral holder of a lien on an enemy vessel is not protected to the extent of his lien. See 28 HARV. L. REV. 217.

¹³ BONFILS, *DROIT INTERNATIONAL PUBLIC*, § 1344; HALL, *INTERNATIONAL LAW*, 5 ed., p. 505; DE BOECK, *PROPRIÉTÉ PRIVÉE ENNEMIE*, pp. 172-176; 2 PISTOYE ET DUVERDY, *PRISES MARITIMES*, p. 3.

¹⁴ CODE DES PRISES (Royal Press, 1784), 251, 412; 2 *ibid.*, 674. DE BOECK, *PROPRIÉTÉ PRIVÉE ENNEMIE*, p. 174. 2 PISTOYE ET DUVERDY, *PRISES MARITIMES*, pp. 1-3. HALL, *INTERNATIONAL LAW*, 5 ed., p. 505, n. BONFILS, *DROIT INTERNATIONAL PUBLIC*, § 1344.

¹⁵ 1 PISTOYE ET DUVERDY, *PRISES MARITIMES*, 239 (1805). This is the only case of a sale during hostilities which is reported in PISTOYE ET DUVERDY. As to sales in anticipation of war, the edict of 1778 requires only that the sale be proved by certain papers executed before the outbreak of war and found on board the vessel. See also, DE BOECK, *PROPRIÉTÉ PRIVÉE ENNEMIE*, pp. 174-175; 4 CALVO, *LE DROIT INTERNATIONAL*, §§ 2328-2331.

¹⁶ Article 7; to be found in DE BOECK, *PROPRIÉTÉ PRIVÉE ENNEMIE*, p. 175, n., and in BARBOUX, *JURISPRUDENCE DES CONSEILS DE PRISES*, p. 150: "When it appears from the examination of the ship's papers that since the declaration of war the nationality of a ship formerly an enemy one has been changed by a sale to neutrals, one must proceed with the greatest care to ascertain that the transfer has been executed in good faith and not for the sole purpose of simulating a neutral character for what is really still enemy property."

the right of condemnation where there has been a *bonâ fide* transfer to neutral ownership.¹⁷

If an appeal has not been seasonably taken, the only remaining possibility of relief is through diplomatic channels, the owners having lost all property in the *res*.¹⁸ If the Department of State should see fit¹⁹ to make a diplomatic claim in this case, based on the rule of law applied rather than on questions of fact, there is no reason why it should not do so. It is commonly said that unless a case has been appealed to the highest local courts, a state will not maintain a diplomatic claim.²⁰ This, however, is not literally true. The only objection to diplomatic claims before remedy has been sought in the highest courts is that the channels of diplomacy will be clogged by claims for decisions which might well have been corrected on appeal. The rule ends where its reason does. Where the objectionable court action depends on an administrative decree of the foreign government, as in this case, nothing could conceivably be gained by an appeal, and the aid of diplomacy may at once be invoked.²¹

THE EFFECT OF A NATIONAL BANK'S PURCHASE OF STOCK IN A BUILDING CORPORATION. — A case of importance, involving the powers of national banks, has recently been decided by the Supreme Court of Tennessee. In *Fourth National Bank of Nashville v. Stahlman*, 178 S. W. 942, the bank bought shares of stock in a building corporation as part of a transaction in which it leased banking quarters in the building to be erected. The promoter of the corporation contracted to purchase from the bank at a later date the stock thus acquired by it, and deposited security for his performance. When suit was brought on his promise, he defended on the ground that the acts of the bank were *ultra vires* and the transaction void. Thus was presented a twofold problem: whether the transaction was *ultra vires*, and whether the authority of the bank was subject to collateral attack. The court held that the transaction was *intra vires*, and intimated that in any event the authority of the bank could not be questioned collaterally.

¹⁷ Mr. Marcy, Secretary of State, to Mr. Mason, Feb. 19, 1856; cited in 7 MOORE, DIGEST OF INTERNATIONAL LAW, pp. 416-417. Clunet speaks of a protest by the American government, August 5, 1915, the day after the condemnation of the *Dacia* was announced. 42 Clunet, p. 502.

¹⁸ "The sentence of a foreign court of *competent jurisdiction*, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world." *Dobree v. Napier*, 2 Bing. (N. C.) 781, 795; *Hughes v. Cornelius*, Sir T. Raymond, 473. The sentence of a foreign court of admiralty binds the property on which it acts though that sentence is made under a decree subversive of the law of nations. This principle was applied to a condemnation under the Milan decree in the Napoleonic wars. *Williams v. Armroyd*, 7 Cranch 423 (1813). Other citations may be found in 7 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 1242-1243.

¹⁹ The prosecution of such claims by the government is a matter of discretion, not of duty. See *Gray v. United States*, 21 Ct. Cl. 340, 392; 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 973, 974, 978, 995, 997.

²⁰ See 6 MOORE, DIGEST OF INTERNATIONAL LAW, § 987, citing numerous authorities.

²¹ For a variety of cases showing that "a claimant is not required to exhaust justice where there is no justice to exhaust," — where an appeal would be futile, — see 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 988-992, incl.

On this latter point of collateral attack the decisions of the United States Supreme Court — federal decisions, of course, control on problems arising under the National Bank Act — are rather confusing. While no such rule is enunciated, the cases are not inconsistent with a doctrine that the *ultra vires* transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, they are valid unless questioned by the government.¹ The leading case sustaining a bank's defense of *ultra vires* is that of *California Bank v. Kennedy*,² in which the bank was discharged from liability on the stock of an insolvent corporation which it held outside its authority; on the other hand, in *National Bank v. Matthews*,³ the bank was allowed to foreclose on a mortgage entered into *ultra vires*. Perhaps the explanation of the cases may be found in the fact that the decision of *McCormick v. Market Bank*,⁴ the first of the cases relieving the banks from liability, was handed down by Mr. Justice Gray, who had written the opinion in *Central Transportation Co. v. Pullman Car Co.*⁵ This latter case, in which no mention was made of the earlier bank rulings *contra*, established the federal doctrine that an *ultra vires* act has no corporate significance whatsoever. Later, in *McCormick v. Market Bank*, if this rule was to be applied to national banks, it became necessary to explain the earlier decisions, and the distinction between "an abuse of a legal power" and "an attempt to exercise a power expressly prohibited by statute" was formulated.⁶ But the distinction between buying stock, for which no authority is granted in the National Bank Act, as being "entirely outside the powers conferred on the bank," and securing a present loan by a real estate mortgage, when the statute authorizes such security only for debts previously contracted,⁷ as "incidental to the exercise of powers conferred upon the bank,"⁸ is not satisfactory, nor

¹ In the following cases banks were allowed to enforce or retain advantages arising from such transactions: *Gold-Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Reynolds v. National Bank*, 112 U. S. 405; *Fortier v. National Bank*, 112 U. S. 439, 451; *National Bank v. Gadsden*, 191 U. S. 451; *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281.

The defense of the bank was upheld in: *McCormick v. Market Bank*, 165 U. S. 538; *California Bank v. Kennedy*, 167 U. S. 362; *National Bank v. Hawkins*, 174 U. S. 364; *National Bank v. Converse*, 200 U. S. 425.

But in a Circuit Court of Appeals case, the bank, through its receiver, was denied the defense of *ultra vires*; though the case also went on the ground that the bank's authority was not exceeded. *Brown v. Schleier*, 118 Fed. 981. And a bank cannot both disclaim liability and reap the benefit of the contract. *National Bank v. Townsend*, 139 U. S. 67.

² See n. 1, *supra*.

³ *Ibid.*

⁴ *Ibid.*

⁵ 139 U. S. 24.

⁶ See 165 U. S. 538, 553. REV. STAT., § 5136 (7), U. S. COMP. STAT., 1913, § 9661 (7), reads: "But no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The association had in this case negotiated the lease of banking premises before such time. The lease was held to be *ultra vires* and absolutely void.

⁷ REV. STAT., § 5137 (2), U. S. COMP. STAT., 1913, § 9674 (2).

⁸ Justice Gray's distinction was thus re-phrased in *California Bank v. Kennedy*, 167 U. S. 362, 370.

does it explain why in the one case the *ultra vires* act of the bank should be void and in the other voidable by the government only. This distinction is even less convincing when the circumstances of the purchase of stock are such as to lead a dissenting minority to consider the acquisition incidental to the banking powers and *intra vires*.⁹ A reluctance to upset titles¹⁰ will not explain why the security of a real estate mortgage must be enforced; and the interpretation of the Act to the effect that "the impending danger of a judgment of ouster and dissolution was the check, and none other, contemplated by Congress,"¹¹ seems as applicable to one type of case as to the other.

But one is spared the difficulty of applying the Supreme Court's distinctions to the principal case¹² if the stock purchase in question was *intra vires*. National banks are authorized by the Act to "hold such real estate as is necessary for its immediate accommodation in the transaction of its business."¹³ Under this provision it has been held that a bank may lease a building site for 99 years and contract to build thereon, at a minimum cost of \$100,000, a structure of not less than four stories, only a part of which is for its own accommodation.¹⁴ Similarly a bank may build on its own land a six story building, renting the space it does not itself occupy.¹⁵ For the Act is not to be construed as prohibiting a businesslike disposition of banking premises. The policy against permitting a bank to speculate or tie up its capital in real estate cannot be invoked to force uneconomical methods of business upon it. But though a bank may erect a building larger than is needed for its own accommodation, may it purchase stock in an independent corporation organized for such purpose?

No authority is given national banks to purchase corporation stock and the omission is held to be a prohibition.¹⁶ It is considered an improper investment of its funds. Yet there is no disability inherent in the ownership of stock, for a bank may lawfully acquire stock by foreclosure on security¹⁷ or in settlement of a claim.¹⁸ The prohibition is against

⁹ In *National Bank v. Converse*, 200 U. S. 425, the bank, as creditor of a failing corporation, participated in the organization of a new corporation and exchanged its claim against the old for stock in the new. Upon the failure of the new corporation, an action was instituted against the bank as stockholder on a statutory double liability. But the acquisition of the stock by the bank was held to be *ultra vires* and utterly void, and the bank was relieved from the liability. Compare also cases holding that a bank can acquire and pass title to its own stock under circumstances expressly prohibited in the Bank Act. *National Bank v. Stewart*, 107 U. S. 676; *Lantry v. Wallace*, 182 U. S. 536.

¹⁰ See *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 287.

¹¹ See *National Bank v. Matthews*, 98 U. S. 621, 629.

¹² It is a subject for speculation whether the transaction in the principal case, if considered *ultra vires*, would be regarded as the mere "abuse of a legal power" to acquire a business location, or "entirely outside the powers conferred upon the bank," because a purchase of stock.

¹³ REV. STAT., § 5137 (1), U. S. COMP. STAT., 1913, § 9674 (1).

¹⁴ *Brown v. Schleier*, 118 Fed. 981.

¹⁵ *Wingert v. National Bank*, 175 Fed. 739.

¹⁶ See *California Bank v. Kennedy*, 167 U. S. 362, 366; *National Bank v. Converse*, 200 U. S. 425, 438.

¹⁷ *National Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971; *McBoyle v. National Bank*, 162 Cal. 277, 122 Pac. 458.

¹⁸ *National Bank v. National Exchange Bank*, 92 U. S. 122; *Tourtelot v. Whithed*, 9 N. D. 467, 84 N. W. 8.

speculation or investment in stock. Where the investment in a building corporation is a reasonable and *bonâ fide* method of acquiring banking quarters, it seems difficult not to support the transaction as an exercise of implied incidental powers. Although in a like manner other corporations are prohibited from investing in stock, it has been held that a railroad company may purchase the majority interest in a corporation engaged in business which the railroad is authorized to transact,¹⁹ and that a cloth manufacturing and bleaching company may buy stock in a corporation producing the dyes used in its manufacturing process.²⁰ Where a corporation may achieve a purpose directly, the power to perform indirectly would seem reasonably incidental, unless some principle of public policy were violated by the method of accomplishment.

It is true that the purchase of less than a controlling interest may be objectionable on the ground that the funds of the bank are thus placed beyond the control of its directors. On the other hand, the situation in the principal case so closely resembles a loan that the transaction can hardly be open to criticism on mere grounds of policy. For the bank obtained from the promoter, at the time of its purchase of the stock, a promise to buy at par value, and received security for the performance of this obligation.

THE TORT LIABILITY OF A CONTRACTOR FOR NEGLIGENT WORK ON COUNTY ROADS. — It has been a great matter of litigation how far public bodies are liable in tort with respect to their duty to maintain and repair highways. Whatever answer the courts may give to that question, the tort liability of individuals who are prosecuting the public work should be sharply distinguished. A recent case in Kentucky, however, lays down the rule that a highway contractor is not liable for positive misfeasance, because his employer, the county, is immune from suit. *Ockerman v. Woodward*, 178 S. W. 1100.

In England, under the common law, the duty to repair roads was imposed on the parish,¹ the duty to repair bridges on the county.² For the failure to perform this obligation, an indictment lay against the inhabitants of the parish or the county.³ Yet an individual who suffered special injury through the defective condition of the bridge out of repair was denied recovery against the county in the leading case of *Russell v. Men of Devon*.⁴ While the principle upon which the case is to be rested has received frequent and varied treatment, it has been generally followed in England and in this country, where either a county, parish, or town was by statute or common law under a duty to repair a bridge or high-

¹⁹ *State v. Missouri, etc. Ry. Co.*, 237 Mo. 338, 141 S. W. 643. But see *contra*, *People v. Pullman Car Co.*, 175 Ill. 125, 159, 51 N. E. 664, 676.

²⁰ *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396.

¹ COM. DIG., tit. Chimin A 4, vol. II, 398; 1 BL. COM., 357.

² COM. DIG., *ibid.*, B 2, vol. II, 399; 1 BL. COM., 357; 2 COKE, INST., 700.

³ COM. DIG., tit. Chimin A 4, B 3; 1 BL. COM., 357; *King v. Inhabitants of Devon*,

¹⁴ East 477.

⁴ 2 D. & E. 667.

way.⁵ The result in that case and in the cases which follow it should rest on the ground that the so-called quasi-corporation is performing a public duty for the benefit of everyone, and is receiving no special benefit of any kind in return. Though *Russell v. Men of Devon* might have been decided on the ground that there was no corporation to sue, and that there was no corporate fund out of which the damages could be paid, such grounds will not suffice to explain later cases where counties, parishes, or towns were incorporated and had treasuries of their own.⁶ Nor will an explanation be found in the principle that the breach of an affirmative public duty gives rise to no private action unless legislation gives the remedy.⁷ For this would lead to a distinction between misfeasance and non-feasance, which neither the original case nor later decisions will support.⁸ Whether an injury occurs through the failure to repair, or through negligence in repairing,⁹ no recovery should be allowed against

⁵ *Hedges v. County of Madison*, 6 Ill. 567; *Town of Waltham v. Kempner*, 55 Ill. 346; *Mower v. Leicester*, 9 Mass. 247; *Sargent v. Guilford*, 66 N. H. 543; *Altnow v. Sibley*, 30 Minn. 186; *Board of Commissioners v. Allman*, 142 Ind. 542; *McKinnon v. Penson*, 8 Ex. 319; *Young v. Davis*, 7 H. & N. 760, 2 H. & C. 197; *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218; *Parsons v. St. Matthews Vestry*, L. R. 3 C. P. 56; *Maguire v. Liverpool Corporation*, L. R. [1905] 1 K. B. 767. *Contra*, *Dean v. New Milford Township*, 5 W. & Ser. (Pa.) 545; *Humphreys v. Armstrong Co.* 56 Pa. St. 204; *County Commissioners v. Duckett*, 20 Md. 468.

⁶ *Russell v. Men of Devon* was placed on this ground in *McKinnon v. Penson*, 8 Ex. 319, 327. That the real ground of the decision went further than this formal requirement is shown by the decision in that very case. Although the statute of 43 GEO. III, ch. 59, permitted the county to sue and be sued in the name of the surveyor, and though the county had funds, yet no right of action was said to exist against the county for an injury resulting from the defective condition of the bridge. In accord, with regard to parishes, under a similar statute, *Young v. Davis*, 7 H. & N. 760. See also *Vaughan Williams, L. J.*, in *Maguire v. Liverpool*, L. R. [1905] 1 K. B. 767, 787; and *Halsbury, L. J.*, in *Cowley v. Newmarket*, [1892] A. C. 345, 350. In *Commonwealth v. Mighels*, 7 Oh. St. 109, *Markey v. Queens County*, 154 N. Y. 675, and *Commonwealth v. Allman*, 142 Ind. 542, the county was not held even though it was incorporated and had funds. In the cases holding counties liable, cited in note 5, such facts were held to distinguish *Russell v. Men of Devon*.

⁷ For a thorough discussion of this principle, see an article by the late Prof. E. R. Thayer, "Public Wrong and Private Action," in 27 HARV. L. REV. 317, 320, 329 *et seq.*

⁸ A city is not liable for the negligent acts of its officers or employees in maintaining or repairing school buildings. *Bigelow v. Randolph*, 14 Gray (Mass.) 541; *Howard v. Worcester*, 153 Mass. 426; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1688. Nor is a city liable for the negligent acts of its employees in the police, fire, health, or parks department. *Blair v. Granger*, 24 R. I. 17; *Louisville Park Comm. v. Printz*, 127 Ky. 460; *Orr v. Lansing*, 35 Ia. 495; *Bowditch v. Boston*, 101 U. S. 16; 4 DILLON, MUNICIPAL CORPORATIONS, §§ 1656, 1660, 1661.

⁹ It may appear at first sight that the English cases support such a distinction. *Freeman v. Canterbury*, L. R. 6 Q. B. 214; *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487; *Pendlebury v. Greenhalgh*, 1 Q. B. D. 36; *Parsons v. St. Matthews Vestry*, L. R. 3 C. P. 56, 59, 60; and *Cowley v. Newmarket*, [1892] A. C. 345, appear to lay down such a rule. But thorough examination of these cases will show no disagreement with the conclusion above stated. Originally no single individual was charged with the duty of repairing roads. The Stat. of 2 & 3 PH. & M., ch. 8, directed the church wardens of each parish to elect two surveyors to mend the highways. Under the Stat. of 4 & 5 WM. IV, ch. 50, the surveyors were given the duty to maintain and keep in repair highways within their respective parishes. Generally throughout England the position of surveyor has been abolished and the "duties, rights and responsibilities" of that office have by various statutes been vested in town and district councils or some other such corporation. The cases making the distinction between misfeasance and non-feasance are cases where the duty of surveyors was transferred to public bodies. Just as the surveyor was liable for his misfeasance, so are the bodies succeeding to his duties and

a county, township, or parish. It is the special nature of the duty which gives the immunity from private suit.¹⁰

The immunity of the public corporation should not extend, however, either to employees or to independent contractors whom the town or county has intrusted with the carrying out of its duty. And here the distinction is properly made between misfeasance and non-feasance, just as in the English case dealing with the liability of surveyors of highways or of those bodies which have been substituted in their place.¹¹ The contractor or the employee owes an affirmative duty only to the county or city employing him, and from his mere failure to repair, whatever may be his liability to his principal, no action should lie against him by an individual.¹² But no reason is apparent why the contractor should be relieved of his ordinary duty of careful conduct with reference to others likely to be injured by his negligence.¹³ The court in the principal case¹⁴ feared that holding the contractor liable would defeat the immunity of the county because in the long run the burden would fall upon the county, by reason of the higher price which contractors would charge. If this be so of the contractor, why not also of the railway which hauled the asphalt or rock, of the truckman who hauled the rock for the contractor, of the manufacturer who constructed the tools which the contractor uses, and of the numberless others who contribute to repairing the road? Certainly the contingency of future lawsuits cuts little or no figure in a contractor's estimate for private work, and it is somewhat fanciful to suppose that the county would be caused substantial detriment on this account. Indeed, the county would probably suffer more under the

liabilities, though the failure to repair is solely a breach of public duty. See Pollack, C. B., in *Davis v. Young*, 7 H. & N. 760, 771; Channell, B., *ibid.*, 776; and Willes, J., in the same case, 2 H. & C. 197, 198.

For a typical statute under which these cases arise, see 38 & 39 VICT., ch. 55, § 144.

¹⁰ With respect to chartered cities, it is generally held that they are liable to private suit for failure to repair streets, on the theory that the valuable rights conferred by charter are a consideration for the duty undertaken. *Weet v. Brockport*, 16 N. Y. 161; *Browning v. City of Springfield*, 17 Ill. 143; *Weightman v. City of Washington*, 1 Black 39; *Galveston v. Posnainsky*, 62 Tex. 118. *Contra*, *Detroit v. Blakeby*, 21 Mich. 84; *Pray v. Jersey City*, 32 N. J. L. 394; *French v. Boston*, 129 Mass. 592. See *Hill v. Boston*, 122 Mass. 344, and collection of cases in 20 L. R. A. N. S. 518. The extent of this liability of municipalities, beyond the duty as to streets, is treated in 25 HARV. L. REV. 646.

¹¹ See n. 10.

¹² There is a tendency to hold a contractor for failing to repair a roadway in cases where he had contracted to do so for a city. *Rockford City v. Matthews*, 44 La. Ann. 559, 11 So. 818; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Terminal Co. v. Springer*, 47 Ind. App. 35, 93 N. E. 707.

These cases proceed on the ground that the contract is made for the general public, the contractor assuming the duty of the city or county which engages him. In view of the fact that a city may not by delegation be relieved of liability for defects in the highway where it is otherwise liable for them, it is difficult to see how such an intention can be found. See 15 HARV. L. REV. 485, 486.

¹³ *Solberg v. Schlosser*, 20 N. D. 307, 127 N. W. 91, where the contractor was held for misfeasance such as described, although the county would not have been liable had it been doing the work itself.

¹⁴ The case followed a former decision in the same jurisdiction. *Schneider v. Cahill*, 127 S. W. 143, which appears to be on all fours with the principal case, except that the distinction between misfeasance and non-feasance was not raised.

doctrine of the Kentucky court, which puts a premium on carelessness and inefficiency. However sound the policy of immunity for the county, it is submitted that the reasons therefor do not require that our highways be filled with a large class of civilly irresponsible individuals.

THE CONSTITUTIONALITY OF A STATUTE DISPENSING WITH INDICTMENT ON PLEA OF GUILTY. — The problem of the prisoner who wishes to plead guilty and have his sentence begin at once, but who must wait several months for the required indictment by grand jury, has been met in Pennsylvania by a recent case sustaining a statute which allows the criminal to enter a plea of guilty and receive sentence without indictment. *Commonwealth ex rel. Stanton v. Francies*, 95 Atl. 527 (Pa.). The state constitution provides that "no person shall, for any indictable offense, be proceeded against criminally by information." The court considered that "information," as used in the constitution, adopted in 1790, referred to the peculiarly objectionable proceedings, used at one time in England, whereby one might be bound over for trial without any preliminary hearing, at the arbitrary whim of the prosecutor.¹ Consequently the statutory proceeding in Pennsylvania, providing a hearing of both sides and committal by a magistrate, was held not to fall within the constitutional prohibition. Although this construction is a reasonable one,² it is not altogether free from doubt in view of the frequent interpretation of the term "information" as referring simply to prosecution without indictment by grand jury.³

Apart from a question of constitutional construction, the case is supportable on another ground. The analogous constitutional provision of trial by jury has generally been treated as a privilege of the defendant's, and subject to waiver by him, where there is a statute permitting waiver, and conferring jurisdiction upon the court to try the issue.⁴ This seems to be true even when the provision of the constitution is

¹ The information had many oppressive features. The frequent use of it for libel increased its unpopularity. An information could not be quashed on motion without trial. The penalty was often divided with the informer. See 3 BACON, ABR., 6 ed., 635; 14 VINER'S ABR., 2 ed., 406, 414.

² See 7 DANE'S ABR., 282, § 5.

³ "An information is defined to be a declaration or statement without being made on the oath of the grand jury, whereby a person is charged with the breach of some public law." *State v. Ledford*, 3 Mo. 75, 77. See *People v. Sponsler*, 1 Dak. 289, 298, 46 N. W. 459, 462; *Clepper v. State*, 4 Tex. 242, 246. The term has been so defined in a Pennsylvania case. See *Respublica v. Wray*, 3 Dallas 490; EDWARDS, GRAND JURY, 34. It is interesting to compare with the argument of the court in the principal case that the constitution forbids the old English practice, the conclusion of the Missouri court that the same constitutional provision merely adopts the common-law use of the information in England, so that only felonies require indictment, and even serious misdemeanors may be prosecuted by information, if the legislature chooses to take them out of the class of indictable offenses. *State v. Ledford*, 3 Mo. 75; *State v. Cowan*, 29 Mo. 330; *State v. Ebert*, 40 Mo. 186.

⁴ *State v. Worden*, 46 Conn. 349; *Re Staff*, 63 Wis. 285, 23 N. W. 587. Some courts do not require the statute. *State v. Stevens*, 84 N. J. L. 561, 87 Atl. 118. See 21 HARV. L. REV. 212. A constitutional provision requiring trial in the county of the crime may also be waived. *State v. Albee*, 61 N. H. 423.

apparently mandatory in terms,⁶ although some courts have found the case easier when their constitution said, "the right to trial by jury shall remain inviolate."⁶ If trial by jury may thus be waived, it would seem, *a fortiori*, that a defendant could waive the one-sided grand jury proceeding, which is not final anyway, for the prosecutor may *not* *pros.* a true bill or hold the case over for another grand jury if the bill is ignored.⁷ This result has been reached in a few cases.⁸ A plea of guilty, by the better view, is strictly not a waiver of trial by jury, for the jury function does not arise unless there is an issue to be tried.⁹ In like manner a grand jury proceeding is a mere formality where there is no question of the defendant's guilt. The finding of a true bill by grand jury, as a prerequisite to the court's jurisdiction, is a procedural difficulty which is surmounted by the Pennsylvania statute, allowing the accused to plead guilty to a formal accusation drawn up by the prosecutor. It may be noted in passing, however, that a commission of judges in New York, though recognizing the desirability of dispensing with indictment on plea of guilty, considered it impossible without an amendment to the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime except on presentment or indictment by grand jury."¹⁰

The principal case is in harmony with the tendency, legislative and judicial, to diminish the importance of the grand jury, so that it is now a disappearing institution. In the United States, indictment by grand jury no longer exists as a privilege of the criminal defendant in at least twenty-four states,¹¹ prosecutions being begun either by indictment or by information.¹² In most of these a grand jury may be called by the district or circuit judge in his discretion, to investigate and present the names in such a case as general corruption. There must generally be a preliminary hearing of both sides by a trained magistrate, thus protecting the innocent from the danger of being held unwarrantably for trial, with more efficiency than under the cumbrous and irresponsible grand jury system.¹³ The defendant's historical rights are amply preserved in the trial by jury, the public character of which makes the prosecutor and witnesses strictly accountable. A few of these states still require indictment in capital cases. At present there is a widespread attack on

⁶ *Belt v. United States*, 4 D. C. App. 25; *Moore v. State*, 22 Tex. App. 117, 2 S. W. 634; *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428 (statute upheld by divided court); *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740, following result in previous case.

⁶ *Brewster v. People*, 183 Ill. 143, 55 N. E. 640.

⁷ *United States v. Martin*, 50 Fed. 918.

⁸ *Edwards v. State*, 45 N. J. L. 419; *Lavery v. Commonwealth*, 101 Pa. St. 560. See *McGinnis v. State*, 9 Humphreys (Tenn.) 43.

⁹ *West v. Gammon*, 98 Fed. 426; *Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

¹⁰ See 4 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 914-17.

¹¹ No question of due process under the federal Constitution is involved. A state may do away with the grand jury as far as it sees fit. *Hurtado v. California*, 110 U. S. 516.

¹² See 3 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 566, naming Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. The constitutions of several other states give the legislature power to abolish the grand jury. Oregon has changed back to indictment.

¹³ See 7 HARV. L. REV. 189, 190-92; 8 *ibid.* 424.

the grand jury system where still required,¹⁴ but its antiquity promises it life for another generation.

REGULATION OF ATTORNEYS' FEES FOR THE PROSECUTION OF CLAIMS AGAINST THE UNITED STATES. — It is, of course, within the power of Congress to regulate the payment of claims against the United States and to fix the conditions upon which such payments may be made. Thus, Congress may forbid the assignment of a claim against the government,¹ or any agreement to give a lien thereon.² Moreover, statutes fixing the compensation of the attorneys employed by the claimant, and making criminal the receipt of a greater amount, have been held within the legislative power.³ But a recent case shows that there are certain constitutional restrictions on this power. An attorney acting under a contract for a 33⅓ per cent contingent fee secured a judgment for his client in the Court of Claims, on account of property taken during the Civil War. Congress thereupon passed a special appropriation act, limiting the attorney's fee to 20 per cent. It was held that the attorney could recover his full fee from his client, the restriction being unconstitutional. *Moyers v. Fahey*, 43 Wash. L. Rep. 691.⁴

It is clear that the attorney's contract is not void as the assignment of a claim against the United States,⁵ since even an agreement to pay a certain percentage out of the amount recovered is not an assignment *pro tanto*,⁶ unless the attorney is expressly given a lien.⁷ Nor by the weight of authority is a contract for a contingent fee objectionable.⁸ Since, then, the contract was valid and binding when made, it is protected under the due process clause from arbitrary impairment.⁹ It is true that the Supreme Court, in *Ball v. Halsell*,¹⁰ held that a statute

¹⁴ See REPORT OF ROYAL COMMISSION ON DELAY IN THE KING'S BENCH DIVISION, presented to Parliament February 10, 1914, recommending the abolition of the grand jury in England. Also similar recommendations by Mr. Taft to the New York Constitutional Convention, 1 VA. L. REG. (n. s.) 226.

¹ *Spofford v. Kirk*, 97 U. S. 484. See *Hager v. Swayne*, 149 U. S. 242, 247; *Ball v. Halsell*, 161 U. S. 72.

² See *Nutt v. Knut*, 200 U. S. 12, 20.

³ *United States v. Fairchilds*, Fed. Cas. No. 15,067, 1 Abb. 74; *United States v. Marks*, Fed. Cas. No. 15,721, 2 Abb. 531; *United States v. Van Leuven*, 62 Fed. 52 (pensions); *Ball v. Halsell*, 161 U. S. 72 (Indian depredations).

⁴ See RECENT CASES, this issue, p. 331.

⁵ Assignments of claims against the United States before the issuance of the warrant are void. U. S. COMP. STAT. 1913, § 6383.

⁶ *Trist v. Child*, 21 Wall. (U. S.) 441; *Wright v. Tebbetts*, 91 U. S. 252; *Roberts v. Consaul*, 24 A. C. (D. C.) 551; *Wassell v. Armstrong*, 35 Ark. 247. *Contra*, *Jones v. Blackledge*, 9 Kan. 562.

⁷ *Nutt v. Knut*, 200 U. S. 12. *Contra*, see *Jones v. Rutherford*, 26 A. C. (D. C.) 114, 120.

⁸ *Wylie v. Coxe*, 15 How. (U. S.) 415; *Taylor v. Bemiss*, 110 U. S. 42; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784; *Matter of Hynes*, 105 N. Y. 560, 12 N. E. 60. *Contra*, *Ackert v. Barker*, 131 Mass. 436.

⁹ "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference." COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 517.

¹⁰ 161 U. S. 72. The right to recover for Indian depredations is based on treaties with the Indians, by which it was agreed that the United States should indemnify those

establishing a court to try claims arising from Indian depredations and fixing the compensation of attorneys for prosecuting claims there invalidated a previous contract for a larger fee. But that decision is clearly distinguishable from the principal case, for Congress, in establishing a new tribunal in which the United States may be sued, has power to regulate the conditions under which attorneys may practice there. There is, in fact, no doubt that Congress could at any time abolish the Court of Claims, and so deprive attorneys of compensation promised them for prosecuting a claim there. But after the attorney has performed his contract and the Court of Claims has rendered judgment, it seems an unjust interference with his rights under the contract for Congress, after appropriating the money, to restrict the claimant in his payment of creditors.

Thus, the result of the principal case is wholly satisfactory. The court, however, based its decision on the broad ground that the legislature cannot interfere with liberty of contract, and neglected to consider the exceptions that must be made to such a sweeping rule. It is submitted that Congress might nullify preëxisting unexecuted contracts by forbidding any attorney to practice in the Court of Claims unless he agreed not to demand more than a fixed fee, since the regulation of that court is entirely within the legislative power. Moreover, it would seem that the legislature might constitutionally declare that in future all contracts for an excessive contingent fee should be void. Such a statute would be a declaration of public policy and a justifiable exercise of the police power. Such a rule, as applied to claims against the government, would involve little more restraint on freedom of contract than the restrictions against assignments and liens, which are of unquestioned validity.¹¹ Similar statutes fixing the compensation of pension attorneys have often been held constitutional.¹² It must be remembered, however, that the pension cases are to a certain extent *sui generis*, since Congress, under its power to "raise and support an army,"¹³ has full control over the pension laws and can in every way regulate the method of distribution.¹⁴ Indeed, it would seem that even executed contracts with pension attorneys might be nullified by the legislature, since the licensed pension attorney is, in a sense, the creature of Congress, and at all times subject to its regulation, to the extent that Congress considers necessary for the protection of the pensioners, who are wards of the government.

If the payment of the claim in the principal case could be regarded as a conditional gift, which might be recovered back if the condition were broken, it would seem unjust and inequitable to compel a forfeiture. But it is clear that the payment in such a case is not a mere gratuity, but the fulfillment of an obligation, since an implied contract to make

injured and get reimbursement out of the annuities of the Indians who were at fault. See *McKinzie v. United States*, 34 Ct. Cl. 278, 286.

¹¹ See notes 1, 2, and 5, *supra*.

¹² *United States v. Fairchild*, Fed. Cas. No. 15,067; *United States v. Marks*, Fed. Cas. No. 15,721; *Frisbie v. United States*, 157 U. S. 160.

¹³ U. S. CONST., art. I, § 8.

¹⁴ See *United States v. Fairchild*, Fed. Cas. No. 15,067; *United States v. Hall*, 98 U. S. 343, 353.

compensation arises under Article V, when property is taken for the use of the United States.¹⁵ Since the United States cannot be sued without its consent, the contract is not enforceable at law; but a moral obligation clearly exists. A conditional gift of money can only be recovered in quasi-contract;¹⁶ and there can be no recovery in quasi-contract if the money paid, though not legally due, was due *ex aequo et bono*.¹⁷ Accordingly, the enforcement of the contract cannot result in any loss to the claimant beyond the amount of the fee he agreed to pay.

RECENT CASES

ASSAULT AND BATTERY — CRIMINAL RESPONSIBILITY — FORCIBLE PREVENTION OF WRONGFUL LEVY ON DEFENDANT'S PROPERTY. — The defendant, using no unnecessary force, resisted a constable who attempted to attach his goods as the property of another person. *Held*, that he is guilty of a criminal assault. *State v. Selengut*, 95 Atl. 503 (R. I.).

It is a general rule that a trespasser may be resisted with reasonable force. See 1 BISHOP, CRIMINAL LAW, 8 ed., § 861. A wrongful attachment is a trespass. *Buck v. Colbach*, 3 Wall. (U. S.) 334; *McAllaster v. Bailey*, 127 N. Y. 583, 28 N. E. 591. Therefore, on strict principle, it would seem justifiable to resist a wrongful attachment. Some authority supports this view. *Commonwealth v. Kennard*, 8 Pick. (Mass.) 133; *Wentworth v. People*, 4 Scammon (Ill.) 550; *Lassiter v. State*, 163 S. W. 710 (Tex.). Cf. *Smith v. State*, 105 Ala. 136, 17 So. 107. However, since the protection of property by personal force involves a breach of the peace, it is submitted that the rule permitting it can only be justified when the alternative offered by the legal remedies is seriously inadequate. Now, in a wrongful attachment a protection to the owner, not present in a private trespass, is afforded by the liability of the attaching officer on his bond. See 2 FREEMAN, EXECUTIONS, 3 ed., § 272. Furthermore, if private persons were permitted to resist wrongful attachments, it would give debtors an opportunity to resist rightful attachments until they had secreted or disposed of their goods, and would entirely defeat the purpose of mesne attachments. Hence it would seem that there should be no right to resist attachment by force, and the weight of authority supports this view. *State v. Downer*, 8 Vt. 424; *Paris v. State*, 3 Oh. St. 159; *State v. Richardson*, 38 N. H. 208; *People v. Hall*, 31 Hun (N. Y.) 404. It is true that an illegal arrest may everywhere be resisted. *State v. Belk*, 76 N. C. 10; *Massie v. State*, 27 Tex. App. 617, 11 S. W. 638. But such an arrest is an irreparable personal injury which cannot be adequately compensated in damages.

BANKS AND BANKING — NATIONAL BANKS — COLLATERAL ATTACK ON *ULTRA VIRES* ACT — AUTHORITY TO PURCHASE STOCK IN BUILDING CORPORATION AS INCIDENTAL TO SECURING BANKING QUARTERS. — A national bank

¹⁵ *Brooke v. United States*, 2 Ct. Cl. 180; *Wixon v. United States*, 14 Ct. Cl. 59.

¹⁶ *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279. But if a chattel is given conditionally, a breach of condition is a forfeiture, and the donor may replevy the chattel. *Halbert v. Halbert*, 21 Mo. 277.

¹⁷ *Farmer v. Arundel*, 2 Wm. Bl. 824; *Goddard v. Seymour*, 30 Conn. 394. See *Moses v. MacFerlan*, 2 Burr. 1005, 1012. See KEENER, QUASI-CONTRACTS, 43 ff.

Cf. the rule concerning "natural obligations" in the Roman law. See 2 ROBY, ROMAN PRIVATE LAW, 81.

bought shares of stock in a building corporation as part of a transaction in which it leased banking quarters in the building to be erected. The promoter of the corporation contracted to buy from the bank at a later date the stock acquired by it, and deposited security for his performance. When suit was brought on his promise, the defendant set up that the acts of the bank were *ultra vires* and the transaction void. The court held that the transaction was *intra vires* and intimated that the authority of the bank was not subject to attack in this manner. *Fourth National Bank of Nashville v. Stahlman*, 178 S. W. 942 (Tenn.).

For a discussion of the principles involved, see NOTES, p. 320.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CLAIMS AGAINST UNITED STATES — STATUTE LIMITING ATTORNEYS' FEES. — The defendant employed the plaintiff to prosecute a claim against the United States for land taken during the Civil War, and contracted to pay him an amount equal to 33⅓ per cent of the sum recovered. The Court of Claims having found for the claimant, Congress passed a special appropriation act, which provided that not more than 20 per cent of the amount thus appropriated should be paid for attorneys' services. Accordingly, 20 per cent was paid to the plaintiff, who now sues his client for the balance. Held, that he may recover, the restriction being unconstitutional. *Moyers v. Fahey*, 43 Wash. L. Rep. 691 (Sup. Ct., D. C.).

For a discussion of the question involved in this decision, see NOTES, p. 328.

DIVORCE — GROUNDS — DESERTION — DEED OF SEPARATION. — When a husband was about to desert his wife, they executed a deed of separation, in which it was mutually agreed that they should live apart, and he agreed to pay her a weekly allowance. About a year later he ceased paying and left for Australia with another woman. Held, that the wife is entitled to a divorce on the grounds of adultery and desertion. *Smith v. Smith*, 60 Sol. J. 25 (P. D.).

American courts regard covenants to live apart as against public policy, and therefore unenforceable. *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302; *Smith v. Knowles*, 2 Grant Cas. (Pa.) 413. Thus, though such covenants are evidence of consent to separation, the consent may be revoked, causing further living apart to be desertion. *Schanck v. Schanck*, 33 N. J. Eq. 363. See *Hankinson v. Hankinson*, 33 N. J. Eq. 66, 70. But in England such covenants are now specifically enforced by injunction against proceedings for the restitution of conjugal rights. *Hunt v. Hunt*, 4 DeG. F. & J. 221; *Besant v. Wood*, 12 Ch. Div. 605. See R. J. Peaslee, "Separation Agreements Under the English Law," 15 HARV. L. REV. 638, 653, 654. And under the Judicature Act they may be pleaded by way of defense to such suits. *Marshall v. Marshall*, 5 P. D. 19. Logically they should also be a defense to actions for divorce on the ground of desertion, since the consent cannot be revoked when embodied in a valid contract. *Queen v. Leresche*, [1891] 2 Q. B. 418; *Crabb v. Crabb*, 1 P. & D. 601. However, separation deeds will, upon equitable principles, be held invalid, if they have been procured by fraud or coercion, or if they are unfair to the wife. *Dagg v. Dagg & Speake*, 7 P. D. 17; *Lambert v. Lambert*, 2 Bro. P. C. 18; see *Crabb v. Crabb*, 1 P. & D. 601, 604. Of course a separation deed giving permission to live apart does not include permission to commit adultery. *Morrall v. Morrall*, 6 P. D. 98. But in England proof of adultery by the husband entitles the wife only to a judicial separation: in order to obtain a decree of dissolution she must also prove either cruelty or desertion. *Fitzgerald v. Fitzgerald*, 1 P. & D. 694; *Balcombe v. Balcombe*, [1908] P. D. 176, 177, 178.

DIVORCE — GROUNDS — DESERTION: REFUSAL TO LIVE WITH HUSBAND'S PARENTS. — The plaintiff petitioned for a divorce, on the ground of his wife's

desertion. He had declined to live elsewhere than with his parents, although his wife's temperament appeared to clash continually with that of her mother-in-law. *Held*, that the decree will not be granted as the desertion was justified. *McCampbell v. McCampbell*, 63 Pittsb. Leg. J. 641 (C. P. Allegheny Co., Pa.).

Under the Pennsylvania statute, a desertion, to be sufficient ground for a divorce, must be wilful, malicious, and without reasonable cause. See PURDON'S DIG. PA. STAT. (1905), 1230. Although of various forms, nearly all desertion statutes have been construed to allow a divorce for any desertion unless excused by something which would be a ground for granting a divorce to the deserting spouse. *Detrick's Appeals*, 117 Pa. St. 452, 11 Atl. 882; *Craig v. Craig*, 90 Ark. 40, 117 S. W. 765. See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 1664, 1753. *Contra*, *Laing v. Laing*, 21 N. J. Eq. 248, 250. Since the husband has the right to determine the locus of the home, the mere election to live with his parents, provided adequate support and a comfortable home are given the wife, can present no ground for divorce. *Rodenbaugh v. Rodenbaugh*, 17 Pa. Co. Ct. R. 477. See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 1713, 1716. Under extreme circumstances, however, to compel the wife to live with her mother-in-law may amount to such cruelty as would be ground for divorce; and, accordingly, in such cases the wife's desertion is justified. *Shinn v. Shinn*, 51 N. J. Eq. 78, 24 Atl. 1022. *Cf. Dailey's Appeal*, 10 Wkly. Notes Cas. 420. However, the mere existence of an unfriendly spirit between the mother-in-law and the wife, as in the principal case, can hardly be called sufficient cruelty to justify the latter in deserting her husband. *Jones v. Jones*, 55 Mo. App. 523; *Loux v. Loux*, 57 N. J. Eq. 561, 41 Atl. 358. *Cf. Mossa v. Mossa*, 123 N. Y. App. Div. 400, 107 N. Y. Supp. 1044. *Contra*, *Powell v. Powell*, 29 Vt. 148; *Field v. Field*, 79 Misc. (N. Y.) 557, 139 N. Y. Supp. 673.

EMINENT DOMAIN — DAMAGES — VALUE OF FEE UNDER HIGHWAY. — The city took by condemnation the fee to water-covered shore land, already subject to a public easement of passage. *Held*, that the owner of the fee may recover substantial damages. *Matter of City of New York (Main Street)*, 216 N. Y. 67.

The owner of the fee of a street possesses valuable property in his right to make any use of the land that will not interfere with the public easement of passage. *Viliski v. Minneapolis*, 40 Minn. 304, 41 N. W. 1050; *Appleton v. New York*, 163 App. Div. 680, 148 N. Y. Supp. 870; *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519; *Dell Rapids Co. v. Dell Rapids*, 11 S. D. 116, 75 N. W. 898. See NICHOLS, EMINENT DOMAIN, §§ 70, 71. It must follow that the condemnation of the fee of a street should be attended by the payment of substantial damages. *Buffalo v. Pratt*, 131 N. Y. 293, 30 N. E. 233. See 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., 1805. There can be no valid distinction in principle between the condemnation of the fee of a street and the fee of land under water subject to a right of passage, for here, too, the fee carries with it valuable rights. *Steers v. Brooklyn*, 101 N. Y. 51, 4 N. E. 7. See NICHOLS, EMINENT DOMAIN, § 171; FARNHAM, WATERS AND WATER RIGHTS, § 113 b.

EVIDENCE — HEARSAY: IN GENERAL — DECLARATIONS OF WIFE ADMISSIBLE AGAINST HUSBAND AS CO-CONSPIRATOR. — On an indictment for assault with intent to murder, evidence was given that the defendant and his wife planned to commit murder. The acts and declarations of the wife during conversations with the intended victim just before and at the time of the alleged assault were offered by the prosecution. *Held*, that these are admissible. *Thompson v. State*, 178 S. W. (Tex.) 1192.

At common law husband and wife, standing alone, cannot be conspirators. 1 Hawk. P. C., 8 ed., 448, § 8; *People v. Miller*, 82 Cal. 107, 22 Pac. 934.

Texas courts have said that the rule has been changed by statute in that state. See *Smith v. State*, 48 Tex. App. 233, 89 S. W. 817, 821; TEXAS PENAL CODE, 1895, §§ 36, 76, 86, 87, 958. But even at common law it is submitted that the principal case is correct. It cannot, it is true, be supported by the rule of evidence that the acts and declarations of one conspirator in furtherance of the common purpose are admissible against any other conspirator. See WIGMORE, EVIDENCE, § 1079; WHARTON, EVIDENCE, § 1205. This rule, however, does not depend on any notion peculiar to conspiracy, but on the fundamental conception that so far as a defendant's liability under the substantive law may be affected by the acts and declarations of another, those acts and declarations are admissible. See *United States v. Gooding*, 12 Wheat. (U. S.) 460, 469; *State v. Moeller*, 20 N. Dak. 114, 120, 126 N. W. 568, 571. See WIGMORE, EVIDENCE, § 1077. The relationship of principal and accessory, joint principals, or principal and agent between the defendant and his wife may entail such liability. *State v. Vertrees*, 33 Nev. 509, 112 Pac. 42; *State v. Dickerhoff*, 127 Ia. 404, 103 N. W. 350. See *Jones v. Monson*, 137 Wis. 478, 484, 119 N. W. 179, 182; *Price v. Price*, 91 Ia. 693, 696, 60 N. W. 202, 205; BISHOP, CRIMINAL LAW, § 631. There was evidence in the principal case to justify a jury finding that one of these relationships existed and that the declarations admitted were made in furtherance of the purpose for which it existed. But at common law one spouse may not testify against the other and this rule extends to declarations proved by third persons. See *Ray v. State*, 43 Tex. Cr. R. 234, 236, 64 S. W. 1057, 1058; WIGMORE, EVIDENCE, § 2232. But the rule does not apply in civil suits when there is an agency between the spouses. See WIGMORE, EVIDENCE, § 2232. There is no reason to distinguish criminal from civil cases in applying rules of evidence. See *United States v. Gooding*, *supra*. It is submitted, therefore, that where in a criminal case a relationship exists between the spouses that is fundamentally one of agency, the acts and declarations of one may be used against the other.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BONDS — SURETY'S LIABILITY TO ASSIGNEE OF ADMINISTRATOR. — An administrator was entitled to a share of the estate. He assigned this interest, and later committed a *devastavit*. The assignee now sues the surety on the administration bond. *Held*, that he may recover. *Muller v. National Surety Co.*, 154 N. Y. Supp. 1096.

An assignee is not subject to cross claims which arise between the assignor and the obligor after the assignment. But an exceptional doctrine is applied where a trustee who is also a *cestui* assigns his beneficial interest, or an executor and trustee who is given a legacy assigns that legacy. It is then held, on the ground that the executor is only intended to get a deferred interest, that the assigned share must bear in full the loss even from a *devastavit* committed after the assignment. *Morris v. Livie*, 1 Y. & C. Ch. 380; *Doering v. Doering*, 42 Ch. Div. 203; *Hart's Estate*, 203 Pa. St. 503, 53 Atl. 373. The fact that there is no trust in the principal case offers no ground for distinction. But it is submitted that the rule is only for the protection of the other *cestuis* or legatees, and that there is no reason to treat the assignable interest as deferred to cross claims of the surety. Thus, though the administrator cannot recover in his capacity as legatee, for he is liable to a counterclaim for indemnification on the bond, the right of the assignee is unimpaired. Indeed, it seems that the administrator himself may recover for the benefit of the estate. See *Wolfinger v. Forsman*, 6 Pa. St. 294, 295.

INDICTMENT AND INFORMATION — CONSTITUTIONALITY OF STATUTE DISPENSING WITH GRAND JURY ON PLEA OF GUILTY. — On prosecution for breaking and entering, and larceny, the prisoner filed a plea of guilty, under a statute dispensing with the necessity of indictment by grand jury in such

case, and was at once sentenced. The state constitution provided that "no person shall, for any indictable offense, be proceeded against criminally by information," with certain exceptions. *Held*, that the relator was properly sentenced. *Commonwealth ex rel. Stanton v. Francies*, 95 Atl. 527 (Pa.).

For a discussion of this case, see NOTES, p. 326.

INDICTMENT AND INFORMATION — JOINDER OF DEFENDANTS — JOINT INDICTMENT FOR PRACTISING MEDICINE WITHOUT A LICENSE. — Two defendants were indicted jointly for "assuming the duties of a physician, and . . . treating persons afflicted with disease . . . without first having obtained from the state" the certificate required by Section 2580, Code of Iowa. *Held*, that the indictment was good. *State v. McAninch*, 154 N. W. 399 (Ia.).

The traditional view has been that there can be no joint indictment for a crime which from its nature cannot be jointly committed. WHARTON, CRIMINAL PLEADING AND PRACTICE, 8 ed., § 302. Thus it was held there could be no joint indictment for exercising a trade without apprenticeship. *Rex v. Weston*, 1 Strange 623. Nor for perjury. 2 Strange 920. Early American cases accepted this notion without analysis. *Vaughn v. State*, 4 Mo. 530; *United States v. Kazinski*, 26 Fed. Cas. 682. And it persists in some jurisdictions. *Walker v. Commonwealth*, 172 S. W. (Ky.) 109; *State v. Wilson*, 115 Tenn. 725, 91 S. W. 195. It has even been held that two persons cannot be jointly drunk. *State v. Deaton*, 92 N. C. 788. The rule seems to have been purely formal, however, for the mere insertion of the word "separaliter" rendered a joint indictment for a crime of this nature valid. 1 STARKIE, CRIMINAL PLEADING, 43. This being so, it is a short step to hold that the word "several" can be implied where from the nature of the act the crime is several. See *State v. Mills*, 39 N. J. L. 587, 588. It is now recognized that the test should be practical, rather than analytical, turning on substantial fairness to the parties rather than the nature of the crime. *State v. Winstandley*, 151 Ind. 316, 51 N. E. 92. Cf. *Rex v. Philips*, 2 Strange 920. In the principal case a joint indictment can work no hardship, as the court may nevertheless order separate trials, if justice or convenience requires. McLAIN'S ANN. CODE OF IOWA, § 5375.

INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — STANDARD MORTGAGE CLAUSE AS PROTECTION AGAINST OWNER'S ACTS. — A mortgagee of certain property sued on the owner's policy. The policy contained standard clauses making the loss, if any, payable to the mortgagee as his interest might appear and stipulating that the conditions contained therein should apply to the mortgagees in the manner written on, attached, or appended thereto. No conditions were appended to the mortgagee clause. The insurance company set up the defense that the owner had burned the property. *Held*, that in the absence of appended conditions the mortgagee's right was unaffected by the owner's acts. *Stamey v. Royal Exchange Assur. Co.*, 150 Pac. 227 (Kan.).

Courts generally regard the above mentioned clauses as constituting, between the insurer and the mortgagee, a separate contract whereby the former agrees to pay the latter irrespective of invalidating acts by the owner. *Queen Ins. Co. v. Dearborn Savings etc. Ass'n*, 175 Ill. 115, 51 N. E. 717; *Oakland Home Fire Ins. Co. v. Bank of Commerce etc.*, 47 Neb. 717, 66 N. W. 646; *Christensen v. Fidelity Ins. Co.*, 117 Ia. 77, 90 N. W. 495. Reasons for this bi-contractual theory are not forthcoming, except that it is a method of reaching a desired result. See *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439. Though it is arguable, it does not seem desirable to stretch the mere agreement by the owner to insure for the mortgagee's benefit into a delegation of power to the former to enter a contract in the latter's behalf. This speculation aside, the

requisites of a contract relation are lacking. The mortgagee is not a party to the agreement, and gave no consideration, either executed or promissory. In truth there are not two contracts, and thus the mortgagee must be regarded as a beneficiary with an independent vested right, if, as the court contends, he may recover irrespective of the owner's act. See 23 HARV. L. REV. 311; 27 *ibid.* 763. It is wrong, however, to place [this construction on the absence of conditions appended to the mortgagee clause, which is better construed to give the mortgagee only a vicarious right. *Delaware Ins. Co. v. Greer*, 120 Fed. 916.

LANDLORD AND TENANT — RENT — DISTRESS: MAY TENANT'S RECEIVER ENJOIN DISTRESS FOR ADVANCE RENT? — The defendant leased premises to a company which agreed to pay rent yearly in advance. At the beginning of the second year it failed to pay as agreed and the defendant distrained for the rent. Later the company went into the hands of a liquidator, who seeks to enjoin the defendant from proceeding further with the distress. *Held*, that the injunction will not issue. *Venner's Electrical Cooking & Heating Appliances v. Thorpe*, 60 Sol. J. 27 (C. A.).

It is well settled that a receiver takes property subject to all claims against it, legal or equitable, in the hands of the person or corporation from whom he takes. *Chicago Title and Trust Co. v. Smith*, 158 Ill. 417, 41 N. E. 1076; *Commercial Pub. Co. v. Beckwith*, 167 N. Y. 329, 60 N. E. 642. Again it has been explicitly held that a distress previously levied for rent in arrears is valid against the receiver. *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373. The fact, moreover, that a distress is levied immediately for rent due in advance, when the agreed time of payment is past, in no way impairs its validity. *Atkins v. Byrnes*, 71 Ill. 326; *London, etc. Discount Co. v. London, etc. Ry. Co.*, [1893] 2 Q. B. 49. The defendant, therefore, was quite within his legal rights in proceeding with the distress in the principal case. Where this is so, equity will interpose only where it appears necessary to restrain an unconscionable abuse of the right. See *In re Roundwood Colliery Co.*, *supra*, 380. No sufficient evidence of inequitable conduct on the part of the defendant appearing, for he clearly was not acting inequitably in endeavoring to collect his due advance rent, the court seems properly to have denied the plaintiff's motion.

LIBEL AND SLANDER — DAMAGES — AGGRAVATION OF DAMAGES BY PLEA OF JUSTIFICATION. — In an action of libel the defendant pleaded truth in justification. *Held*, that the plea may be considered in aggravation of damages. *O'Malley v. Illinois Publishing and Printing Co.*, 51 Nat. Corp. Rep. 475 (App. Ct. of Ill., 1st Dist.).

It is well settled that "actual malice" in the publication of a defamation opens the defendant to exemplary damages. *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215; *Lee v. Crump*, 146 Ala. 655, 40 So. 609. See ODGERS, SLANDER AND LIBEL, 5 ed., 389. By malice is meant not necessarily the defendant's knowledge of the falsity of the statement, but also his recklessness as to its truth, or his intent to injure the plaintiff. *Palmer v. Mahin*, 120 Fed. 737. See ODGERS, SLANDER AND LIBEL, 5 ed., 390. The weight of authority, including the principal case, holds that a plea of justification, if not proved, is evidence of malice in the original publication and hence aggravates damages. *Gorman v. Sutton*, 32 Pa. St. 247; *Krulic v. Pelcoff*, 122 Minn. 517, 142 N. W. 897. See *Coffin v. Brown*, 94 Md. 190, 199, 50 Atl. 567, 570. Many courts, however, hold that the plea must be found to have been introduced in bad faith to be given this effect. *Fodor v. Fuchs*, 79 N. J. L. 529, 76 Atl. 1081; *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839. It is submitted that only if so introduced is the plea logically probative of either a carelessness of truth or an intent to injure. Of course no action itself could be brought on the plea, because it is absolutely

privileged. *McGehee v. Ins. Co. of North America*, 112 Fed. 853. See ODGERS, SLANDER AND LIBEL, 5 ed., 242. And it might well be urged that the reason back of this privilege, *i. e.*, the freedom of a party to an action to make a defense, demands that the plea should not aggravate damages.

LIMITATION OF ACTION — NATURE AND CONSTRUCTION OF STATUTE — INABILITY TO DISCOVER BREACH OF WARRANTY PREVENTING RUNNING OF STATUTE. — A defendant pleaded a set-off based on a breach of warranty of goods sold. The breach was not discovered for a considerable time after delivery. The period prescribed by the Statute of Limitations had run since the delivery, but not since the discovery of the breach. *Held*, that the Statute runs only from the expiration of a reasonable length of time within which the defendant could have discovered the breach. *Sheehy Co. v. Eastern Importing & Mfg. Co.*, 43 Wash. L. R. 708 (D. C. App.).

When goods are sold under a warranty, the warranty is broken on delivery of inferior goods, and a right of action at once accrues to the buyer. *Vogel v. Osborne*, 34 Minn. 454, 26 N. W. 453. Ordinarily the Statute of Limitations begins to run simultaneously. But where the defect is revealed only after a lapse of time, an injured party may have his right of action barred before he is aware that he has such a right. Likewise, in warranties of title, the buyer may have to sue before being disturbed in possession in order to have his right of action, when his damages are purely speculative. These considerations have led some courts to adopt the view of the principal case. *Felt v. Reynolds Rotary, etc. Co.*, 52 Mich. 602, 18 N. W. 378; *Gross v. Kierski*, 41 Cal. 111. The weight of authority is, however, that the statutory period runs from the breach of the warranty. *Allen v. Todd*, 6 Lans. (N. Y.) 222; *Perkins v. Whelan*, 116 Mass. 542. See *Battley v. Faulkner*, 3 B. & Ald. 288. See 2 GREENLEAF, EVIDENCE, § 435. But where a defendant has fraudulently concealed the right of action the rule is usually lightened, although this result was not reached without some difficulty. *Gibbs v. Guild*, 9 Q. B. D. 59; *Sherwood v. Sutton*, 5 Mason (U. S.) 143. See 29 HARV. L. REV. 226. The basis of these cases is apparently an unwillingness to allow the defendant to profit by his own wrong. This would not, therefore, include the principal case, the result of which, though just, seems difficult to reach in view of the express wording of the Statute.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — COMMON-LAW ALTERNATIVE CLAUSE — EFFECT OF ABROGATION OF ASSUMPTION OF RISK. — An employee of the defendant railroad, who was hired for the purpose of repairing electrical apparatus, was killed by a shock sustained while at work on a defective insulator. The defendant, who was free from any fault in the accident, had not subscribed to the insurance clause of a Workmen's Compensation Act. By the Massachusetts Act (1911, Mass. Acts and Resolves, ch. 751, § 1), an employer who is not a subscriber loses the right to plead the "defense" of assumption of risk. The defendant is sued by the estate of the deceased. *Held*, that the plaintiff cannot recover. *Ashton v. Boston & M. R. Co.*, 109 N. E. 820 (Mass.).

There is a clear distinction between the assumption of the risks incident to the inherent dangers of a business and the assumption of those risks created by the evident negligence of the employer. *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460. See Note, 28 L. R. A. N. S. 1215; Buford, "Federal Employers' Liability Act," 28 HARV. L. REV. 163, 177. For in its first sense assumption of risk is simply indicative of the fact that the status of master and servant has not put the master in the position of an insurer by creating a relational liability without fault. See *Duffey v. Consolidated Block Coal Co.*, 147 Ia. 225, 228, 124 N. W. 609, 610. But in its second meaning the phrase indicates an affirmative defense protecting the employer in spite of his

negligence. *Martin v. Des Moines Light Co.*, 131 Ia. 724, 106 N. W. 359. In this sense the doctrine has no application to the facts of the principal case. Clearly a literal interpretation of the language of the Act sustains the court in limiting the scope of the expression to this latter meaning. Such, however, must have also been the intention of the legislature. For an earlier New York Act had been called unconstitutional because it established a relational liability without fault. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431. And it was to avoid this result that the Massachusetts legislature inserted this optional common-law remedy. See *Opinion of Justices*, 209 Mass. 607, 610, 96 N. E. 308, 315; RUBINOW, SOCIAL INSURANCE, 175. Therefore, to hold that the optional common-law remedy likewise established a relational liability without fault would be to defeat the very purpose of the legislature in providing the option.

MORTGAGES — PRIORITIES — PRIORITY OF SUBSEQUENT CREDITORS OVER BONDHOLDERS. — A receiver was appointed for the defendant railroad, and subsequently the bondholders brought suit to foreclose. The plaintiff intervenes, claiming priority to the bondholders for certain claims out of the proceeds of the foreclosure sale, on the ground that they arose from services which the plaintiff, as a connecting carrier, was legally bound to render to the defendant. *Held*, that these claims do not take priority over the lien of the bondholders. *Chicago, etc. R. Co. v. United States, etc. Trust Co.*, 225 Fed. 940 (C. C. A., 8th Circ.).

Current expenses of a railroad have a claim on gross earnings prior to that of the bondholders, on the ground that the creditors relied on such earnings rather than on general credit. *Virginia, etc. Coal Co. v. Central R. & B. Co.*, 170 U. S. 355. But only when the income has been diverted from the payment of current expenses to the improvement of the property may such claims be satisfied out of the *corpus*, in preference to the bondholders. *Burnham v. Bowen*, 111 U. S. 776; *Southern Ry. Co. v. Carnegie Steel Co.*, 76 Fed. 492. See 18 HARV. L. REV. 605. It has been stated that an exception exists where the preservation of the business requires immediate payment. *Milttenberger v. Logansport Ry. Co.*, 106 U. S. 286, 311; see dissent in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 190. Although the courts in the later cases recognize this exception, their refusal to apply it shows its narrow limits. *Thomas v. Western Car Co.*, 149 U. S. 95; *Gregg v. Metropolitan Trust Co.*, *supra*. See *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 98; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 298, 316. The plaintiff's claim in the principal case, therefore, suggests a new exception, which the court seems correct in denying. The plaintiff, having entered the business of a carrier voluntarily, can scarcely complain of the relational burdens it has thereby assumed, nor make such complaint the basis of a claim for a preference. Indeed, a preference to a common carrier has been held the less justified, because immediate payment is not necessary to secure continued service. *Carbon Fuel Co. v. Chicago, etc. R. Co.*, 202 Fed. 172.

MUNICIPAL CORPORATIONS — OFFICERS AND AGENTS — LIABILITY OF HIGHWAY CONTRACTOR FOR MISFEASANCE. — The defendant, a contractor working on county roads, negligently piled stones on the road without proper safeguards. The plaintiff sues for injuries to himself and team resulting therefrom. *Held*, that he may not recover. *Ockerman v. Woodward*, 178 S. W. 1100 (Ky.).

For a discussion of this case, see NOTES, p. 323.

NEGLIGENCE — DEFENSES — ILLEGAL CONDUCT OF THE PLAINTIFF. — A statute requires public officers to impound all cattle running at large in highways. MASS. R. L., c. 33, §§ 22, 23. The plaintiff's bull escaped into the highway and was there killed by the defendant's negligently driven street car.

Held, that the plaintiff can recover the value of the bull. *Carrington v. Worcester Consolidated St. Ry. Co.*, 109 N. E. 828 (Mass.).

Unlicensed automobiles are held in Massachusetts to be trespassers, and neither their owners nor persons riding in them can recover from negligent defendants. *Dudley v. Northampton St. Ry. Co.*, 202 Mass. 443, 89 N. E. 25; *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923. See *Bourne v. Whitman*, 209 Mass. 155, 171, 95 N. E. 404, 408. See 28 HARV. L. REV. 505. But bulls are apparently less trespassers than automobiles, though the only offense of the machine is the failure of its owner to pay a license tax, while the bull's very presence is in effect prohibited by the positive requirement that he be taken up. Indeed, it has been expressly stated by the Massachusetts court that the presence of cattle in the highway under such a statute is unlawful. See *Leonard v. Doherty*, 174 Mass. 565, 570, 55 N. E. 461, 462. The distinction cannot be explained by a lenience toward cattle, for in Massachusetts cattle trespassing on private property render their owners liable. *Lyons v. Merrick*, 105 Mass. 71. And even where by decision or statute this is otherwise, cattle straying upon private property are nevertheless trespassers and have only the rights of such. *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557; *Herold v. Meyers*, 20 Ia. 378. Cf. *Haughey v. Hart*, 62 Ia. 96, 17 N. W. 189. In many jurisdictions there is a duty of due care in active conduct owed to trespassers after their presence has come to the attention of the defendant. *Herrick v. Wixon*, 121 Mich. 384, 80 N. W. 117. In such jurisdictions, or in the absence of a rule holding an unlicensed automobile a trespasser as against lawful users of the highway, the decision in the principal case is right enough. *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577. Cf. *Davies v. Mann*, 10 M. & W. 546. But where actually made it seems to show a tendency, previously noticed, to regard persons who use automobiles as in some way deserving of less consideration than the remainder of mankind. See 28 HARV. L. REV. 91.

PARENT AND CHILD — AGREEMENTS CONCERNING CUSTODY — LIABILITY OF PARENT. — A father who had delivered his infant child to the plaintiff under an agreement that the latter should keep it until it came of age, took the child back before that time arrived. *Held*, that the plaintiff can recover on a *quantum meruit* for services actually rendered. *Gordon v. Wyness*, 155 N. Y. Supp. 162.

In determining disputes as to the custody of children, the court acts as *parens patriae* and regards the welfare of the child as the controlling consideration. *Kelsey v. Green*, 69 Conn. 291, 37 Atl. 679. When the interests of the child will best be promoted by leaving it with its foster parent, the father will not be allowed to take it back. *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. 639; *Peese v. Gellerman*, 51 Tex. Civ. App. 39, 110 S. W. 196; *Richards v. Collins*, 45 N. J. Eq. 283, 17 Atl. 831. However, when, as is usual, it is best for the child to have its father's care, his agreement to give the custody to another will not deprive him of the right to resume possession. *Wood v. Shaw*, 92 Kan. 70, 139 Pac. 1165. But if the agreement be regarded as valid, the father, when he rescinds it, must place the foster parent *in statu quo*. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 337, 343. And even if, as most courts hold, the agreement is invalid, the case falls within the principle that one who performs services for another with the latter's assent, can recover their reasonable value. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 11. Moreover, when a father fails to support his child, a stranger who supplies necessaries can recover from the father. *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722. Of course there can be no recovery by one who, when he conferred the benefit, intended it to be gratuitous. *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114; *Brown v. Tuttle*, 80 Me. 162. But in the

principal case, the plaintiff expected to receive compensation through the society of the child. Therefore, since his services under the agreement were not illegal or officious, he can recover on a *quantum meruit*.

PATENTS — INFRINGEMENT — USE BY GOVERNMENT. — Certain government officers drew up specifications for wireless apparatus for warships. These plans made it impossible to build such apparatus without infringement of the plaintiff's patent. The government advertised for bids and awarded the contract to supply the apparatus to the defendant. The patentee brings a bill to enjoin the carrying out of this contract. On a motion for a preliminary injunction the entire bill was dismissed. *Marconi Wireless Telegraph Co. of America v. Simon*, 54 N. Y. L. J. 671 (U. S. Dist. Ct., South. Dist. N. Y.).

Before 1910 a patentee had no relief for a governmental infringement of his patent unless a contractual obligation to pay for the same could be established. *Schillinger v. United States*, 155 U. S. 163; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552. This was owing to the fact that the United States had consented to be sued only in actions sounding in contract. See U. S. REV. STAT., § 1059. In 1910 a statute was passed permitting a patentee to recover just compensation in the Court of Claims in case the United States used his patent without license or lawful right. See 1 FED. STAT. ANN., 1912 SUPP. 286. This statute has been construed as establishing the right of the government to appropriate a license to use a patent as an exercise of the power of eminent domain. See *Crozier v. Krupp*, 224 U. S. 290, 305. Under this construction the appropriation by the government is no longer a tort with no remedy but a lawful taking, since compensation need not precede the taking. *Great Falls Mfg. Co. v. Garland*, 25 Fed. 521. Granting, then, that since 1910 the government may lawfully appropriate a license to use a patent, it should be permitted to do so through the means of an independent contractor since there is no substantial difference between appropriating a patent directly by government agents or indirectly by an independent contractor. There is no hardship on the patentee since he recovers just compensation in the Court of Claims.

PLEDGES — WRONGFUL SALE OF STOCK BY BANK PRESIDENT — LIABILITY OF BANK. — The plaintiff pledged stock to the defendant bank, giving the president of the bank authority to sell the stock in case the debt was unpaid when due. The latter, without notice to the plaintiff, fraudulently sold the stock for an inadequate price. *Held*, that neither the bank nor its president is liable in trover for the conversion of the stock, but that the latter is liable for the damages the plaintiff has actually incurred. *Lem v. Wilson*, 150 Pac. 641 (Cal. Dist. Ct. of App.).

No express authority is needed to enable the pledgee to sell stock pledged if the debt remains unpaid at maturity, and the sale is made after due notice to the pledgor, for an adequate price, and under conditions reasonably tending to safeguard the pledgor's interests. *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *Diller v. Brubaker*, 52 Pa. St. 498. See JONES, PLEDGES AND COLLATERAL SECURITIES, 2 ed., §§ 721, 722, 723. In the principal case the authority given by the plaintiff to the bank president waived none of these conditions of sale, and was merely an affirmation of the pledgee's common-law right. Again it did not constitute the president the plaintiff's agent to sell the stock, for the sale is for the benefit of the bank, not for the plaintiff. See MECHEM, AGENCY, § 1. Nor is the president made a trustee, for the plaintiff, and not he, has the legal title to the pledge *res*. See PERRY, TRUSTS AND TRUSTEES, 6 ed., §§ 1, 2. Then, since the sale was wrongful, it amounts to a conversion of the stock. *Dimock v. United States Nat. Bank*, 55 N. J. L. 296, 25 Atl. 926; *Content v. Banner*, 184 N. Y. 121, 76 N. E. 913. Technically, it is a conversion for which trover should not lie, since the pledgor has neither posses-

sion nor the right to possession, at the time of the conversion. *Halliday v. Holgate*, L. R. 3 Ex. 299. However, it is now generally held that the pledgor may sue in trover when the pledgee sells wrongfully after maturity, on the theory that the tortious act vests the right to possession in the pledgor. *Neiler v. Kelley*, 69 Pa. St. 403; *Feige v. Burt*, 118 Mich. 243, 77 N. W. 928; *King v. Boerne State Bank*, 159 S. W. 433 (Tex. Civ. App.). See 13 HARV. L. REV. 55; 18 *ibid.* 610. And since the sale was made by the president in the scope of his authority, and for the benefit of the bank, the latter should be liable in trover also. *Johnston Fife Hat Co. v. Nat. Bank of Guthrie*, 4 Okla. 17, 44 Pac. 192.

POST-OFFICE — USE OF MAILS TO DEFRAUD — WHAT CONSTITUTES "SCHEME OR ARTIFICE." — The defendant, as president of a corporation engaged in a legitimate business, mailed a fraudulent statement of its financial condition to a bank to induce a loan to the corporation. The use of the mail for any scheme or artifice to defraud or obtain money by false pretenses is unlawful. CRIM. CODE, § 215; 35 U. S. STAT. AT L. 1130. The defense was that this single transaction in connection with a legitimate business was not a "scheme or artifice" within the meaning of the statute. *Held*, that the defendant was guilty of a violation of the statute. *Bettman v. United States*, 224 Fed. 819 (C. C. A., 6th Circ.).

Until the latest amendment, this statute only provided against the use of the mails for a scheme or artifice to defraud. REV. STAT., § 5480; as amended, 25 U. S. STAT. AT L. 873. The underlying purpose of the statute was stated to be the broad one of reserving the mails to legitimate business. See *Horman v. United States*, 116 Fed. 350. Further, the phrase "scheme or artifice" received a very broad construction. *Durland v. United States*, 161 U. S. 306, 313; *United States v. Stever*, 222 U. S. 167, 173; *O'Hara v. United States*, 129 Fed. 551, 555. The amendment making criminal a scheme or artifice to obtain money by false pretenses considerably broadened the scope of the act. Misrepresentations of financial condition mailed to one that he might induce others to make loans relying upon those representations constitutes use of the mails for a scheme within the statute. *United States v. Young*, 232 U. S. 155. Also such single transactions as a blackmailing letter, or an attempt to obtain goods by mailing a worthless check in payment, are "schemes" within the statute. *Weeber v. United States*, 62 Fed. 740; *Harrison v. United States*, 200 Fed. 662, 665; *Charles v. United States*, 213 Fed. 707, 712. Even under the unamended statute a transaction apparently indistinguishable from that in the principal case was held to fall within the statute. *Scheinberg v. United States*, 213 Fed. 757. In view of the fact that the broad interpretation always given to this act was nevertheless followed by amendments extending its scope, the principal case seems necessarily correct.

QUASI-CONTRACTS — RESCISSION OF CONTRACT FOR SALE OF LAND BY PURCHASER — RECOVERY BY VENDOR FOR USE AND OCCUPATION. — A purchaser in possession under a contract for the sale of land, on the ground of a breach by the vendor, rescinded the contract and recovered back the part payment he had already made, but no interest thereon. The vendor sues for the value of the use and occupation of the premises. *Held*, that he cannot recover. *Castle v. Armstead*, 168 App. Div. (N. Y.) 466.

It is well settled that an action for use and occupation lies only where there is the "relation of landlord and tenant" between the parties. 2 TAYLOR, LANDLORD AND TENANT, 9 ed., § 636. Some courts construe this to exclude cases where the relation is that of vendor and purchaser. *Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Ankeny v. Clark*, 148 U. S. 345, 359. But the better view is merely that the defendant must have been in possession in acknowledged subordination to the plaintiff's title. *Clark v. Green*, 35 Ga. 92. This is a necessary premise for those cases, representing the weight of authority, which

allow a recovery by a vendor when the failure of the contract is due to some fault of the purchaser. *Woodbury v. Woodbury*, 47 N. H. 11. See 2 WARVELLE, VENDORS, 2 ed., § 876. However, where the vendor is at fault, he is generally not allowed to recover. *Hough & Wood v. Birge*, 11 Vt. 190. It would seem more equitable to make recovery depend on the usual principles of unjust enrichment, rather than on the fault of either party, and some cases adopt this view. *Allen v. Talbot*, 170 Mich. 664, 669, 137 N. W. 97, 98; *Jones v. Grove*, 76 Wash. 19, 22, 135 Pac. 488, 489. Thus the result reached in the principal case is justified by the fact that the defendant received no interest on the purchase price, which may therefore be balanced against the plaintiff's claim for the value of the use and occupation. *Ohio Valley Trust Co. v. Allison*, 243 Pa. St. 201, 89 Atl. 1132. See *Grainger v. Jenkins*, 156 Ky. 257, 259, 160 S. W. 926, 928.

RESTRAINT OF TRADE — COMPULSORY SALES — IMMATERIALITY OF MOTIVE IN REFUSING TO SELL. — The plaintiff maintained a system of retail stores. The defendant, manufacturer of "Cream of Wheat," sold to plaintiff at wholesale rates on condition that plaintiff would resell only at prices requested by defendant. Upon his refusal to maintain the retail price, defendant declined further to deal with plaintiff and requested that the jobbers to whom he sold do likewise. The plaintiff brought suit in the Federal District Court praying that the price maintenance scheme be declared a violation of the anti-trust laws, and that defendant be restrained from "cutting off the said plaintiff's supply" of "Cream of Wheat." On appeal to the Circuit Court of Appeals, the refusal of the lower court to grant a preliminary injunction was affirmed. *The Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (not yet reported). The court brushes aside the plaintiff's contention that the defendant's system of price maintenance was in restraint of trade with the remark that the business of the defendant was not a monopoly, and bases its decision on the ground that the common-law right of a trader to deal with whom he pleased, for what reason he pleased, has not been altered either by the Sherman Law or the Clayton Act. For a discussion of the principles involved in attempted compulsory sales and price maintenance, see 29 HARV. L. REV. 77.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO RULE — LIMITATION FOR LIFE EXPECTANT UPON ESTATE VOID FOR REMOTENESS. — An antenuptial settlement provided that property should be held in trust for the settlor for life, then for his wife for life, then for the children of the marriage who should reach the age of twenty-five, then for the settlor's sisters for life, with further trusts declared. Held, that the trust in favor of the sisters is void for remoteness. *Re Hewett's Settlement*, 113 L. T. R. 315 (Ch. Div.).

The rule, that the remoteness of one estate avoids all subsequent estates that are expectant on it, is clear law in England. *Beard v. Westcott*, 5 B. & Ald. 801; *Re Thatcher's Trusts*, 26 Beav. 365. The court in the principal case felt bound by these authorities, though considerable criticism has been directed at this rule. See GRAY, PERPETUITIES, 2 ed., §§ 251 *et seq.* See *Crozier v. Crozier*, 3 Dr. & War. (Ire.) 353, 369. Since the gift over, though expectant on an estate which is void for remoteness, runs to a person in being, it must necessarily vest within the prescribed period, and is therefore no violation of the rule against remote future interests. See GRAY, PERPETUITIES, 2 ed., § 252; 18 HARV. L. REV. 232. This reasoning is accepted in cases involving powers of appointment. *Crozier v. Crozier*, 3 Dr. & War. (Ire.) 353. The rule of the principal case is supported only on the unjustified assumption that in the absence of an express provision the limitations shall be construed as alternative, and the result thus reached more nearly conforms to the intent of the testator or settlor. See *Monypenny v. Dering*, 2 DeG. M. & G. 145, 182. It is to be

hoped that the American courts, in which this situation has apparently never arisen, will not follow this illogical rule.

SCHOOLS AND SCHOOL DISTRICTS — DIPLOMA — MANDAMUS FOR DIPLOMA FOR UNQUALIFIED STUDENT ALLOWED TO TAKE PART IN GRADUATION EXERCISES. — Although the plaintiff had not qualified for graduation, the school board, in order to save his parents from humiliation, allowed him to take part in the graduation exercises, for which he bought a class button and the class flower. The real diplomas had not yet come from the printer, and he with the others was given a dummy diploma. Later the school board refused to give him a real diploma, and he demands a mandamus to compel them to. *Held*, that he is not entitled to his writ. *Sweitzer v. Fisher*, 154 N. W. 465 (Ia.).

If a student's record has been determined to be satisfactory, and the duty of giving a degree has become ministerial, he is entitled to a mandamus to compel the school board to graduate him. *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871; *State v. Lincoln Medical College*, 81 Neb. 533, 116 N. W. 294. Cf. *People v. Bellevue Hospital Medical College*, 60 Hun 107, 14 N. Y. Supp. 490. But the determination of his record is for the school board and a mandamus will not issue to control the exercise of so discretionary a power. *People v. New York Law School*, 68 Hun 118, 22 N. Y. Supp. 663; *People v. New York, etc. College*, 20 N. Y. Supp. 379; *Niles v. Orange Training School*, 63 N. J. L. 528, 42 Atl. 846. As the plaintiff's record, in the principal case, had in fact been determined to be unsatisfactory, his claim can only be supported on the ground that the school board, after allowing him to participate in the forms of graduation and to incur expense thereby, cannot now be heard to say that he was unqualified to do so. However, as there is a public interest in having degrees represent a certain standard of attainment, it is submitted that not by estoppel, nor even by express contract, should a school board be able to bind itself to issue a degree to an unqualified student, or be bound by a degree so issued. See *City of Joliet v. Werner*, 166 Ill. 34, 41, 46 N. E. 780, 782. There is a further ground for the decision in the feasibility of an appeal to the county superintendent, for mandamus is essentially an extraordinary remedy. *Marshall v. Sloan*, 35 Ia. 445; *Stockton v. Board of Education*, 72 N. J. L. 80, 59 Atl. 1061.

SURETYSHIP — SURETY'S DEFENSES — WHETHER AFFECTED BY RISE OF SURETYSHIP AS BUSINESS UNDERTAKING. — The defendant surety company became surety on a bond for a contractor, who promised to pay for all materials used by him. The plaintiff, who furnished materials, accepted from the contractor short-time notes and renewals of them. On the contractor's failure to pay the notes, the plaintiff sued the surety company on the bond. *Held*, that the defendant is liable. *People v. Traves*, 154 N. W. 130 (Mich.).

A corporation obtained a loan from the plaintiff, and gave as security a warehouse receipt for goods worth more than the amount of the loan, and notes made by the corporation, and signed by its five stockholders as indorsers. The plaintiff surrendered the warehouse receipt to the corporation, and on its failure to repay the loan, sued two of the stockholders on the notes. *Held*, that the defendants are liable. *Mercantile Trust Co. v. Donk*, 178 S. W. 113 (Mo.).

For a discussion of these cases, see NOTES, p. 314.

TAXATION — JOINT STOCK COMPANIES — LIABILITY UNDER FEDERAL CORPORATION TAX. — The plaintiff brings suit as president of the United States Express Company, a joint stock company of New York, to recover money paid as taxes under the Federal Corporation Tax Law which provides that "every corporation . . . joint stock company or association, organized

for profit and having a capital stock represented by shares . . . now or hereafter organized under the laws of the United States or of any state or territory of the United States" shall be subject to the tax. *Held*, that the Express Company was properly taxed. *Roberts v. Anderson*, 226 Fed. 7 (C. C. A., 2nd Circ.).

It seems clear that a joint stock company may be taxed under the statute if otherwise within its terms. See *Flint v. Stone Tracy Co. (The Corporation Tax Cases)*, 220 U. S. 107, 145, 162; *Eliot v. Freeman*, 220 U. S. 178, 185. The question then remains whether the United States Express Company is organized under the laws of New York within the meaning of the act. Now it is clear that a joint stock company possessing only common-law powers is not organized under the laws of a state. *Eliot v. Freeman, supra*. But a New York joint stock company possesses in substance all corporate attributes save that of limited liability. See *Hibbs v. Brown*, 190 N. Y. 167, 177, 82 N. E. 1108, 1111; *People v. Wemple*, 117 N. Y. 136, 144, 22 N. E. 1046, 1047. And at least the power to sue and be sued in the name of one of the members is statutory and distinctively corporate. Cf. *Hybart v. Parker*, 4 C. B. N. S. 209, with *Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537. See 2 COOK, CORPORATIONS, 7 ed., §§ 503, 508. Since the company thus does business in a corporate capacity by reason of powers which it takes from New York laws, it would seem to follow that it is organized under those laws within the meaning of the act, and so is subject to the tax. *People v. Wemple, supra*. Cf. *Oliver v. Liverpool Ins. Co.*, 100 Mass. 531; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX: TAXATION OF FOREIGN REAL ESTATE EQUITABLY CONVERTED. — A testator domiciled in Illinois left realty in Illinois and in Ohio. He directed that all his property be sold and the proceeds distributed among legatees, some of whom were residents of Ohio. He appointed a resident of Ohio one of his executors, who took out ancillary administration there, and distributed the proceeds of the sale of the Ohio land among the legatees resident in Ohio. Illinois seeks to collect from the Illinois executor a tax on the succession to this property. *Held*, that it may not do so. *People v. Kellogg*, 109 N. E. 304 (Ill.).

A state cannot impose a tax upon the succession to real estate outside its territory. *In re Swift*, 137 N. Y. 77, 32 N. E. 1096; *Bittinger's Appeal*, 129 Pa. St. 338, 18 Atl. 132. But it is universally held that succession to personalty, no matter where it is located, may be taxed at the domicile of the decedent, because the state of actual *situs* of the property permits the law of the domicile to govern its descent and distribution. *In re Swift, supra*; *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623. See DOS PASSOS, INHERITANCE TAX LAW, 2 ed., § 46. This same situation exists in the case of equitable conversion, for though the state of the *situs* governs the descent of the legal title by its own law, it permits the law of the domicile to determine the succession to the proceeds. *In re Piercy*, [1895] 1 Ch. 83; *Jenkins v. Guarantee Trust, etc. Co.*, 53 N. J. Eq. 194, 32 Atl. 208. It would seem, then, that the state of the domicile has power to tax succession to the proceeds in such a case, as in any case of succession to personal property, but outside of Pennsylvania no attempt to levy such a tax has been made. *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350; *In re Swift, supra*, 88. See *McCurdy v. McCurdy*, 197 Mass. 248, 250, 83 N. E. 881, 882. In the Pennsylvania cases, the property was actually brought into the state of the domicile for the purpose of distribution and this limit to the broad doctrine as there expounded has been suggested. *Miller v. Commonwealth*, 111 Pa. St. 321, 2 Atl. 492; *Williamson's Estate*, 153 Pa. St. 508, 26 Atl. 246; *Dalrymple's Estate*, 215 Pa. St. 367, 64 Atl. 554. See *Hale's Estate*, 161 Pa. St. 181, 183, 28 Atl. 1071, 1072. The

principal case is not within the doctrine as thus limited, and the result is no doubt equitable, for at no time did the Illinois executor have power to collect the tax out of the proceeds that were distributed in Ohio. Yet this consideration has had no weight where the question was simply that of succession to personal property. *In re Hodges*, 150 Pac. 344 (Cal.).

TORTS — NATURE OF TORT LIABILITY IN GENERAL — EFFECT OF BAD MOTIVE IN PERSUADING TENANTS NOT TO DEAL WITH THE PLAINTIFF. — The defendant, without any coercion, induced his tenants, who had short term leases, to cease using electric power furnished by the plaintiff. The defendant did this because he was an enemy of one of the plaintiff's officers. The plaintiff sues to enjoin this action of the defendant. *Held*, that the injunction will be denied. *People's Land & Mfg. Co. v. Beyer*, 154 N. W. 382 (Wis.).

By the sounder view, damage caused intentionally is *prima facie* actionable. See 29 HARV. L. REV. 86. There is authority that this rule does not apply to the use of one's own property. *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Letts v. Kessler*, 54 Oh. St. 73, 42 N. E. 765. But the better view is that a defendant should be held liable, even in such cases. *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381. See *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945. Again, by the trend of present authority, a defendant, who, with the sole motive of injuring the plaintiff, has indirectly injured him by influencing the conduct of third persons, is held liable even though no breach of contract was involved. *Lumley v. Gye*, 2 El. & Bl. 216; *Walker v. Cronin*, 107 Mass. 555; *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946; *Lewis v. Bloede*, 202 Fed. 7. *Contra*, *Passaic Print Works v. Ely, etc. Co.*, 105 Fed. 163. No reason is perceived why the same result should not follow when the defendant makes use of his position as a landlord to injure the plaintiff indirectly, without justification. See *Chesley v. King*, 74 Me. 164. Nor can it be argued that the defendant in the principal case had the undisputed right of an owner to employ on his land the people most acceptable to him, for however short the leases, it is clear that he had conveyed away the present rights of ownership at least to such an extent that the plaintiffs were not his but his tenants' employees. Hence if he acted solely from a desire to injure the plaintiff, the injunction should have been granted. However, if he acted to any extent with the motive of protecting his reversionary interest, the plaintiff was rightly refused relief.

TRIAL — VERDICT — JOINT TORTFEASORS: SEVERANCE OF DAMAGES. — A passenger was hurt in a collision between a street car and a train. He sued both companies. The jury found a verdict against both defendants, assessed damages at \$10,000, and ordered that one defendant pay \$6,000 and the other \$4,000. The trial court entered judgment for \$10,000 against both. *Held*, that the judgment must be reversed and a new trial had. *Rathbone v. Detroit United Ry.*, 154 N. W. 143 (Mich.).

The defendants here are joint tortfeasors. *Mathews v. Delaware L. & W. R. Co.*, 56 N. J. L. 34, 27 Atl. 919. This being so, they are both liable for all the damage suffered by the plaintiff; the jury must simply find that damage, and, in the absence of statute, cannot apportion it among them. *Hill v. Goodchild*, 5 Burr. 2790. *Contra*, *White v. M'Neily*, 1 Bay (S. C.) 11. The trial court should enforce this rule, when necessary, by sending back the jury to bring in a proper verdict; there is then no further difficulty. *Fuller v. Chamberlain*, 11 Met. (Mass.) 503; *Washington Market Co. v. Clagett*, 19 App. D. C. 12; *Olson v. Nebraska Telephone Co.*, 87 Neb. 593, 127 N. W. 916. When this is not done it leaves the verdict irregular. But ordinarily a verdict that decides the issue is not vitiated by the addition of something beyond the jury's power to add. The unauthorized addition, if fairly severable from the other findings, may be stricken out as surplusage and judgment entered on the rest. *Staller*

v. *United States*, 157 U. S. 277; *Southern Ry. Co. v. Oliver*, 1 Ga. App. 734, 58 S. E. 244. Cf. *Barth v. State*, 18 Conn. 432. But in split verdict cases there is sometimes simply a finding of several sums against separate defendants, and it is then felt that the jury have not clearly found the plaintiff's damages to be an amount larger than the largest sum found against any particular defendant. He can therefore have judgment only for that sum, though the judgment is sometimes against all the defendants and sometimes against the particular defendant only. *O'Shea v. Kirker*, 8 Abb. Pr. Rep. 69; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Halsey v. Woodruff*, 9 Pick. (Mass.) 555. See *Crawford v. Morris*, 5 Gratt. (Va.) 90, 103. Even when there is a finding of the total and then a separation, some courts treat the case like those just discussed. *Schultz v. Hunter*, 2 Browne (Pa.) 233. If the plaintiff treats it in this way and remits damages accordingly, there can be no objection. *Warren v. Westrup*, 44 Minn. 237, 46 N. W. 347; *Nashville Ry. & Light Co. v. Trawick*, 118 Tenn. 273, 99 S. W. 695. But if he claims judgment against all the defendants for the total, it is submitted that he ought to have it. His damages clearly have been found equal to the total, the rest of the verdict is an unauthorized addition fairly severable from the prior finding, and ought to be discarded as surplusage. *Currier v. Swan*, 63 Me. 323; *Westfield, etc. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *San Marcos, etc. Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151. See *Post v. Stockwell*, 34 Hun (N. Y.) 373, 374. *Contra, Whitaker v. Tatem*, 48 Conn. 520. Since the damages are measured solely by the extent of the plaintiff's injury, to argue, as the court here does, that the amount found would have been different had the jury realized that the defendants must be jointly liable, is to assume that understanding of the law would make the jury change its conclusions as to fact, an assumption not to be indulged. See *Raphael v. Bank of England*, 17 C. B. 161.

TRUSTS — RESTRAINTS ON ALIENATION OF *CESTUI'S* EQUITABLE LIFE ESTATE — EFFECT OF ACQUISITION OF REMAINDER BY *CESTUI*. — A fund was left to trustees to hold for the plaintiff's life and apply the income to his use, the principal after his death to revert to the testator's estate. The residuary legatees who inherited this reversionary interest sold it to the plaintiff who now prays for a decree dissolving the trust. The decree was refused. *Dale v. Guaranty Trust Co.*, 773 N. Y. Comb. 601 (App. Div., 1st Dept.).

The trust described fell within the New York statute declaring the *cestui's* interest in an income to be applied to his use for life to be inalienable. NEW YORK PERSONAL PROPERTY LAW (CONSOL. LAWS, ch. 41 [LAWS OF 1909, ch. 45], § 15). Authorities differ as to the nature of the reversionary interest. The trustees may be regarded as possessing the absolute legal title, the plaintiff having an equitable life estate and the acquired equitable reversion in fee. See 1 PERRY, TRUSTS, 5 ed., § 318. Secondly, it is suggested that the trustees have an estate for the plaintiff's life, followed by a legal reversion in fee held by the plaintiff. See *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81, 85; *Nicoll v. Wakworth*, 4 Denio (N. Y.) 385, 390; *Moore's Estate*, 198 Pa. St. 611, 612. If the *cestui* here acquired an equitable reversion, his life estate could not merge therein in violation of the statute, so far as to give him an alienable equitable fee. See *Moore's Estate, supra*. But if such a merger were possible and the life estate extinguished, then by the rule of common law the *cestui* could force the trustee to transfer to him the legal life estate. *Inches v. Hill*, 106 Mass. 575. See 2 PERRY, TRUSTS, 5 ed., § 816 a. On the other hand, if the *cestui* acquired a legal reversion, no question of merger could ever arise, for there can be no fusion of estates of dissimilar nature. *Moore's Estate, supra*. In such case the plaintiff prays the dissolution of an active trust without any justification. By a former New York statute, when a *cestui* acquired the remainder or a part thereof, he could release his life interest to himself, where-

upon the trustee's legal estate would cease. *NEW YORK PERSONAL PROPERTY LAW* (GEN. LAWS, ch. 47; LAWS OF 1897, ch. 417). This provision, however, was omitted from subsequent legislation, as was logically necessary, for if New York is to support its spendthrift trust doctrine, it should not maintain a legislative loophole, especially since such a policy might give remainders an inflated value.

BOOK REVIEWS

PATHOLOGICAL LYING, ACCUSATION, AND SWINDLING. By William Healy and Mary Tenney Healy. Boston: Little, Brown, and Company. 1915. Criminal Science Monograph No. 1, Supplement to the *Journal of Criminal Law and Criminology*. pp. ix, 286.

At the present time there is a healthful tendency in the community to try to understand some of the phenomena which heretofore have been considered only by the penologists. It is high time that a scientific attempt be made to explain delinquencies. Criminology, after all, is not an exclusively "legal" subject. In many of its aspects it is a borderland, or rather a land of concurrent sovereignty, which concerns the judges, lawyers, social workers, administrators, as well as physicians, psychiatrists, and criminal anthropologists.

This volume is the first of a series of monographs authorized by the American Institute of Criminal Law and Criminology and published as supplements to the *Journal of Criminal Law and Criminology*. As stated in the editorial announcement, this series is to include researches in various departments of knowledge upon which criminology draws, such as psychology, anthropology, neurology, education, sociology, and law, and it is anticipated that the series will stimulate the study of problems of delinquency.

The object of the authors appears, from the Preface as well as from the contents of the book, to be to classify the offenders according to typical characteristics. The material presented consists of case studies made by the Juvenile Psychopathic Institute of Chicago, of which Dr. William Healy is the Director. The book is divided into six chapters. The first is an introductory one, giving definitions and delimiting the problem; the second considers the literature on the subject, which is scanty; the third discusses twelve case studies of pathological lying and swindling; the fourth contains nine case studies of pathological accusation; in the fifth, six case studies are detailed as borderline mental types. The final chapter sums up the study.

The subject of pathological lying and swindling has only recently been considered as a psychiatric problem. The contribution to the subject, in this volume, consists largely in adding to the casuistic literature on the special topic without offering much in the way of explanation of the etiology or the pathology of this condition, or, in consequence, any very definite points for guidance in treatment. Dr. Healy is well known as a believer in intensive case study, paying great attention to all externals of personality.

The definition of pathological lying given in the introductory chapter is as follows: "Pathological lying is falsification entirely disproportionate to any discernible end in view, engaged in by a person who, at the time of observation, cannot definitely be declared insane, feeble-minded, or epileptic." This is, in a few words, the underlying idea of the entire volume. According to this, "the pathological liar forms a species by himself, and as such does not necessarily belong to any of the larger classes of epilepsy, insanity, or mental defect." Pathological accusation is similarly defined as a false accusation indulged in apart from any obvious purpose.

The authors, realizing that pathological lying is a type of delinquency, and "following the rule that for explanation of conduct tendencies one must go to the youthful beginnings," have attempted to gain the fullest possible information about developmental and family history, early environment, and early emotional experiences. It is unfortunate that the authors have refrained from publishing the mental tests and other exact details. Just that massing of detail is what is wanted. Largely through this lack the accounts of the cases are literary rather than scientific. The information obtained, with few exceptions, such as the results of the Aussage test and the summary of the results of the mental tests, are such as could be obtained by any social worker.

A characteristic statement of the authors, which will give an idea of their attitude toward this work, is the following, from page 13 of the introductory chapter: "We confess to no particular pleasure in writing up this rather sordid material; the task is undertaken because such studies offer the only way to gain that better understanding which is necessary for adequate treatment of special types of human beings." It might seem strange to those who regard delinquency and mental disease with objective equanimity that it is necessary to characterize the material as "sordid," and that after the great amount of time devoted to these cases, and after careful study, there should not have been any particular pleasure in writing up the results. Perhaps the reason for this is that, after all, the book contains merely a summary of work done without any new point of view or new information.

As a contribution to the casuistic literature the volume will prove of value in that a series of cases are carefully recorded in regard to their social histories, their environmental difficulties, their heredity, and in regard to the impression they made on so experienced and keen an observer as Dr. Healy.

It is a question whether one is justified at present in drawing the sharp line that the authors do between the pathological liar and swindler and more pronounced forms of disease such as epilepsy, insanity, and mental defect. In the chapter on borderline mental types the authors state that they keep these cases separate in order to emphasize that pathological lying by an insane person does not make a pathological liar in the true sense. "We should hesitate, therefore," they go on to say, "to give in legal form a verdict of insanity in several of these borderline cases we cite. They are very difficult to classify, and the question of responsibility called for sometimes in court work is unanswerable."

Pathological lying and swindling is considered in itself a borderline condition somewhere between normality and mental disease. A well-known experience with such conditions is that it is not always possible to evaluate the significance of individual traits unless, as in the case of disease, the symptoms become exaggerated and the clinical picture becomes clear.

In the analysis of the cases made by the authors, one finds emphasis laid upon habit formation, lack of parental correction, early experience with lying, mental conflict, early sex experiences and habits, and home conditions. As an inventorial method, this may have value. From a point of view, however, of diagnostics, it is difficult to correlate the facts of this group with the precision that is demanded of the physician, so as to base very definitely upon them prognosis and treatment. The authors are naturally very modest in dealing with the latter points.

Altogether the book is disappointing to those who realize the importance of the subject and who had hoped for more definite help from the authors. The methods employed are, with the exception of the mental tests, but an elaboration of the methods that have been used by the laity since early times. One misses the careful laboratory tests for the will, which have been carried out in similar cases by Kraepelin.¹

¹ 4 KRAEPELIN, *PSYCHIATRIE*, 8 ed., 2067.

The insistence of the authors that pathological lying and swindling forms a group quite distinct from psychotic and epileptic conditions does not help our advance. On the contrary, the only hope for ultimate progress in this field of research lies in the possibility of correlating the phenomena here observed with those recognized elsewhere. It is important to apply the point of view of the pathologist in dealing with these subjects, that is to say, the significance of mild disturbances may become clear and reasonable in the light of knowledge obtained in the study of severe variations from the normal. Nearly all that we know about physiology of the human body has been obtained in studying exaggerated conditions produced either spontaneously or experimentally. In the field of psychiatry the experimental method has so far been inapplicable. The methods of the psychologists have been applied as far as possible. These methods, however, are largely introspective. In psychiatric research we are therefore dependent upon such experiments as nature provides spontaneously. It is left to our ingenuity to find the correlations.

We are probably still far from this desired end. In the meanwhile, those who are wise will refrain from superficial judgments and will endeavor to explain delinquency in its various forms as a manifestation of the same fundamental causes that operate in other and better recognized pathological conditions.

HERMAN M. ADLER.

THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE according to the Hanafi, Malavi, Shafi'i and Hanbali Schools. By Abdur Rahim, M.A., Judge of the High Court of Judicature at Madras. London: Luzar & Co. 1911. pp. xvii, 443.

PRINCIPLES OF MUHAMMADAN LAW. An essay at a Complete Statement of the Personal Law Applicable to Muslims in British India. By Faiz Baruddin Tyabji, M.A., Officiating Judge, High Court, Madras. Bombay: D. B. Taraporevala Sons. 1913. pp. xxxvii, 711.

HINDU LAW, A Treatise. By P. R. Ganapathi Iyer, B.A., B.L., High Court Vakil, Madras. Vol. I. General Principles and Marriage. Madras: Thompson & Co. 1915. pp. xlviii, 718.

These books on the personal law of Mohammedans and Hindus, as administered in British India, have, one need not say, no interest for the practising lawyer in this part of the world. But they contain much that cannot but be of significance to the student of the science of law who would keep abreast of the march of that science in the world of to-day.

The work of Mr. Justice Abdur Rahim is of special interest as indicating what might be called a humanist movement in Anglo-Mohammedan law. He points out that the book of chief authority upon Mohammedan law has been studied in India, not from the original Arabic writings, but from an English version in which it was frequently impossible for the translator to find words to convey the exact legal significance of technical Arabic expressions. Moreover the author of the Hedaya assumed that the reader was familiar with the principles of Mohammedan legal science and with the Koran and the Hadith. Thus, we are told, and it is quite credible, the translator's way of stating the arguments of the classical Mohammedan jurists "has at times led to the misapplication of their *dicta*." One is reminded at once of the situation in the modern Roman law when the Humanists in the sixteenth century and the Historical School in the nineteenth century set up the cry of "back to the texts," which had been overlaid by the gloss or pushed aside by the *usus modernus*. In the same spirit Mr. Justice Abdur Rahim takes us to the classical texts.

Nor is this mere pedantry or mere worship of the past in the one case more

than in the other. Hanifa, and, in a lesser degree, Malik, Shafi'i and Hanbal, were jurists of a high order. The method of analogical deduction, the theory of juristic equity and the doctrine of consensus of opinion which he developed, were worthy of the Roman jurists and indeed did for a slender store of jural materials much the same service which interpretation and natural law in the hands of the Roman jurisconsult did for the narrow and arbitrary rules of the *ius strictum*. The student of universal history will welcome the clear and well-written statement in English of the development of juristic science during the Arabian hegemony and of the stages by which it led to the Anglo-Mohammedan law of to-day which Mr. Justice Abdur Rahim has given us.

Mr. Justice Tyabji has a different purpose. His endeavor is to expound the Mohammedan law, as applied in India to-day, dogmatically in the form of a code, a method which Sir James Stephen made familiar in English law and one which Mr. Spencer Bower has been employing more recently with marked success. Except as another example of the possibilities of this mode of exposition the American lawyer has no concern with it. It should be said, however, that the work seems to have been well done and shows that systematic method has made notable progress in Indian legal literature. The tendency to appeal to the classical texts, which had full scope in the academic lectures of Mr. Justice Rahim, can find few opportunities in a dogmatic exposition. Yet here also it is manifest in more than one spot and is a good augury of independent legal thought in a people who are showing a great natural aptitude for the law.

Hindu law appears to afford less opportunity for a humanist movement. The great Arabian jurists were lawyers through and through. The authoritative texts by which they were bound were not many and were so elastic that juristic science had full scope. On the other hand the Hindu lawyer has to deal with inspired or sacred texts that go into great detail. Hence Mr. Ganapathi Iyer's book has much less interest for the student of comparative law and universal legal history. Moreover his English legal training has led him to take Austin's Jurisprudence and Maine's Ancient Law for something like sacred texts in jurisprudence, although he does reject the view of the latter in connection with the question whether Manu sets forth a system of law that was ever actually administered.

The reviewer cannot pretend to be competent to pass upon the merits of these works. But as one compares them with the Anglo-Indian law books of a generation ago he cannot but perceive that the native lawyers in India have been making rapid progress and that a legal juristic development is going on of which students of jurisprudence must take account.

ROScoe POUND.

THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD. By Edwin M. Borchard. New York: The Banks Law Publishing Company. 1915. pp. xxxvii, 988.

This is an unusually interesting book, partly because of its timeliness and partly because of its clearness. The subject is a broad one; and even the subtitle, "The Law of International Claims," does not indicate the number of topics here brought together.

That the discussion is timely and clear is shown by the following passages: "The weaker countries of Latin America, knowing the advantages under which diplomatic protection has placed aliens, have in their municipal laws, constitutions, and treaties emphasized the legal equality which exists as between national and alien. Relying upon this presumably liberal doctrine of complete equality, the Latin-American states insist upon the application of the general principle that the alien is bound by the local law, and that the propriety of their conduct toward resident foreigners is to be tested by their municipal

laws. The Pan-American conferences of 1889 and 1901 passed formal resolutions, which subsequently found their way into constitutions and statutes, to the effect that foreigners have the same civil rights as the citizens of the nation and that the Latin-American states have not, nor do they recognize in favor of foreigners, any other obligations and responsibilities than those which by their laws they have toward their own citizens. . . . The United States has vigorously opposed the attempt of the Latin-American countries to pass upon the scope of their international duty. . . . The principle that equality of treatment between nationals and aliens releases a state from pecuniary responsibility for injury to aliens is conditional upon the fact that its administration of justice satisfies the standard of civilized justice established by international law. Foreign states, however, undertake to judge for themselves as to the local state's compliance with international standards — a defect in the system which arbitration has done much to remedy. The United States has never taken the position that one who acquires a residence in a foreign country does so at his peril and assumes the risk of ill-treatment or injury identically with citizens. . . . One reason why the alien is not bound to submit to unjust treatment equally with nationals, against which the national has no judicial redress, is because the latter is presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards of the rights of the citizen. For this reason diplomatic interposition may be invoked by the alien for the enforcement of his rights" (§ 44).

Topics peculiarly interesting in the light of the present European war, and perhaps on that account inserted in a treatise dealing primarily with citizens abroad, include the whole subject of belligerent and private rights in time of war, requisitions, contributions, and neutral obligations (§§ 98-108), and the nationality of vessels (§§ 207-209), unneutral conduct, contraband, blockade, and the like (§§ 351-368).

This enumeration of some subjects just now of special consequence fails to indicate the book's more permanent value; and as there has been substantially no predecessor in the field covered by the title "The Diplomatic Protection of Citizens Abroad," the student and the practitioner may find it useful to know that among the matters treated — many of them not easily found elsewhere — are these: "temporary allegiance" of aliens (§ 61), dual and no nationality (§ 11), citizens in international and in constitutional law (§ 12), status of foreign corporations (§ 23), right of excluding aliens (§ 26), expulsion (§§ 27-33), subjection to territorial law (§ 41), extraterritoriality (§ 43), aliens in war (§ 46), mob violence (§§ 89-92), civil war injuries (§§ 93-96), the Drago doctrine (§ 119), denial of justice (§§ 127-130), method of presenting a private claim (§ 137), consular administration of decedents' estates (§ 166), the backward countries of near and far East (§ 168), extraterritorial protection (§§ 180-182), consular service (§ 184), naturalized citizens abroad (§ 199), occasional protection of foreigners (§§ 201-203), American seamen (§ 206), passports (§§ 214-220), international effects of naturalization (§§ 231-242), domicile and declaration of intention (§§ 243-252), dual nationality (§§ 253-261), married women and widows (§§ 263-268), children (§§ 269-273), partnerships and corporations (§§ 274-282), heirs and administrators (§§ 284-289), instructions for claimants against foreign governments (§§ 303-304), consular registration of citizens (§§ 311-313), expatriation (§§ 315-333), the Calvo clause (§§ 371-378), failure to exhaust local remedies (§§ 381-383).

The annotation is voluminous, and so are the bibliographies (pp. xxvii-xxxvii, 865-927).

EUGENE WAMBAUGH.

ENGLISH COURT HAND, A.D. 1066 TO 1500. Illustrated chiefly from the public records. By Charles Johnson and Hilary Jenkinson. In two parts. Part I: Text, pp. xlviii, 250; Part II: Frontispiece and xlv Plates. Oxford: Clarendon Press. 1915.

A work worth doing and wonderfully well done. Those of us who have tried to decipher the court hand of the later middle ages without help from those skilled in the art have sought in vain for books which would really clear up difficulties. A short study of this book should enable one to read any court-hand manuscript sufficiently accurately for ordinary purposes.

The text may be divided into three parts. The first is a general sketch of the development of court hand, a description of methods of abbreviation, a list of common abbreviations and of ligatures, hints on transcription, a classification of documents written in court hand, and a bibliography. This part is clearly written, and is a sufficient though concise introduction to the reading of court-hand manuscripts. The second part is a history of the form of the separate letters, abbreviations and signs, numerals and punctuation and paragraph marks. This part is most valuable. Typical letter-forms, separated from their context, are so brought together that the development of form can be seen, and the typical forms of a given time may be distinguished from later and earlier forms. The reproduction of the forms is made with great clearness, and it is quite apparent that in an obscurely written bit the most welcome help could be had by comparison with these type-forms. The third part consists in a transcription of the documents which are given in facsimile in the volume of plates.

This second volume of plates is one of the best — may the reviewer not speak in superlatives, and say the very best — facsimile reproductions of manuscripts extant, not even forgetting the wonderful reproduction of the Florentine manuscript of Justinian's Digest. Both in line and in color the plates leave nothing to be desired. The documents are well selected to give a complete picture of court hand. They are charters, writs, exchequer rolls, plea rolls, fines, deeds, bonds, memoranda, and letters — all the current writings of the time.

A study of the plates, with the help of the text, would certainly enable one to read any ordinary manuscripts of the middle ages, and to check the transcription of another. What can we do but be grateful for this luxurious tool, and hope for time to use it? Each part may be procured separately, but who, having one, could bear to lack the other?

J. H. BEALE.

A SKETCH OF ENGLISH LEGAL HISTORY. By Frederic W. Maitland and Francis C. Montague. Edited with notes and appendices by James F. Colby. New York and London: G. P. Putnam's Sons. 1915. pp. x, 229.

Professor Colby has performed a service in collecting in this little book articles by Maitland and Montague, which have appeared scattered through Traill's *Social England*, and in arranging them to form a connected history of English Law. Occasionally he has added in brackets extracts from Jenks' short history and from Pollock and Maitland's larger work in order to aid the continuity. But these additions are few. More valuable are the editor's own list of readings which follow each chapter. They are well chosen, and, while not exhaustive, are useful to the law student who is seriously investigating legal history. For these short essays are really of more value to the layman than to him. In 187 pages one can give but a very brief outline of our system of law. Necessarily it is the machinery by which the law was made that is emphasized, not the development of law in particular internal branches.

Thus we find that Maitland's contribution, a little more than half of the book, deals with early dooms, the assizes of Henry II, Glanvil, Bracton, the jury, Magna Charta, "The English Justinian's" work, the omnipotence of Parliament, chancery; and later Montague's essays emphasize legislation and procedural reform from the seventeenth to the nineteenth centuries. These form a helpful outline which can be run through in two or three hours as a preparation for further work. The limitations of the book are best indicated by saying that "tort" does not appear in the index, and that the two appearances of "contract" refer to a short note on Anglo-Saxon contract, which had no real existence, and to a few modern statutes affecting bargains in the nineteenth century. As the editor indeed says, the collection is "untechnical." But it is just this that prevents the book from being in comparison with Jenks' Short History of English Law, or even Maitland's Forms of Action, "the best available introduction to English legal history."

JOSEPH WARREN.

GERMANY'S VIOLATION OF THE LAWS OF WAR, 1914-15. Compiled under the auspices of the French Ministry of Foreign Affairs. Translated by J. O. P. Bland. New York: G. P. Putnam's Sons. 1915. pp. xxxvi, 346.

THE PREVENTION AND CONTROL OF MONOPOLIES. By W. Jethro Brown. New York: E. P. Dutton and Company. 1915. pp. xix, 198.

JUDICIAL INTERPRETATIONS OF THE LAW RELATING TO WORKMEN'S COMPENSATION. By John Chartres. London: Butterworth and Company. 1915. pp. i, 753.

THE PROTECTION OF NEUTRAL RIGHTS AT SEA. Documents on the Naval Warfare. With an introduction by William R. Shepherd. New York: Sturgis and Walton Company. 1915. pp. x, 129.

LAW AND ITS ADMINISTRATION. By Harlan F. Stone. New York: Columbia University Press. 1915. pp. viii, 232.

BELGIUM, NEUTRAL AND LOYAL. THE WAR OF 1914. By Emile Waxweiler. New York: G. P. Putnam's Sons. 1915. pp. xi, 324.

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HOURS OF LABOR AND REALISM IN CONSTITUTIONAL LAW*

THE Massachusetts Supreme Court was called upon recently to consider the constitutionality of the following statute:

"Employees in and about steam railroad stations in this Commonwealth designated as baggage men, laborers, crossing tenders and the like, shall not be employed for more than nine working hours in ten hours' time; the additional hour to be allowed as a lay off."

The increasing demand for shorter hours of labor throughout the industrial world, the likelihood that such demand will receive legislative recognition, the nation-wide importance of the attitude of the judiciary toward such legislation; conversely, the attitude of public opinion upon the continued exercise by the courts of their traditional power under the American constitutional system — all these considerations, and more, justify a constant critique within the profession of the point of view, no less than the explicit factors, which control judicial decisions upon social and industrial legislation.¹

The question before the Massachusetts Supreme Court was not a new question. Necessarily, therefore, the court had to consider

* For laborious help in the preparation of this article I am indebted to one of my students, Mr. Howard F. Burns.

¹ Valuable contributions have been made in recent years which will be referred to later, particularly the admirable papers of Professor Ernst Freund, "Limitation of Hours of Labor and the Federal Supreme Court," 17 GREEN BAG 411; Judge Learned Hand, "Due Process of Law and the Eight Hour Day," 21 HARV. L. REV. 495; and Professor Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454.

the applicable precedents, and the legal thinking which was embodied therein.² What then was the legal background? It will be serviceable perhaps briefly to summarize the state of the authorities dealing with regulation of the hours of labor. Such a summary will tell a useful tale of legal history; it will do more — it may guide us not a little in the solution of present-day constitutional problems.

For the purpose of legal analysis, these cases fall into three groups:³ (a) regulation of the labor of women and children; (b) regulation of labor in dangerous or peculiarly unhealthful employments; and (c) regulation of labor in industry generally.

(a) — REGULATION OF LABOR OF WOMEN AND CHILDREN

1876 *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, sustained a law prohibiting the labor of women and children for more than sixty hours per week in manufacturing establishments. The statute was sustained as a matter of course. No reference whatever was made to the Fourteenth Amendment and counsel was apparently unable to "refer to any particular clause of the [Massachusetts] Constitution to which this provision is repugnant" (p. 384).

1895 *Ritchie v. People*, 155 Ill. 98,⁴ invalidated an eight-hour law for women as "a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties" (p. 108).

² This paper will concern itself wholly with the validity of the regulation of hours of labor as a problem in what Mr. Justice Holmes calls the "apologetics of the police power." Therefore, objections to the specific statute under consideration because (1) it fails to make provision for emergencies, (2) it is a denial of the equal protection of the laws by reason of arbitrary classification, and (3) it interferes with a field taken over by Congress in the Hours of Service Act of March 4, 1907, or special arguments in its favor, based (a) on the power to amend corporate charters, and (b) on the fact that a special obligation may be imposed on public-service companies, are all put on one side.

³ Cases involving the validity of legislation as to hours of labor upon public works or work done for the public are not considered. All recent important authorities now sustain such legislation, not as an exercise of the police power, but as an assertion by the state of its right to regulate the conditions under which public work shall be done. *Atkin v. United States*, 191 U. S. 207 (1903); *People v. Crane*, 214 N. Y. 154, 108 N. E. 427 (1915), affirmed, 239 U. S. 195 (1915); *Heim v. McCall*, 214 N. Y. 629, 108 N. E. 1095 (1915), affirmed, 239 U. S. 175 (1915).

⁴ 40 N. E. 454.

1902 *Wenham v. State*, 65 Neb. 394,⁵ sustained a sixty-hour per week law for women on the ground that "women and children have always, to a certain extent, been wards of the state"; and that while "the employer and the laborer are practically on an equal footing . . . these observations do not apply to women and children" (p. 405).

1902 *State v. Buchanan*, 29 Wash. 602,⁶ sustained a ten-hour law for women in mechanical and mercantile establishments.

"It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. . . . While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint" (p. 610).

1907 *People v. Williams*, 189 N. Y. 131,⁷ declared invalid a statute prohibiting night work of women because "it is, certainly, discriminative against female citizens, in denying to them equal rights with men in the same pursuit" (p. 135).

1907 *Burcher v. People*, 41 Colo. 495,⁸ nullified an eight-hour law for women and children because (1) under the Colorado Constitution the legislature must specifically designate what pursuits are unhealthful; and (2) even if the court had power to pass on the issue "the laundry business must be considered healthful; for counsel themselves, in their stipulation of facts, on which the record shows the cause was decided, are in accord that such occupation is healthful" (p. 504).

1908 *Muller v. Oregon*, 208 U. S. 412, sustained the constitutionality of a ten-hour law for women in any mechanical establishment or factory or laundry.

"The legislation and opinions referred to . . . may not be, technically speaking, authorities, and in them is little or no discussion of the

⁵ 91 N. W. 421.

⁷ 81 N. E. 778.

⁶ 70 Pac. 52.

⁸ 93 Pac. 14.

constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil" (p. 420).

"The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all" (p. 422).

1910 *Ritchie & Co. v. Wayman*, 244 Ill. 509,⁹ sustained a ten-hour law for women in any mechanical establishment, factory or laundry. A heroic effort is made to distinguish the first Ritchie case from the second Ritchie case. It is true that one was an eight-hour law and the other was a ten-hour law, but the two cases are, in fact, irreconcilable in their underlying point of view.

1914 *Sturges v. Beauchamp*, 231 U. S. 320, sustained the Illinois Child Labor Law as an exercise "of the protective power of government."

1914 *Riley v. Massachusetts*, 232 U. S. 671, sustained a Massachusetts fifty-four-hour per week statute.

1914 *Hawley v. Walker*, 232 U. S. 718, sustained an Ohio nine-hour statute.

1915 *Miller v. Wilson*, 236 U. S. 373; *Bosley v. McLaughlin*, 236 U. S. 385. In these two able opinions by Mr. Justice Hughes the United States Supreme Court sustained the extremest regulation of hours of labor to date — California statutes limiting the labor of women in certain pursuits to forty-eight hours per week.

"It is manifestly impossible to say that the mere fact that the statute of California provides for an eight-hour day, or a maximum of forty-eight hours a week, instead of ten hours a day or fifty-four hours a week, takes the case out of the domain of legislative discretion. This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme, but there is no ground for the conclusion here that the limit of the reasonable exertion of protective authority has been overstepped" (p. 382).

1915 *People v. Schweinler Press*, 214 N. Y. 395.¹⁰ The Court of Appeals sustained a statute prohibiting night work for women and

⁹ 91 N. E. 695.

¹⁰ 108 N. E. 639.

with courageous frankness expressly overruled *People v. Williams*, *supra*.

"Impairment caused by exhaustion or even ordinary weariness must be repaired by normal and refreshing sleep and rest if health and efficiency are to be preserved" (p. 401).

" . . . surely it is a matter of vital importance to the state that the health of thousands of women working in factories should be protected and safeguarded from any drain which can reasonably be avoided. This is not only for their own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers" (pp. 405-406).

(b) — REGULATION OF LABOR IN DANGEROUS EMPLOYMENTS

1898 *Holden v. Hardy*, 169 U. S. 366,¹¹ sustained a Utah statute limiting to eight the hours of labor in underground mines. Familiar as this case is, a few sentences from the powerful opinion of Justice Brown will bear re-quoting:

"The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts" (p. 395).

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority" (p. 397).

"The question in each case is whether the legislature has adopted the

¹¹ It is worth while to note that Mr. Justice Brewer and Mr. Justice Peckham dissented.

statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class" (p. 398).

1899 *In re Morgan*, 26 Colo. 415.¹² The opinion of the United States Supreme Court in *Holden v. Hardy*, *supra*, was not convincing to the Supreme Court of Colorado and with sturdy independence that court nullified a similar eight-hour law as to underground mines.¹³

"The result of our deliberation, therefore, is that this act is an unwarrantable interference with, and infringes, the right of both the employer and employé in making contracts relating to a purely private business, in which no possible injury to the public can result" (p. 450).

1902 *Re Ten Hour Law for Street Railway Corporations*, 24 R. I. 603,¹⁴ in an advisory opinion declared constitutional a ten-hour statute for employees operating street railways.

1904 *Ex parte Boyce*, 27 Nev. 299;¹⁵ followed in *Ex parte Kair*, 28 Nev. 127; *ibid.*, 425 (1905);¹⁶ and

1904 *State v. Cantwell*, 179 Mo. 245,¹⁷ sustained an eight-hour law for underground mining work.

1911 *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612, sustained the constitutionality of the Hours of Service Act of March 4, 1907.

"The fundamental question here is whether a restriction upon the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of em-

¹² 58 Pac. 1071.

¹³ To avoid the grotesque clash between state courts and the Supreme Court as to the scope of constitutional protection of the same fundamental rights, a recommendation to leave the protection of such rights entirely to the Fourteenth Amendment, and therefore omit the corresponding provisions of the Bill of Rights in our state constitutions, has received the support of distinguished members of the profession and of statesmen like ex-President Taft and ex-Attorney-General Wickersham.

¹⁴ 54 Atl. 602.

¹⁵ 80 Pac. 463; 82 *id.*, 453.

¹⁶ 75 Pac. 1.

¹⁷ 78 S. W. 569.

ployés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution" (pp. 618-619).

(c) — REGULATION OF HOURS OF LABOR IN GENERAL

1894 *Low v. Rees Printing Co.*, 41 Neb. 127,¹⁸ declared unconstitutional an eight-hour day for mechanics and laborers, both because it was class legislation and violative of liberty of contract. After naïvely regarding it as irrelevant to consider the impulse back of such legislation,¹⁹ the court nullified the statute as an attempt by the legislature to "prohibit harmless acts which do not concern the health, safety, and welfare of society" (p. 147).

1905 *Lochner v. New York*, 198 U. S. 45. In this well-known case the Supreme Court invalidated a ten-hour law for bakers. Speaking for the five majority judges, Mr. Justice Peckham declared that "to the common understanding the trade of a baker has never been regarded as an unhealthy one" (p. 59), and therefore

"the act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . ." (p. 61).

The vigorous dissenting opinions of Harlan, White, Day, and Holmes, JJ., are familiar. But the following from the opinion of Mr. Justice Holmes pithily and completely puts the other point of view in the clash of ideas then before the Court:

¹⁸ 59 N. W. 362.

¹⁹ "For some reason, *not necessary to consider*, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation" (p. 135, italics ours).

"I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work" (p. 76).²⁰

1909 *State v. Miksicek*, 225 Mo. 561,²¹ invalidated a six-days act — rest one day in seven — for bakers as an arbitrary infringement of liberty of contract.

1912 *State v. Lumber Co.*, 102 Miss. 802,²² sustained a ten-hour law for labor employed in manufacturing. The court decided that the *Lochner* case did not control on the facts, and, significantly, relied on the dissenting opinions in that case for the statement of the governing principles.

"It would not be unreasonable for the legislature to decide that it would promote the health, peace, morals, and general welfare of all laborers engaged in the work of manufacturing or repairing if they were not permitted to extend their labor over ten hours a day, and the legislature could also decide that the best interests of the people in the state would be promoted by limiting the time of work of this numerous class of its citizenry to the time mentioned. In fact, when we consider the present manner of laboring, the use of machinery, the appliances, requiring intelligence and skill, and the general present day manner of life, which tends to nervousness, it seems to us quite reasonable, and in no way improper, to pass such law so limiting a day's labor" (p. 834).

On rehearing the decision was affirmed,²³ the court taking occasion to comment upon.

"the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor. This inestimable privilege is generally the object of the buyer's disinterested

²⁰ See the elaboration and application of this last thought in Mr. Justice Holmes's dissenting opinions in *Adair v. United States*, 208 U. S. 161, 190 (1908), and *Coppage v. Kansas*, 236 U. S. 1, 26-27 (1915).

²¹ 125 S. W. 507.

²² 59 So. 923.

²³ *State v. Lumber Co.*, 103 Miss. 263, 60 So. 215 (1913).

solicitude. Some day, perhaps, the inalienable right to rest will be the subject of litigation . . ." ²⁴ (103 Miss. 267-268).

1913 *State v. Barba*, 132 La. 768,²⁵ held unconstitutional an eight-hour law for stationary firemen, both because it constituted an arbitrary classification and impaired the liberty of contract.

1914 *State v. Bunting*, 71 Ore. 259,²⁶ sustained a ten-hour law for labor in factories. In this case the court again found the dissenting opinions of the *Lochner* case rather than the decision on the facts of that case the relevant authority.

"A certain minimum of physical well-being is necessary in order that social life may exist, the usefulness and intelligence of the citizens be increased, and the progress of civilization accelerated: Freund, *Police Power*, secs. 8, 10. . . . The required minimum of well-being varies in different periods, but rises with advancing civilization until it includes a certain standard of comfort. . . . It is an undeniable fact that prolonged and excessive physical labor is performed at the expense of the mental powers, and it requires no argument to show that a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. . . . In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. . . . It is urged . . . that if it is possible for the legislature to make the declaration that to work in a factory more than 10 hours in one day is injurious to the health, then that body can make four hours a day's work, and require two hours of the work to be performed before 8 o'clock A.M. It is sufficient to say that the question of four hours constituting a day's labor, or when any part of it shall be done, is not now before this court" (pp. 267, 272, 273).

1915 *People v. Klinck Packing Co.*, 214 N. Y. 121.²⁷ "The right to rest" — or rather the need for leisure — to which the Su-

²⁴ See a similar observation in *Holden v. Hardy*, 169 U. S. 369, 397, *supra*: "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, . . . his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class."

²⁵ 61 So. 784.

²⁶ Appeal now pending before the Supreme Court of the United States.

²⁷ 108 N. E. 278.

preme Court of Mississippi adverted in 1912, quickly received authoritative recognition from the New York Court of Appeals. In this case there was sustained a statute requiring one day of rest in seven. The proper sphere of legislative discretion and a correspondingly limited scope of judicial review are put most excellently by Judge Hiscock:

"Our only inquiry must be . . . whether it can fairly be believed that its [the statute's] natural consequences will be in the direction of betterment of public health and welfare, and, therefore, that it is one which the state for its protection and advantage may enact and enforce. It seems to me very clear that we may answer that it is such an one. . . . A constantly increasing study of industrial conditions I believe leads to the conviction that the health, happiness, intelligence and efficiency even of an adult man laboring in such employments [factory and mercantile] as those mentioned in this statute will be increased by a reasonable opportunity for rest, for outdoor life and recreation, for attention to his own affairs, and, if he will, study and education.

"Then we come to the question what is a reasonable opportunity, and within wide limits that problem is for the legislature. Anybody would probably say that one day in thirty or sixty would be too little and one day in each two days extravagant. Between these extremes none can safely assert that the mean adopted by the legislature of one day in seven is unreasonable" (pp. 127-128).²⁸

A study of these opinions indicates a change not only in the decisions but in the groundwork of the decisions. We find a shift in the point of emphasis, a modification of the factors that seem relevant, a different statement of the issues involved, and a difference in the technique by which they are to be solved. The turning point comes in 1908 with *Muller v. Oregon*.²⁹ While lone voices of wisdom had been heard for almost two decades,³⁰ and the tendency was clearly in its direction, yet this case marks the culmination.

Prior to 1908 the decisions disclose certain marked common characteristics:

²⁸ Since the decision of the Massachusetts case under discussion the Supreme Court of Louisiana has again declared unconstitutional an eight-hour law for stationary firemen partly as unfair classification (because applying only to cities over 50,000) and partly as an impairment of liberty of contract. 77 So. (La.) 70 (1915).

²⁹ 208 U. S. 412, *supra*.

³⁰ See the dissenting opinion of Mr. Justice Holmes in *Commonwealth v. Perry*, 155 Mass. 117, 123 (1891); THAYER, LEGAL ESSAYS, I; 26 GREEN BAG 511, 514.

(1) Despite disavowal that the policy of legislation is not the courts' concern, there is an unmistakable dread of the class of legislation under discussion.³¹ Intense feeling against the policy of the legislation must inevitably have influenced the result in the decisions. In truth this presents the point of greatest stress in our constitutional system, for it requires minds of unusual intellectual disinterestedness, detachment, and imagination to escape from the too easy tendency to find lack of power where one is convinced of lack of wisdom.

(2) Legislation is sustained as part of the prevailing philosophy of individualism, as an exceptional protection to certain individuals as such, and not as a recognition of a general social interest. Thus legislation is supported either because women and children are wards of the state, are not *sui juris*, or to relieve certain needy individuals in the community from coercion.³² The underlying assumption was, of course, that industry presented only contract relations between individuals. That industry is part of society, the relation of business to the community, was naturally enough lost sight of in the days of pioneer development and free land.³³

(3) The courts here deal with statutes seeking to affect in a very concrete fashion the sternest actualities of modern life: the conduct of industry and the labor of human beings therein engaged. Yet the cases are decided, in the main, on abstract issues, on tenacious theories of economic and political philosophy. There is lack of scientific method either in sustaining or attacking legislation. Legislation is sustained or attacked on vague humanitarianism, on pressure of immediate suffering, or "common understanding." This is not the fault of the courts. It was characteristic of our legislative processes, as well as of the judicial proceedings which

³¹ "The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens, is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protest against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body." *People v. Williams*, 189 N. Y. 131, 135, 81 N. E. 778, 780 (1907).

"This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase." *Lochner v. New York*, 198 U. S. 45, 63 (1905).

³² *Holden v. Hardy*, 169 U. S. 366, 397, *supra*.

³³ See the stimulating paper, "Labor, Capital and Business at Common Law," by Edward A. Adler, 29 HARV. L. REV. 241, particularly 262-274.

called them into question. It was true, substantially, of the social legislation of the nineteenth century.³⁴

The courts decided these issues on *a priori* theories, on abstract assumptions, because scientific data were not available or at least had not been made available for the use of courts. But all this time scientific data had been accumulating. Organized observation, investigation, and experimentation produced facts, and science could at last speak with rational if tentative authority. There was a growing body of the world's experience and the validated opinions of those competent to have opinions. Instead of depending on *a priori* controversies raging around jejune catchwords like "individualism" and "collectivism," it became increasingly demonstrable what the effect of modern industry on human beings was and what the reasonable likelihood to society of the effects of fixing certain minimum standards of life.

The Muller case, in 1908, was the first case presented to our courts on the basis of authoritative data. For the first time the arguments and briefs breathed the air of reality. The response of the court on this method of presenting the case is significant.

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters. . . ."³⁵

³⁴ The earliest Factory Act was the "work of benevolent Tories." DICEY, *LAW AND OPINION IN ENGLAND*, 2 ed., p. 110, and Lecture VII, particularly pp. 220 *et seq.*, 228, 229; GOLDMARK, *FATIGUE AND EFFICIENCY*, ch. I.

³⁵ *Muller v. Oregon*, 208 U. S. 412, 419 (1907). The great mass of data contained in the brief is epitomized in the margin of the court's opinion. Miss Josephine Goldmark, Publication Secretary of National Consumers' League, collaborated with Mr. Brandeis in the preparation of this and subsequent briefs, which are now available in part II of Miss Goldmark's book, *FATIGUE AND EFFICIENCY*.

The present-day demand for scientific ascertainment of facts for legislation and administration is strikingly illustrated by Miss Lathrop in her Third Annual Report as Chief of the United States Children's Bureau (1915). "The whole field of child labor is thus far singularly barren of scientific study. . . . Full and intelligent protection of the physique and mental powers of the youthful workers in this country requires costly and laborious studies in laboratory and in workshop. . . . The Children's Bureau now desires to call attention to these studies and to submit the reasonableness of spending money to make them. It proposes a later presentation of carefully considered plans for which certain preparatory studies are now going forward. The more rapidly the restrictive child labor legislation becomes uniform,

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, *when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact*, a widespread and long continued belief concerning it is worthy of consideration."³⁶ (Italics ours.)

That upon such showing the Supreme Court should sustain the contested statute was inevitable. But the Muller case is "epoch making," not because of its decision, but because of the authoritative recognition by the Supreme Court that the way in which Mr. Brandeis presented the case — the support of legislation by an array of facts which established the *reasonableness* of the legislative action, however it may be with its wisdom — laid down a new technique for counsel charged with the responsibility of arguing such constitutional questions, and an obligation upon courts to insist upon such method of argument before deciding the issue, surely, at least, before deciding the issue adversely to the legislature. For there can be no denial that the technique of the brief in the Muller case has established itself through a series of decisions within the last few years, which have caused not only change in decisions, but the much more vital change of method of approach to constitutional questions.³⁷

The most striking illustration is the attitude of the New York

the more evident must be the need of studying the welfare of the young worker within the occupation, so that we may secure just standards for the use of labor, as new standards for material are being developed." (pp. 23, 24.)

³⁶ Muller v. Oregon, 208 U. S. 420-421.

³⁷ See briefs in Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695 (1910); Hawley v. Walker, 232 U. S. 718 (1914); Miller v. Wilson, 236 U. S. 373 (1915); Bosley v. McLaughlin, 236 U. S. 385 (1915); Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743 (1914) (and brief in the same case now pending before the Supreme Court of the United States); People v. Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

Court of Appeals in *People v. Schweinler Press*.³⁸ In that case, it will be recalled, the court courageously overruled *People v. Williams, supra*,³⁹ and sustained a statute prohibiting night work for women. We find a careful ascertainment of facts by the legislature as the basis of its action, and thereafter a careful presentation of facts before the court to support the legislative reason. Not only was there a presentation of facts in 1915 such as counsel failed to make in 1907, but there was a presentation of new facts acquired since 1907. If the point of view laid down in this case be sedulously observed in the argument and disposition of constitutional cases, it is safe to say that no statute which has any claim to life will be stricken down by the courts.

"While theoretically we may have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential."⁴⁰

"There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission."⁴¹

These recent cases, dealing with regulation of the hours of labor, do not stand apart but illustrate two dominant tendencies in current constitutional decisions:

(1) Courts, with increasing measure, deal with legislation affecting industry in the light of a realistic study of the industrial conditions affected.⁴²

³⁸ 214 N. Y. 395, 108 N. E. 639 (1915).

³⁹ 189 N. Y. 131, 81 N. E. 778 (1907).

⁴⁰ *People v. Schweinler Press*, 214 N. Y. 395, 411, 108 N. E. 639, 643 (1915).

⁴¹ *Ibid.*, 214 N. Y. 395, 412-413, 108 N. E. 639, 644 (1915).

⁴² *McLean v. Arkansas*, 211 U. S. 539, 549-550 (1908) (it is significant that Mr. Justice Brewer and Mr. Justice Peckham dissented); *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612, 619 (1911).

(2) The emphasis is shifted to community interests, the affirmative enhancement of the human values of the whole community — not merely society conceived of as independent individuals dealing at arms' length with one another, in which legislation may only seek to protect individuals under disabilities, or prevent individual aggression in the interest of a countervailing individual freedom.⁴³

As a result we find that recent decisions have modified the basis on which legislation limiting the hours of labor is supported. As science has demonstrated that there is no sharp difference in kind as to the effect of labor on men and women, courts recently have followed the guidance of science and refused to be controlled by outworn ignorance. And so we find the Supreme Court of Oregon, in sustaining the ten-hour law for men, observing that "legislative regulation of the hours of labor of men and that of women differ only in the degree of necessity therefor."⁴⁴ True enough, we are not out of the woods of difficulty by saying the question is a matter of difference of degree. But once that is recognized, once we cease to look upon the regulation of women in industry as exceptional, as the law's graciousness to a disabled class, and shift the emphasis from the fact that they are *women* to the fact that it is *industry* and the relation of industry to the community which is regulated, the whole problem is seen from a totally different aspect. Once admit it is a question of degree, there follows the recognition — and the conscious recognition is important — that we are balancing interests, that we are exercising judgment, and that the exercise of this judgment, unless so clear as to be undebatable, is solely for the legislature.⁴⁵

What, then, are the common factors in the labor of men and women that would make a limitation of the hours of labor, in employments not dangerous or inherently unhealthy, to ten hours or nine hours an exercise of legislative discretion not beyond the pale of reasonable argument, and therefore to be respected by the courts? They are:

(1) "The common physiological phenomenon, fatigue," and the

⁴³ *People v. Klinck Packing Co.*, 214 N. Y. 121, 128, 108 N. E. 278, 280 (1915).

⁴⁴ *State v. Bunting*, 71 Ore. 259, 271, 139 Pac. 731, 735 (1914).

⁴⁵ *Price v. Illinois*, 238 U. S. 446, 452 (1915).

need of rest to repair the waste of the toxin.⁴⁶ Can the point where the line is to be drawn possibly be drawn *a priori*? Or, at the least, in the light of modern physiology is any layman entitled to say that a limitation of routine manual labor of masses of men to nine hours is a capricious and wilful oppression, without sustaining reason?⁴⁷

(2) An enlarged conception of leisure and the tendency to regard not only its relation to the immediate effects upon animal health but also its bearing on the industrial output and the demands of citizenship.⁴⁸

(3) Experience, based upon adequate trial, with the gradual reduction of labor and the slow increase of hours of leisure encouragingly demonstrates that such limitation of labor and increase of leisure have been put to fruitful uses. The tried measures of curtailing manual labor have added to the sum total of that by which we measure the civilized aspects of life.⁴⁹

This then was the "state of the art" which confronted the Massachusetts Supreme Court in passing upon the constitutionality of the nine-hour law in question. One would suppose that in the light of all this it would be an easy matter for the court to hold that a nine-hour day is not "so extravagant and unreasonable, so disconnected with the probable promotion of health and welfare that its enactment is beyond the jurisdiction of the legislature,"⁵⁰ or, at the very least, that, since the subject is "debatable, the legislature is entitled to its own judgment."⁵¹

Quite the contrary. The court held that the statute "is an unwarrantable interference with individual liberty and an interference with property rights, and therefore contrary to constitutions which secure these fundamental rights."⁵²

How could such a result have been reached?

⁴⁶ See GOLDMARK, *FATIGUE AND EFFICIENCY*, ch. 2. The scientific views set forth in Miss Goldmark's book recently formed the basis of an arbitration judgment, in Australia, by Mr. Justice Higgins, in the *Waterside Workers' case* (not yet reported).

⁴⁷ *Price v. Illinois*, 238 U. S. 446, 452 (1915), *supra*.

⁴⁸ See *e.g.* HOBSON, *WORK AND WEALTH*, particularly chapters XIV and XV; TAUSIG, *INVENTORS AND MONEY MAKERS*, pp. 63, 65 *et seq.*, 71 *et seq.*; U. S. Commissioner of Labor Statistics Royal Meeker, 63 *Annals Amer. Acad. of Pol. and Soc. Sci.*, 262, 267.

⁴⁹ See GOLDMARK, *FATIGUE AND EFFICIENCY*, p. 279.

⁵⁰ *People v. Klinck Packing Co.*, 214 N. Y. 121, 127, 108 N. E. 278, 280 (1915).

⁵¹ *Price v. Illinois*, 238 U. S. 446, 452 (1915).

⁵² *Commonwealth v. Boston & M. R. R.*, 110 N. E. (Mass.) 264 (1915).

(1) The case was inadequately presented. The court was not called upon to pass on the validity of the statute as such, but upon an agreed statement of facts under the statute to the effect that there is nothing inherently unhealthy about the work which the employee did, as it was half performed in the open air and was not arduous.⁵³ The assumption back of such a statement is that where work is not inherently unhealthy it is immaterial how long such work is pursued. Thus a wholly unscientific concession of fact was made, and therefore a wholly unscientific issue was presented to the court. But even such an issue was not supported by the available body of scientific facts. No attempt was made to bring to the attention of the court a detailed, painstaking, thoroughly marshaled array of facts to explain and to fortify the experience and theory back of labor legislation. In other words, the case was not argued in the way in which the decisions in the Muller case, the second Ritchie case, the Hawley case, the Miller case, the Bosley case, and the Schweinler case demanded that it should be argued.

(2) One can therefore understand why the court found the case "governed" by the Lochner case, *supra*.⁵⁴ Nevertheless, one is compelled to conclude that the illumination that has been cast upon the Lochner case during the past decade does not leave to that case any principle which *ipso facto* controls the validity of specific measures regulating hours of labor. The principle of the Lochner case is simple enough: that arbitrary restriction of men's activities, unrelated in reason to the "public welfare," offends the Fourteenth Amendment. As to the principle, there is no dispute. But the principle is the beginning and not the end of the inquiry. The field of contention is in its application. The Lochner case, judged by its history and by more recent decisions of the Supreme Court, does not in itself furnish the yardstick for its application.

(a) It is now clearly enough recognized that each case presents a distinct issue; that each case must be determined by the facts relevant to it; that we are dealing, in truth, not with a question of law but the application of an undisputed formula to a constantly changing and growing variety of economic and social facts.⁵⁵ Each

⁵³ *Commonwealth v. Boston & M. R. R.*, 110 N. E. (Mass.) 264 (1915).

⁵⁴ *Lochner v. New York*, 198 U. S. 45 (1905).

⁵⁵ See *People v. Schweinler Press*, 214 N. Y. 395, 411-412, 108 N. E. 639, 643 (1915); *Bosley v. McLaughlin*, 236 U. S. 385, 392 *et seq.* (1915); *Miller v. Wilson*, 236 U. S. 373, 382 (1915); *McLean v. Arkansas*, 211 U. S. 539, 549-550 (1908).

case, therefore, calls for a new and distinct consideration, not only of the general facts of industry but the specific facts in regard to the employment in question and the specific exigencies which called for the specific statute.

(b) The groundwork of the *Lochner* case has by this time been cut from under. The majority opinion was based upon "a common understanding" as to the effect of work in bakeshops upon the public and upon those engaged in it. "Common understanding" has ceased to be the reliance in matters calling for essentially scientific determination. "Has not the progress of sanitary science shown," Professor Freund pertinently inquires, "that common understanding is often equivalent to popular ignorance and fallacy?"⁵⁶ On the particular issue involved in the *Lochner* case "study of the facts has shown that the legislature was right and the court was wrong."⁵⁷ Either because matters as to which the court of its own knowledge cannot know, or, because not knowing, it cannot assume the non-existence of facts, contested legislative action should be resolved in favor of rationality rather than capricious oppression. Happily the fundamental constitutional doctrine of the assumption of rightness of legislative conduct, where the court is uninformed, is again rigorously being enforced by the United States Supreme Court.⁵⁸

(c) So far as the general flavor of the *Lochner* opinion goes, it surely is no longer "controlling." If the body of professional opinion counts for anything in the appraisal of authority of a decision, (itself decided by a divided court, and since departed from in effect

⁵⁶ 17 GREEN BAG 411, 416.

⁵⁷ Professor Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454, 480, and n. 123.

⁵⁸ Thus, in one of its latest opinions, the Supreme Court refused to upset a "police measure" with the following language:

"Petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action. . . ." *Hadacheck v. Sebastian*, 239 U. S. 394, 413 (Dec. 20, 1915).

Here, as elsewhere in the law, Mr. Justice Holmes long ago put the matter with acute finality: "I cannot pronounce the legislation [prohibiting fines against weavers for defective workmanship] void, as based on a false assumption, since I know nothing about the matter one way or the other." *Commonwealth v. Perry*, 155 Mass. 117, 124-125, 28 N. E. 1126, 1127 (1891). As to the reasonableness of the legislature's belief that a system of fines affords dangerous temptations for oppressive use see *R. H. TAWNEY, MINIMUM RATES IN THE TAILORING INDUSTRY*, pp. 60 and 95.

in an important series of cases), it has been impressively arrayed against this decision. If ever an opinion has been subjected to the weightiest professional criticism it is the opinion in the *Lochner* case. Judge Andrew Bruce, Professor Ernst Freund, Judge Learned Hand, Professor Roscoe Pound — to mention no others — surely speak with high competence upon this subject. Nevertheless, the body of persuasive authority which their writings present was not brought to the court's attention and failed to be considered in the disposition of the case.⁵⁹

The circumstances which resulted in this decision reveal anew a situation of far-reaching importance. For it affects the very bases on which constitutional decisions are reached and, therefore, affects vitally the most sensitive point of contact between the courts and the people. The statute under discussion may well have been of no particular social import. The decision which nullified it, one may be sure, offers no intrinsic obstruction to needed legislation, and in itself has merely ephemeral vitality. But, unfortunately, the evil that decisions do lives after them. Such a decision deeply impairs that public confidence upon which the healthy exercise of judicial power must rest.

Under the present-day stress of judicial work it is inevitable that courts, on the whole, can only decide specific cases as presented to them.⁶⁰ In other words, the substantial dependence upon the facts and briefs presented by counsel throws the decision of the courts largely upon those chances which determine the selection of counsel. These are, of course, necessary human draw-

⁵⁹ A. A. Bruce, "The Illinois Ten Hour Labor Law for Women," 8 MICH. L. REV. 1; G. S. Corwin, "The Supreme Court and the Fourteenth Amendment," 7 MICH. L. REV. 643; Ernst Freund, "Limitation of Hours of Labor and the Federal Supreme Court," 17 GREEN BAG 411, "Constitutional Limitations and Labor Legislation," 4 ILL. L. REV. 609; L. N. Greeley, "The Changing Attitude of the Courts toward Social Legislation," 5 ILL. L. REV. 222; Learned Hand, "Due Process of Law and the Eight Hour Day," 21 HARV. L. REV. 495; Sir Frederick Pollock, "The New York Labor Law and the Fourteenth Amendment," 21 L. QUART. REV. 211; Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 480. Cf. Mr. Wigmore's comment on "The Qualities of Current Judicial Decisions," 9 ILL. L. REV. 529, 530-1.

But see *Atkins v. Grey Eagle Coal Co.*, 84 S. E. 906 (1915), where the Court of Appeals of West Virginia sustained a truck act, in effect overruling the decision in *State v. Goodwill*, 33 W. Va. 179 (1889), and cited among its authorities Professor Pound's article, "Liberty of Contract," 18 YALE, L. J. 480.

⁶⁰ See Mr. Justice Swayze in "The Growing Law," 20 YALE, L. J. 1, 18-19. *People v. Schweinler Press*, 214 N. Y. 395, 411, 108 N. E. 639, 643 (1915).

backs, and the practice works out well enough in controversies where purely individual interests are represented by counsel. This is not the situation in cases such as the one before the Massachusetts court. The issue submitted to the court in fact was the issue as determined by the District Attorney of Worcester and counsel for the Boston and Maine Railroad. In truth, the issue was between the Court and the Legislature. In such a case either the legislative judgment should be sustained if there is "no means of judicial determination" that the legislature is indisputably wrong,⁶¹ or the court should demand that the legislative judgment be supported by available proof.⁶² It would seem clear that courts have inherent power to accomplish this by indicating the kind of argument needed to reach a just result; or even by calling for argument from members of the bar — officers of the court — of particular equipment to assist in a given problem.⁶³ If legislation be necessary New York furnishes an example in its recent enactment authorizing the courts to request the attendance of the attorney general in support of an act of the legislature when its constitutionality is brought into question.⁶⁴

These, after all, are only expedients. Fundamental is the need that the profession realize the true nature of the issues involved in these constitutional questions and the limited scope of the reviewing power of the courts.⁶⁵ With the recognition that these questions raise, substantially, disputed questions of fact must come the invention of some machinery by which knowledge of the facts, which are the foundation of the legal judgment, may be at the service of the courts as a regular form of the judicial process. This need has been voiced alike by jurists and judges.⁶⁶ Once

⁶¹ *Hadacheck v. Sebastian*, 239 U. S. 394, 413 (1915). *Price v. Illinois*, 238 U. S. 446, 452 (1915).

⁶² Professor Ernst Freund, "Constitutional Limitations and Labor Legislation," 4 ILL. L. REV. 609, 622.

⁶³ It is interesting to note that the chief arguments in the series of cases beginning with the *Muller* case were made by an *amicus curiae*, Mr. Louis D. Brandeis, in behalf of the National Consumers' League.

⁶⁴ NEW YORK LAWS, 1913, ch. 442, p. 919.

⁶⁵ See 28 HARV. L. REV. 790.

⁶⁶ Professor Roscoe Pound, in "Legislation as a Social Function," 7 Pub. Am. Soc. Soc'y, 148, 161: "In the immediate past the social facts required for the exercise of the judicial function of law-making have been arrived at by means which may fairly be called mechanical. It is not one of the least problems of the sociological jurist to discover a rational mode of advising the court of facts of which it is supposed

the need shall be felt as the common longing of the profession the inventive powers of our law will find the means for its satisfaction.

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to take judicial notice." So (in dealing with a somewhat similar problem) Judge Learned Hand, in *Parke Davis & Co. v. Mulford & Co.*, 189 Fed. 95, 115: "How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance." Cf. also, *Steenerson v. Great Northern Ry.*, 69 Minn. 353, 377, 72 N. W. 713, 716 (1897).

PROPERTY IN CHATTELS

I

PROPERTY IN THE TRESPASSER

IS it true that the common law ever thought of a trespass as conferring the absolute property in the chattel on the trespasser?¹ No such result would have followed from the application of disseisin to chattels, for the doctrine of ownership which Professor Ames treats under that head is admittedly a doctrine of divided ownership with the right to possession in the disseisee and the present enjoyment and right of alienation in the disseisor.² It is only by combining disseisin with the fact that trespass was not an action for the specific recovery of property and limiting the disseisee's remedy to the action of trespass that any such result is reached.³ Nowhere in the books is to be found any intimation of such absolute change of property by a trespass, and it is so counter to fundamental notions that not only have prevailed from the later Middle Ages to our own time, but seem to have been just as fundamental in the earlier law of which Pollock and Maitland treat,⁴ that the burden of proof is heavy on him who would establish it even for a time.

It is not until the reign of Edward III that we find the "property" in a chattel ascribed to a trespasser or thief.⁵ If at that time there was a right to the specific recovery of chattels taken by way of trespass as there was admittedly of chattels taken by way of theft, the notion that this "property" of the trespasser was an absolute property must fall. "Our common law . . . seems to have started in the twelfth and thirteenth centuries with a stringent prohibition of informal self help,"⁶ and Britton supposes a case

¹ Ames, "Disseisin of Chattels," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 549.

² *Ibid.*, 543.

³ *Ibid.*, 549.

⁴ 2 HISTORY OF ENGLISH LAW, 2 ed., 168 n. 2.

⁵ AMES, 3 SELECT ESSAYS, 542.

⁶ 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 169.

where on an appeal for stealing a horse, the appellee proves the horse his own and thus escapes the gallows but loses his horse because he has had recourse to force rather than to judgment.⁷ In 18 Edward III, however, a plaintiff in trespass urges that "even though the mine was dug in his [the defendant's] freehold, as he says, nevertheless through our having the lead in our hands the property in it came to us, in which case he could not lawfully take it away from us, but would be put to his action."⁸ But the point is not allowed. Proprietary pleas were not allowed in trespass, but it seems doubtful whether even from the first a jury in such a case would have found there had been a taking of the goods of the plaintiff.

What Maitland says as to real property that by the death of Edward III the common law seems to have taken its final form, that in general possession was not protected against ownership,⁹ seems to have been as true in the case of chattels as in the case of land. It is said that it was during the fourteenth, fifteenth, and sixteenth centuries that the right of self-redress received its greatest expansion.¹⁰ Littleton tells us that descent did not cut off a right of entry to a chattel real,¹¹ and this has been applied also to goods.¹²

Nor is it at all certain that there was not a right of specific recovery in the greater number of cases of trespass through the action for a *chose adirrée* in the local courts.¹³ It was the civil action that corresponded to the action for a theft¹⁴ and the limitation of actions of trespass in the King's courts to cases where the chattel was worth forty shillings must have made the relief in the local courts in cases of trespass all important.¹⁵

Until within the last century¹⁶ the law as to the specific recovery of chattels seems to have been much the same as it was in the

⁷ 1 NICH. BRITT. 115, 116, cited 2 P. & M., 2 ed., 168.

⁸ Y. B. 17 & 18 EDW. III (R. S.) 628.

⁹ 4 LAW QUART. REV. 289.

¹⁰ 28 LAW QUART. REV. 266.

¹¹ CO. LITT. 249 a.

¹² COM. DIG. BIENS (E).

¹³ Professor Ames thinks on the whole that there was not. "History of Trover," 3 SELECT ESSAYS, 438.

¹⁴ 2 P. & M., 2 ed., 161. There was some doubt as to whether it lay in case of a wrongful taking, 161 n. 4.

¹⁵ See 2 P. & M., 2 ed., 150.

¹⁶ *Ibid.*, 154.

early years of Edward III. If anything the chances of specific recovery had been lessened, for although in detinue one was not sure of recovering the property, as the defendant had his option of returning the property or paying its value, still there was more probability of the return of the chattel than in trover, and trover had largely superseded detinue until it was revived by the Common Law Procedure Act of 1854, giving the successful plaintiff a definite right to the property.¹⁷ Replevin in practice was still usually confined to cases of distress and there was a question in 1856 as to whether it lay in any other case.¹⁸

As far as specific recovery is concerned, there would probably be as much ground for arguing that in 1800 a trespass effected an absolute change of property in a chattel as in 1326. But if anyone in 1800 had asked a lawyer whether a trespasser gained the absolute property in the chattel by his tort, there is little doubt that he would have responded in the negative just as had the judges of the 1400's,¹⁹ and their proof would have been his proof that replevin lay in such a case. This concurrence of replevin with trespass would have been largely if not quite theoretical. But while Professor Ames, it would seem correctly, traces this theoretical concurrence back as far as the institution of the writ *de proprietate probanda*²⁰ which allowed of the continuance of replevin proceedings if property were found in the plaintiff, notwithstanding a claim of property by the defendant, he would seem to have been in error in placing the institution of that writ in the reign of Edward III rather than in that of his predecessor.²¹ He doubted²² the correctness of the reference to it as of 2 Edward III, Iter North,²³ on the ground that Stonore and Shardelowe, to whom apparently reference is made, were not then judges, but Stonore was apparently at that time a judge of the Common Pleas,²⁴ and Shardelowe, although not yet raised to the Bench, may well have been on circuit, and there is an express reference to the writ in 19 Edward II.²⁵ The reference in the *Abbrevatio Placitorum*.²⁶ to an attachment proceeding for a

¹⁷ MAITLAND, *EQUITY*, 365.

¹⁹ See *infra*, pp. 385-6.

²¹ *Ibid.*, 552.

²³ FITZ. ABR., PROP. PROB. 4.

²⁴ See FOSS, *BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND*.

²⁵ FITZ. ABR. REP. 26.

²⁶ 18 EDW. II, Ab. Pl. 348-349, rot. 17, quoted in AMES, *LECTURES*, 67.

¹⁸ *Mennie v. Blake*, 6 E. & B. 842 (1856).

²⁰ 3 SELECT ESSAYS, 553.

²² LECTURES ON LEGAL HISTORY, 68 n. 5.

false claim of property in replevin would rather confirm this than otherwise, for such a proceeding is expressly provided for in the writ.²⁷ That theoretical concurrence was not accompanied by concurrence in practice would indicate that the demand for specific relief was not great. But what Professor Ames said as to absolute property in the trespasser was *obiter*. His main thesis was disseisin.

Lord Esher, in 1891,²⁸ expressed the opinion that the property in chattels is not changed by the running of the Statute of Limitations. If this be so, the law of adverse possession with regard to land is of little help to us in the law of chattels and a rich field of analogy is lost. Lord Esher's opinion, however, was given without the benefit of Professor Ames' work,²⁹ and it does not seem likely that it will be followed; but the evident assumption on which he was proceeding — that disseisin had been peculiar to land — may cause us to question how far those ideas which are peculiarly associated with disseisin, as distinguished from adverse possession, found expression in the law of chattels.

The difference between the old disseisin and the modern adverse possession may be brought out by an analogy from the law of nations. In the old books, a belligerent who had seized the territory of his enemy might call it "his" even during the continuance of military operations. By right of conquest the inhabitants now owed him allegiance and might be compelled to serve in his armies.³⁰ Thus prior to the Napoleonic wars, territory seized by the French armies and the inhabitants thereof became French by the fact of seizure.³¹ The effects of conquest, however, were profoundly modified by the doctrine of *postliminium* or *postliminy*, by which on the retaking of the territory title reverted in the old sovereign as from the beginning, the old allegiance was restored and transfers of land made in the meantime invalidated. The doctrine of *postliminy* did not in general apply to movables. To-day conquest has been relegated to a subordinate place in treatises on international law and military occupation has taken the place of importance once held by it. No longer may the inhabitants of occupied territory

²⁷ REG. BREV. 85.

²⁸ *Miller v. Dell*, L. R. [1891] 1 Q. B. 468.

²⁹ 3 SELECT ESSAYS, 571.

³⁰ See, for instance, MARTENS, SUMMARY OF THE LAW OF NATIONS, Bk. VIII, Ch. III, § 8.

³¹ See POTHIER, TRAITÉ DES PERSONNES, Title II, § 1.

be compelled to take the oath of allegiance to the occupant, nor be compelled to serve in his armies. The occupant's rights are of a temporary, provisional nature and do not extend to the alienation of land.

It is the same distinction, it is believed, that marks the difference between the old disseisin and the modern adverse possession. The old disseisin was a doctrine of change of title which might be revested as from the beginning by the reëntry of the disseisee.³² The modern adverse possession is a doctrine of inchoate title which may ripen into perfect title by the lapse of time. Old notions of conquest were contrary to the morality of the time as preached by Rousseau and others and failed to satisfy juristic conceptions of the distinction between ownership and possession. No such crusade as that of Rousseau was directed against disseisin, but its inadequacy to satisfy present moral and juristic conceptions is evidenced by the desuetude into which it has fallen. Much, however, that was law under the old conquest is still law under military occupation, and also much that was law under disseisin holds good under adverse possession. In many cases the result has been merely a change of emphasis.

There is much probability that livery of seisin was once as essential to the transfer of title to chattels as it was of title to land.³³ If this was so, it must have been impossible for one to transfer the property in chattels in the adverse possession of another. But there was less occasion to pass on this question in the case of chattels than there was in the case of land, and how little that occasion was may be gathered from the very scanty evidence either way which Professor Ames was able to find in the Year Books.³⁴ What evidence there is from the 1400's is rather against the non-assignability of such property than for it,³⁵ but already in the 1400's it had become possible to transfer chattels by deed³⁶ or sale³⁷ without delivery, and it is possible that the views expressed then marked

³² The analogy between this and *postliminy* has been noticed by common-law writers. See 3 BL. COM., Ch. 12, 210; STEARNS, REAL ACTIONS, 410.

³³ 2 P. & M., 2 ed., 180.

³⁴ See "Disseisin of Chattels," 3 SELECT ESSAYS, 555-560.

³⁵ Danby, C. J., Needham and Vavasor were against it, while Brian, C. J., was for it. Littleton, as counsel, was for it but was overruled. See *infra*, pp. 385-6.

³⁶ See the cases cited in *Cochrane v. Moore*, L. R. 25 Q. B. D. 57 (1890).

³⁷ See BLACKBURN, SALE, 283 *et seq.* But see also Maitland, "Mystery of Seisin," 3 SELECT ESSAYS, 610 n.

a departure from earlier ideas. In Fitzherbert³⁸ is cited a case from the time of Edward III which, if correctly reported, would support this view. But the suspension of the disseisee's right of alienation in the case of land would probably not have been thought of as divesting his property or right of property³⁹ and no such result would necessarily have followed a suspension of the right of alienation in the case of chattels.

Nor would any common lawyer probably have thought of a disseisin as working a change of "property" in land. In striking contrast with the possessory actions such as the assize of novel disseisin was the proprietary writ of right. In so far as "property" was thought of in connection with land it must have been generally identified with the best right which was the foundation of the writ of right rather than with the seisin of free tenement which was the disseisor's.⁴⁰ But the doctrine of estates did not apply to chattels, and if disseisin was to be applied to chattels at all, it is hard to see what terms could have been found to express the nature of the rights of the disseisor and disseisee other than those used by Brian, C. J. — "property" and "right of property."⁴¹ This ascription of "property" to the disseisor and the denial of it to the disseisee must have seemed the less strained from the fact that property then as now was commonly used to indicate the thing which was the subject of the right as well as the right itself. Brian, however, was not using "property" to indicate the *res*, and he had to argue that his "property" and "right of property" were not the same thing, and although he found support for this usage of terms in the cases cited by Professor Ames from the time of Edward III,⁴² this usage apparently seemed as strange to most of the judges of the 1400's as it does to us.⁴³ "Property" to them meant "right of property," something akin at least to our ownership, and this they were unwilling to ascribe to the trespasser. Disseisin of chattels might have had a better chance had it not been for the unfortunate language in which it was clothed.

"Property" seems to have been ascribed to a thief even earlier

³⁸ ABR. REP. 43, trans. by Prof. Ames, 3 SELECT ESSAYS, 559. Query as to whether the last sentence in Prof. Ames' translation was in the original report or was an addition of Fitzherbert. For a similar case, see *infra*, p. 393-4.

³⁹ See following paragraph.

⁴⁰ See 2 P. & M., 2 ed., 78, 153 n.

⁴² 3 SELECT ESSAYS, 544.

⁴¹ Y. B. 6 HEN. VII, 9-4.

⁴³ *Infra*, pp. 385-6.

than to a trespasser.⁴⁴ Professor Ames' statement of the case is as follows:

"*John v. Adam* was a case of replevin in the *detinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant's hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which Herle, C. J., answered: 'Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was.'"⁴⁵

The case is not, however, an authority for the statement that "the goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels."⁴⁶ Herle, C. J., said that it would be "hard law" if it were so; to which it was replied that "it is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."⁴⁷

The case is interesting as an attempt to use replevin in a case of theft and that as against one holding subsequently to the thief. But it is unfortunate that felony was involved. Otherwise despite its procedural handicap, replevin might have developed into an effective remedy against the third hand. Its recuperatory character gave it an advantage in this respect over trespass. As it was, however, the fact that the action was brought against one subsequent to the wrongdoer was fatal. Disseisin offered a ready explanation for denying the plaintiff recovery. The beasts were not "his" at the time of the taking by the defendant.

In the following century the same point was made against allowing an appeal of felony against a second thief.⁴⁸ The argument evidently was that after the first theft the appellor could no

⁴⁴ Y. B. 8 EDW. III, 10-30.

⁴⁵ 3 SELECT ESSAYS, 542.

⁴⁶ *Ibid.*, 543.

⁴⁷ Trans. Ames, "History of Trover," 3 SELECT ESSAYS, 421. See 2 P. & M., 2 ed., 165.

⁴⁸ Y. B. 13 EDW. IV, 3-7.

longer call the stolen goods "his," but the appeal had been of old a remedy against even the twentieth hand⁴⁹ and it was held that by the first taking the property was not out of the appellor and that the appeal lay. For purposes of replevin one from whom goods had been stolen could no longer call the goods "his"; for purposes of appeal he could. But the rule as to the appeal was taken more broadly. It was the accepted law of the Year Books that a theft did not change the "property" in the stolen goods.⁵⁰

A case in trespass in the year following the replevin case is enlightening on trespass as a disseisin.⁵¹ During the course of the argument, Shardelowe, J., said:

"The timber of the house pulled down during the estate of the disseisor is never said to be the chattel of the disseisee, for if you pull down my house and carry off the timber and I bring my writ of trespass, the writ will say *Quare prostravit domum suam, meremium inde asportavit*, and not *meremium suum*."

To which counsel replied: "Sir, it is true and the cause is this, that the house was yours and the timber from it will be considered yours." This case finds a close parallel⁵² a few years later in Professor Ames' other case,⁵³ where on a bill of trespass brought by the plaintiff for carrying off his horse and killing it,

"the defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was divested out of you and vested in us, and therefore we could not kill our own horse *contra pacem*." ⁵⁴

⁴⁹ 2 P. & M., 2 ed., 164.

⁵⁰ STAUNF. PL. COR. 61 a, 188 a; FITZ. ABR. COR. 39; BRO. ABR. COR. 171; FINCH, LAW, 210; VINER, ABR. PROPERTY (E 4); COM. DIG. BIENS (E). Pollock and Maitland attempt to explain away the ascription of "property" to the thief. 2 P. & M., 2 ed., 165. The truth of the matter would appear to be that "property" was not ascribed to the thief in the Year Books except in the replevin case quoted above from Professor Ames and possibly in some other rare instance.

⁵¹ Y. B. EDW. III, 2-4. On the point being raised shortly afterwards as to whether trespass for an ouster lay where the plaintiff would have been entitled to an assize, it was after some deliberation allowed. Y. B. (R. S.) 11 & 12 EDW. III, 503-505, 517-519; Y. B. 14 EDW. III, 231, cited by Prof. AMES, 3 SELECT ESSAYS, 553 n. 2.

⁵² Brian, C. J., argues from a case like the above to cases of trespass where land is not involved. Y. B. 6 HEN. VII, 9-4.

⁵³ Y. B. 27 ASS., pl. 64.

⁵⁴ TRANS. AMES, 3 SELECT ESSAYS, 542.

The bill was adjudged bad. The substantial defense of the defendant had been that the horse had been taken *damage feasant*, that it had been put in the pound, that it had jumped the enclosure and then been tied to a post within the pound on which it had killed itself. A new bill was brought in which nothing but the killing was alleged and the plaintiff recovered. It is to be noticed that on the second bill no attempt was made to take advantage of trespass *ab initio*, as would have been done at a later day. That doctrine was still for the future,⁵⁵ but the exclusion from the bill or writ in trespass of anything but the charge of taking and asportation must have contributed to the establishment of the general form for trespass *de bonis asportatis* and so helped prepare the way for trespass *ab initio* in cases of distress.

Even in the time of Edward III,⁵⁶ as we have seen, the argument of a plaintiff that even although the ore he had dug had come from the defendant's freehold, through having the lead in his hands, the property in it had come to him and the defendant could not lawfully take it away from him, received scant attention.

That the notion of a change of "property" by a theft had

⁵⁵ The foundation for trespass *ab initio* lay in the fact that from an early day any slip in the complicated code of distress was likely to subject the distrainor to the appeal or trespass (*infra*, p. 391). Something closely akin to it is to be found in Y. B. 5 EDW. II, 134, 135. But to treat it too largely is to ignore the very technical character of the doctrine that has come down to us under that name. In 1410 (Y. B. 11 HEN. IV, 75-16) where the defendant in trespass for a breaking and entering had pleaded an entry to view waste, the plaintiff replied that the defendant had broken in on entering and remained a day and a night. The defendant objected that this matter was not contained in the writ or count and that no response to it was necessary. The objection was not allowed, Hill, J., stating that the subsequent tort would be intended as the cause of the entry, and Hankford, J., that in a like case all would be adjudged tortious. The definite establishment of the doctrine would appear to date from 1431. In a like case in that year (Y. B. 9 HEN. VI, 29-34) Paston, J., urged that the plaintiff should take issue on the intent with which the entry had been made and not allege new matter, but Babington, C. J., held that issue should not be taken on the intention but on whether claim of fee had actually been made which was matter of fact. He was acting on the same principle as Brian, C. J., when the latter said: "It is common learning that the intent of man shall not be tried, for the devil himself doth not know the intent of man" (Y. B. 17 EDW. IV, 2-2). Issue was finally taken on the facts alleged in the plaintiff's replication. Paston advised counsel for the plaintiff to "watch out, for the issue is of novel form." In Edward IV's time the rule of the case had become accepted doctrine (Y. B. 2 EDW. IV, 5-9; 12 EDW. IV, 9-20; 13 EDW. IV, 9-5). In 1482 an entry is said to have become tortious *a principio* (Y. B. 21 EDW. IV, 19-22) and in 1490 we get the modern trespasser *ab initio* (5 HEN. VII, 11a-2).

⁵⁶ *Supra*, p. 375.

been the peg to hang the decision on rather than the underlying reason for denying replevin against one holding subsequently to the thief is evidenced by the reasons given for denying trespass against the second trespasser. The earliest case in point cited by Brooke⁵⁷ is a case of ejectment from wardship,⁵⁸ which was an action in the nature of a trespass.⁵⁹ It was there said that "if a man ejects another, and then another ejects him, the first who is ejected will not have an action of ejectment against the tenant of the wardship but writ of right." The point was conceded. The guardian in chivalry had a writ of right on which he could fall back,⁶⁰ but in the ordinary case of trespass to chattels there was no such writ to which to resort. Nevertheless in this case also trespass was denied against the second trespasser despite the fact that because of the lack of other action to fall back upon the cases were not parallel.⁶¹

A more satisfying reason for denying trespass against the second trespasser was given by Brian, C. J., himself and his companions. In a charge to the jury he said:

"If one takes my horse *vi et armis* and gives it to S., or S. takes it with force and arms from him who took it from me, in this case S. is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty."⁶²

Not except in Brooke's "gloss" is the result ascribed to a change of "property" by the first trespass.⁶³ And that it was not dependent on change of "property" or even disseisin is shown by the position taken by many of the judges at this time as to the much-mooted question of the right of the disseisee after reëntry to trespass against an intermediate trespasser or one holding under the dis-

⁵⁷ ABR. TRES. 256, EJ. CUST. 8.

⁵⁸ Y. B. 38 ASS., pl. 9.

⁵⁹ See Y. B. 17 & 18 EDW. III (R. S.) 392 and 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 13 n. 5.

⁶⁰ As to the right of the guardian in chivalry to a writ of right, see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 13.

⁶¹ The case of ejectment from wardship is a striking confirmation of Pollock and Maitland's general argument as to the significance of the rule denying trespass against the second trespasser. 2 P. & M., 2 ed., 167.

⁶² Y. B. 21 EDW. IV, 74-66, trans. AMES, 3 SELECT ESSAYS, 549.

⁶³ BRO. ABR., TRESP. 358.

seisor. By the reëntry the freehold had reverted in the disseisee from the beginning. The peculiar effects of disseisin had been wiped out. Notwithstanding this, Constable, Kingsmil, Frowike, and others in 1498 were of the opinion that even after reëntry the disseisee would not recover in trespass against the feoffee of the disseisor "for two reasons, the one, as aforesaid, he is in by title, the other, the trespass was not made by him but by the first disseisor. And the law is to the same effect where my disseisor is disseised, and I reënter, the second disseisor will not be punished."⁶⁴ The views of Brian, C. J., and his companions were applicable to replevin as well as to trespass. Herle, C. J., in the time of Edward II had said that replevin was the most "possessional thing" there was.⁶⁵ It was the idea of trespass to property "as an extension of that protection which the law throws around the person"⁶⁶ that was uppermost in the minds of Brian, C. J., and his companions and those other judges, of the time of Henry VII, just as it was three centuries and more later to Lord Denman.

The holdings in the above cases seem to have been as good law in 1800 as they were when made. It was still true that replevin did not lie against the "vendee or bailee of a trespasser, nor against a second trespasser";⁶⁷ for the continuous carrying away of trees cut on another's land, a special form of trespass *quare clausum* and not trespass *de bonis asportatis* still lay;⁶⁸ in trespass *de bonis asportatis* the taking and carrying away were all that were charged, although the real cause of the action were some subsequent act which now brought into play the doctrine of trespass *ab initio* and trespass did not lie against the second trespasser.⁶⁹ In the language of the pleader the property could not have been laid in the plaintiff in these cases as of the time of the subsequent wrong. This language would have had a familiar sound to Herle, C. J., and it is doubtful whether he would have given a very much wider scope to its meaning than his modern successor. At least we know that when one attempt was made to carry it beyond the law of ac-

⁶⁴ Y. B. 13 HEN. VII, 15-11. There was a conflict on this point. See AMES, LECTURES ON LEGAL HISTORY, 230; also STEARNS, REAL ACTIONS, 416 n.

⁶⁵ Y. B. 3 & 4 EDW. II (S. S.) 72.

⁶⁶ Rogers v. Spence, 13 M. & W. 571, 581 (1844), cited 2 P. & M., 2 ed., 42.

⁶⁷ Ames, 3 SELECT ESSAYS, 554, citing Mennie v. Blake, 6 E. & B. 847 (1856).

⁶⁸ POLLOCK & WRIGHT, POSSESSION, 230.

⁶⁹ *Ibid.*, 151.

tions and into the general law of property he made a vigorous protest.⁷⁰

But however far the judges of the time of Edward III might have been willing to go in applying disseisin to chattels, to whatever extent they were ready to ascribe "property" to trespassers or thieves, most of their successors in the following century saw in the ascription of "property" to the trespasser not disseisin but disseisin by election,⁷¹ and disseisin by election was purely remedial.⁷² To them it was the proceedings in trespass rather than the trespass itself that divested the property, and the proceedings in trespass had this effect because they were for damages alone and therefore involved a waiver of the right to the property itself.

Disseisin by election appears in an action of trespass brought in 1440 for the taking of a horse and other goods and chattels.⁷³ The defendant pleaded that the plaintiff had taken his grain and that he had taken the horse *damage feasant* to the grain. It was objected that the defendant had shown by his plea that the property in the grain was out of him at the time of the taking of the horse. To this Newton, C. J., replied:

"If you had taken my chattels it is at my wish to sue a replevin, which proves that the property is in me, or to sue a writ of trespass, which proves that the property is his who took them and so it is at my wish to waive the property or not. So here, he has not waived the property for he has justified for *damage feasant* in the said grain."

Markham insisted that a new possession was necessary before the distraint. To which Newton said:

"Suppose that you take my goods in A. and carry them to B. and then from B. to C., by your taking in A. the property is out of me and still I will have a good action of trespass of the taking from B. to C., which proves that the property is in me at my wish."

In 1462⁷⁴ Danby, C. J., used the same reasoning based on the concurrence of replevin with trespass in denying the point made by

⁷⁰ *Supra*, p. 380.

⁷¹ AMES, 3 SELECT ESSAYS, 553.

⁷² "A disseisin by election was not the foundation of rights in the disseisor; it did not operate at all to the prejudice of the person who elected to be disseised, but on the contrary, afforded him a convenient remedy through which to enforce his rights."

3 GRAY, CASES ON PROPERTY, 2 ed., 34 n.

⁷³ Y. B. 10 HEN. VI, 65-5. See also AMES, 3 SELECT ESSAYS, 553.

⁷⁴ Y. B. 2 EDW. IV, 16-8.

Littleton, who was then of counsel, that a gift by a bailor to one who had taken the chattel from the bailee was void. Danby's remarks were in support of Needham, J., to whose statement Littleton had taken exception.

Disseisin by election was expressly invoked by Vavasor, J., in a similar case in 1495. He said:

"Although one take the possession from me, still he is not able to take my property from me, for it is proved that my property remains for I will have replevin which proves the property entirely in me, for if he wishes to claim property it will be found against him and with me. And so, if he was able to have this by the taking, then I would receive nothing by replevin against him. And so one is able to bring writ of detinue, which proves that the property is not out of him if he does not wish it, but he may if he wishes, bring action of trespass, for he is able to be out of the property if he wishes, as one is able to be disseised of rent if he wishes by bringing the assize, but it is at his wish. And so it is of goods taken. One can divest the property out of himself, if he wishes by bringing action of trespass, or demand property by replevin or writ of detinue."⁷⁵

To this Brian, C. J., did not agree. He admitted that neither the bailment nor the trover in detinue were traversable, but said that detinue would lie only where the defendant came by the goods loyally and allowed replevin but on the ground that it was of property which the plaintiff had at the time of the taking. But as early as 1358 it had been held that a plaintiff might have replevin though it was only by bringing the action that the property was vested in him, so that he had not had the property before the time of action brought;⁷⁶ and if replevin had not at least assumed property in the plaintiff at the time of action brought, there would not have been that "contrairiositie"⁷⁷ in the supposal of the writs of replevin and trespass emphasized in the Year Books and noted by Professor Ames. It was in this connection that Brian made the statement which Professor Ames has made his text:

"And so in my opinion the property is divested by the taking, and then he has nothing but a right of property, and so the property and the right of property is not all one."

⁷⁵ Y. B. 6 HEN. VII, 8-4.

⁷⁶ FITZ. ABR., REPLEVIN, 43. See CO. LITT. 145 b.

⁷⁷ AMES, 3 SELECT ESSAYS, 551, citing the Year Books. See especially the statement by Newton, Y. B. 8 HEN. VI, 27-17, which precedes the case in 1440 for the taking of the horse *damage feasant* by some eleven years.

The contrast between replevin and detinue on the one hand and trespass on the other was not new. The former were recuperatory, the latter was not, and so they seem to have survived to the executor from the first while trespass was denied until in 1330 a statute allowed the executor to bring trespass for goods carried away in the lifetime of his testator.⁷⁸ The importance of this recuperatory element in the notion that replevin affirmed property in the plaintiff may be seen from what was said in 1489⁷⁹ as to the appeal of felony. On an indictment for larceny the defendant pleaded that he had been acquitted of the same felony in another county. To Hussey, C. J., this seemed no plea.

“And as I understand, trespass for battery committed in one county cannot be found in another county on pain of attain; and the same law of goods taken and carried out of the county where they were taken, it can only be found in the county where the taking occurred, and that on pain of attain. But the law is otherwise in appeal; for there he may bring an appeal in each county where the goods are carried. And this has been a diversity, for the appeal is to recover his goods, and affirms property continually in the party, etc., but it is otherwise of trespass; for it is not to recover the goods but damages for the goods, etc. And, sir, I take it, if one steals my goods, and another steals the goods from him, I shall have an appeal against the second felon; but it is otherwise of trespass. And notwithstanding the appeal lies in each county where the goods are carried, still he cannot be indicted except where the taking was made, for the indictment is not to have the goods, etc.; and that has been the diversity between indictment and appeal.”⁸⁰

To this diversity between appeal, indictment, and trespass, Fairfax, J., agreed.

Aside from the relief afforded, there was another respect in which replevin at one time differed from trespass, and that was in the wrongs which they remedied. Replevin was originally a proceeding in case of distraint and remained primarily such to recent times. On the other hand the use of trespass in cases of distress was distinctly limited. To Professor Ames “trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against a cus-

⁷⁸ See AMES, 3 SELECT ESSAYS, 557, 581.

⁷⁹ Y. B. 4 HEN. VII, 5-1; BEALE, CASES ON CRIMINAL LAW, 820.

⁸⁰ Trans. BEALE.

todian.”⁸¹ If trespass for an asportation was so pronouncedly an action against a disseisor, then there is ground for arguing that there was a strong analogy between it and the assize, and as trespass to land would not at first lie for a disseisin, for arguing that trespass for an asportation had more in common with the assize than it did with trespass to land. Professor Ames goes to that length, making trespass to land and replevin analogous and setting them over against the assize, trespass for an asportation,⁸² and the appeals.⁸³ But any theory that would make trespass to land and trespass to chattels fundamentally distinct would destroy an analogy much in use throughout the Year Books and after and substitute in its place one that at best early disappeared.

The wrongs charged in the writs of trespass *de bonis asportatis* and replevin differed in that in the former it was a taking and carrying away *vi et armis* and against the peace of the king that was charged, while in the latter it was a taking and unjust detention. In the count the detention is specified as one against gage and pledge.⁸⁴ This was the count in the *vee de nam* in Bracton's time and he tells us that it happened frequently that the lord might safely deny the detention against gage and pledge, but not the unjust seizure, whereupon both were in mercy.⁸⁵ In the time of Edward I, it is said⁸⁶ that the defendant still ought to respond to the detinue as well as to the taking, but although the like opinion was held by some in a case in the fifth year of Edward II the plea of the defendant to the taking of the beasts was received without his responding to the detinue.⁸⁷ Damages might still be given, however, where the taking was lawful but the detention tortious,⁸⁸ until finally where there was nothing but the tortious detention, the plaintiff was forced to resort to detinue.⁸⁹ The *vi*

⁸¹ 3 SELECT ESSAYS, 551.

⁸² *Ibid.*, 553 n. 2, 425-427. See also AMES, LECTURES ON LEGAL HISTORY, Lecture XIX. On page 228 he says: "It is to be remembered that trespass *quare clausum fregit* is not a counterpart to trespass *de bonis asportatis*. Assize of novel disseisin corresponds to the latter action. The modern trespass or case for injury to chattels corresponds to trespass *quare clausum fregit*."

⁸³ MARTIN, CIVIL PROCEDURE, 374.

⁸⁴ BRACT. 156 b.

⁸⁵ FITZ. ABR., REPLEVIN, 27.

⁸⁶ Y. B. 5 EDW. II, 157; FITZ. ABR., REPLEVIN, 21.

⁸⁷ F. N. B. 69 G.

⁸⁸ See 33 HEN. VI, 26-12 and F. N. B. 69 G. n. (a).

et armis of the writ of trespass seem to have already become words of form in 4 Edward II,⁸⁹ while the surviving function of the *contra pacem* was to affect the charge with a tinge of criminality.⁹⁰ In effect, in the early years of Edward II the charge in each of the two actions had been narrowed down to an unlawful taking, and at that time we find replevin and trespass on the Statute of Marlborough for driving the cattle distrained out of the county treated as concurrent actions.⁹¹

So far indeed were the judges of the Year Books from feeling that trespass was not on principle an action to be used in case of a distress, that it was accepted doctrine that prior to the Statute of Marlborough⁹² trespass *vi et armis* had lain against the lord who had distrained when rent was not in arrear.⁹³ This also was the understanding of Coke.⁹⁴ Their history may have been at fault,⁹⁵ for trespass *vi et armis* was just becoming a writ of course about the time the Statute of Marlborough was passed, but the important point for us is that they saw nothing on principle to prevent the use of trespass *vi et armis* in such a case. They gave a narrow construction to the statute and allowed trespass against the lord's bailiff.⁹⁶

That replevin lay for a trespass was, as we have seen, the stock argument of the judges of the 1400's to show that a trespass was nothing more than a disseisin by election. Brian, C. J.'s argument against disseisin by election would have been so much more effective if he could have denied the concurrence of replevin with trespass as he did of detinue. He made no such attempt, notwithstanding, as it would seem, that they were not concurrent in practice.⁹⁷ If they had ever been "fundamentally distinct and mutually exclusive actions" it is hard to see how he could have recog-

⁸⁹ Y. B. 3 & 4 EDW. II (S. S.) 29.

⁹⁰ 2 P. & M., 2 ed., 464.

⁹¹ Y. B. 5 EDW. II, 134, 135.

⁹² C. 3.

⁹³ 44 EDW. III, 20-16; 11 HEN. IV, 78-19; 10 EDW. IV, 7-18; 9 HEN. VII, 4-4, 14-8. That statute had provided that the lord should not be fined in such a case and as a fine was incident to trespass *vi et armis*, the latter was impliedly excluded. See CO. LITT. 127 a.

⁹⁴ 2 INST. 105; Bevil's Case, 4 Co. 11 b (1583).

⁹⁵ But see *infra*, p. 391, and the cases cited by Maitland, 3 HARV. L. REV. 167.

⁹⁶ See the citations in the preceding notes.

⁹⁷ AMES, 3 SELECT ESSAYS, 431, 553 n. 2.

nized them as "theoretically" concurrent. The writ *de proprietate probanda* had removed the objection that replevin could be defeated by a claim of property before the sheriff, but this had not been responsible for such change in attitude as to "property" in the trespasser as there may have been in the judges of the time of Edward III and the judges of the 1400's, for it had been instituted at least as early as the time of Edward II⁹⁸ and its object seems to have been not so much to extend the scope of replevin as to make replevin more effective by keeping down false claims of property. When we get the first expression of the concurrence of replevin with trespass *contra pacem*, that by Gascoigne, C. J., in 1405,⁹⁹ the writ *de proprietate probanda* is resorted to by way of argument to show that replevin was not concurrent with trespass in that where the property was found for the defendant at the sheriff's inquest, the replevin proceedings were at an end. In practice replevin was regarded as a proceeding to settle disputes between landlords and tenants, or more broadly between distrainers and distrainees, but fundamentally the judges did not see why it might not be used generally in cases of trespass. In its early stages it could have been defeated by a claim of property just as trespass to land could have been defeated by a claim of freehold, but any distinction between actions based on the intention with which similar acts were done was likely to have short life in the Middle Ages, and it did in these cases. The anomalous character of the proceedings in replevin by which the sheriff handed over the property on mere complaint and before trial, gave occasion for the writ *de proprietate probanda*, and this writ helped to keep the fact of the old difference between replevin and trespass alive. But if they were ever fundamentally distinct it is hard to account for the unanimity of opinion in their "theoretical" concurrence in the later 1400's.

But not only would it seem that replevin and trespass were not fundamentally distinct and exclusive but that their relationship from the first was of the most intimate kind. Both were intimately connected with the appeal of robbery. A *vee de nam* was said to be "a kind of robbery against the peace of the king even more than a novel disseisin,"¹⁰⁰ while Littleton¹⁰¹ and Choke¹⁰² could

⁹⁸ *Supra*, p. 376.

⁹⁹ Y. B. 7 HEN. IV, 28b-5; AMES, LECTURES ON LEGAL HISTORY, 69.

¹⁰⁰ BRACT. (Twiss), 157 b; 2 P. & M. 577.

¹⁰¹ Y. B. 2 EDW. IV, 15-7.

¹⁰² Y. B. 9 EDW. IV, 33-9.

argue from the appeal to trespass. In early counts in appeal¹⁰³ and trespass¹⁰⁴ we find the allegation that has come down to us through replevin from the *vee de nam* that the defendant had detained chattels against gage and pledge. In the first chapter of the Statute of Marlborough "distresses" and "revenges" are put under the like interdict, as trespasses, and it is only through the exception made in the third chapter that the lord escaped this general interdict. Even he was subject to the general fine if he distrained out of his fee¹⁰⁵ or drove the distress out of the county.¹⁰⁶ The legality of extra-judicial distress does not appear to have been ancient.¹⁰⁷ In the time of which Pollock and Maitland wrote, "the distrainer who did not observe all the complex rules of the code of distress was lucky if he extricated his neck from the noose,"¹⁰⁸ and this is reflected in the trespass *ab initio* of later days. There was no such intimate connection between detinue and trespass, and one subject to an action of detinue did not become a trespasser *ab initio* by a subsequent misdemeanor.

It is a significant fact that in the discovery of "the seisin of chattels"¹⁰⁹ replevin and theft played a conspicuous part. In his presentation of the matter, Maitland was forced to rely for the most part on replevin cases¹¹⁰ in which the phrase "still seised" did not finally give way to "still detained" until the reign of Henry VI.¹¹¹ As long as the defendant in replevin was "still seised" the plaintiff did not have to reply to the avowry,¹¹² and this rule *et seisiatus placitet* is found as far back as the laws of Henry I.¹¹³ "It is said that German law without foreign help got as far as this" in the protection of possession¹¹⁴ and we have already seen Herle's statement that replevin was the "most possessional thing" there was.¹¹⁵ And the technical phrase running back to the Laws of

¹⁰³ SEL. PL. CR. (S. S.), pl. 138; 2 ROT. CUR. REG. 230.

¹⁰⁴ Maitland, "Register of Original Writs," 3 HARV. L. REV. 167.

¹⁰⁵ C. 2.

¹⁰⁶ C. 4.

¹⁰⁷ 2 P. & M., 2 ed., 576; BIGELOW, HIST. PROC., 208.

¹⁰⁸ 2 P. & M., 2 ed., 499.

¹⁰⁹ Maitland, 1 LAW QUART. REV. 324.

¹¹⁰ 1 LAW QUART. REV. 325.

¹¹¹ *Ibid.*, 330.

¹¹² Maitland, 1 LAW QUART. REV. 327, 328, citing Y. B. 21 & 22 EDW. I (S. S.) 10, 56.

¹¹³ C. 29, § 2; 1 LAW QUART. REV. 325.

¹¹⁴ 2 P. & M., 2 ed., 47.

¹¹⁵ *Supra*, p. 384.

Henry I was *de furto seisiatus*.¹¹⁶ It was a "question of life and death whether the thief was taken in seisin of the stolen goods."¹¹⁷ It seems likely that to a lawyer of the time of Edward I "disseisin of chattels" would sooner have suggested theft or the proceedings in replevin than trespass. Any unlawful ouster from land, it would seem, would from the first have subjected a man to the assize. The claim of freehold was important where the act was less than ouster and so of doubtful import.¹¹⁸ Likewise it would seem that any unlawful taking of a chattel would have been considered a disseisin whether under claim of property or not.

Whatever analogy there may have been between the assize and trespass for an asportation and the appeal, it was not an active one in the Year Books. It did not result in trespass being used against the second trespasser¹¹⁹ nor for a tortious transfer by the bailee,¹²⁰ and far from allowing the appeal against the second thief on analogy to the assize, it was put on the ground that the property had not been changed by the first theft.¹²¹ On the other hand, the analogy between trespass to chattels and trespass to land was most active, and there is strong reason for thinking that so much of disseisin as drifted through to trespass for an asportation did so by way of trespass for a disseisin of land.¹²² In the early examples of trespass *quare vi et armis* the destruction or asportation of goods is generally complained of as an incident to trespass to land¹²³ and it was only slowly that the subforms of the general action developed.¹²⁴ The development of these subforms does not appear to have gone very far in the reign of Edward III.¹²⁵

Viewed either as a commentary on the "his" of the writs of replevin and trespass or as another way of stating that one waived the property in a chattel by proceeding in trespass, the notion that

¹¹⁶ 1 LAW QUART. REV. 325.

¹¹⁷ *Ibid.*, 326.

¹¹⁸ If an act less than an ouster was done a second time, the assize held notwithstanding a disclaimer of freehold by the defendant. 1 BRITT. (NICHOLS), 343; BRACT. 216 b.

¹¹⁹ As to the failure of the analogy in this respect, see especially 2 P. & M., 2 ed., 168 n. 2.

¹²⁰ See AMES, 3 SELECT ESSAYS, 550.

¹²¹ *Supra*, p. 380-1.

¹²² *Supra*, p. 381, and see 2 P. & M., 2 ed., 167.

¹²³ 2 P. & M., 2 ed., 166.

¹²⁴ *Ibid.*

¹²⁵ Y. B. 20 EDW. III (R. S.) XXXVIII.

the "property" in a chattel could be changed by a trespass would seem to have been neither fundamental nor old. That it had what vogue it had with the glossators of the Year Books would appear to have been due partly to the great authority of whatever came from Brian, C. J., but principally to the contrast made between felony and trespass in proceedings against the third hand.¹²⁶ It had early been held that a taking by way of distress did not alter the "property" in the goods,¹²⁷ and this was re-affirmed in the year preceding the case against the second felon.¹²⁸ The distrainer did not claim property in the distress but took it as security for the performance of some obligation. When the argument was made that the property had been altered by the first theft, the case of distress evidently presented itself and the same point was made as to the thief that he does not claim property. He does claim property in the accepted sense in which that phrase is used in connection with disseisin,¹²⁹ but evidently it was not disseisin that the judges had in mind. We now say that a taking is not a theft if it is under *bonâ fide* claim of right.¹³⁰ A taking under a dispute as to title is not felonious. It was this that the judges had in mind and they were laying down a valid distinction between larceny and trespass when they said that "a felon does not claim property" however far removed this may have been from disseisin.

The contrast between felony and trespass is brought out in Fitzherbert's report of the case by the addition, after the words "for felony does not claim property," of "otherwise is it of trespass."¹³¹ A like diversity between trespass and the appeal is emphasized in the case from 1489 already quoted.¹³² In the latter case the procedural character of the contrast is evident. Fitzherbert's addition seems to be an assertion that trespass claims property and not necessarily that it alters it, but Brooke gives the latter explanation of the case against the second trespasser,¹³³ while Finch ex-

¹²⁶ FITZ. ABR., COR. 39; Y. B. 13 EDW. IV, 3-7; Y. B. 4 HEN. VII, 5-1; *supra*, p. 380.

¹²⁷ FITZ. ABR., REPLEVIN, 43.

¹²⁸ Y. B. 12 EDW. IV, 10-25.

¹²⁹ AMES, 3 SELECT ESSAYS, 426.

¹³⁰ 2 BISHOP, NEW CRIMINAL LAW, § 851.

¹³¹ ABR. COR. 39. Compare this with the "it is otherwise if he who took the beasts claimed the property" of the case of distress referred to *supra*, p. 379.

¹³² *Supra*, p. 387.

¹³³ BRO. ABR., TRESP. 358; *supra*, p. 383.

plains Professor Ames' case where the defendant was charged with carrying off the plaintiff's horse and killing it ¹³⁴ by the "pretence of title" attributed to the trespasser in this case against the second thief.¹³⁵ The statement made by Finch, however, was of the broadest kind,¹³⁶ and in this he was followed by Viner.¹³⁷

"And so we arrive at this lamentable result which prevails for awhile: If my chattel be taken from me by another wrongfully but not feloniously, then I can have no action against any third person who at a subsequent time possesses it or meddles with it; my one and only action is an action of trespass against the original taker. A lamentable result we call this, not so much because it may have done some injustice to men who are long since dead and buried, as because for centuries it bewildered our lawyers, made them ascribe 'property' to trespassers and even to thieves, and entailed upon us a confused vocabulary, from the evil effects of which we are but slowly freeing ourselves." ¹³⁸

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¹³⁴ *Supra*, p. 381.

¹³⁶ *Ibid.*, 199, 210.

¹³⁸ 2 P. & M., 2 ed., 167.

¹³⁵ FINCH, LAW, 199.

¹³⁷ ABR. PROP. (E. 4).

A LEGISLATIVE INDICTMENT OF THE COURTS

WE are living in a period of great legislative activity. The amount of statute law upon our shelves is already discouragingly large, but there is no indication of any decrease in the output. It was stated on good authority not long ago that 62,014 statutes were passed by our national and state legislatures during the five years from 1909 to 1913 inclusive, and there has certainly been no diminution in the industry of the lawmakers since that time. If there has been any change it has been in the direction of greater speed. This article, however, is not to be a jeremiad on modern legislation. Unwise and hasty as much of it may be, there can be no doubt that there will have to be much more legislation if we are to have laws which shall fit the conditions which modern industrialism and increasing population are bringing upon us. That the changed conditions will be met and provided for I have little doubt; there will doubtless be much unsatisfactory and experimental legislation enacted during the process, but this does not lead my mind to the conclusion that there is no help in legislation, but rather that we need more scientific legislation, and this means that the educated and thoughtful citizen, and especially the educated lawyer, owes a duty to the state to familiarize himself with the legislation of the day and render any aid that he can in making it more perfect. This, however, is another story. This article is not intended to be hortatory, but suggestive.

There are many things in connection with modern legislation, especially that class of legislation designed to correct real or supposed defects in the existing laws concerning labor and social conditions, which deserve serious thought, and among them there is to my mind nothing more significant than the tendency to take from the courts the duty of settling disputed questions of fact and impose it upon an arbitration committee, or an administrative board or officer with provisions requiring the determination to be made summarily without the aid of a jury and without regard to the strict rules of evidence enforced by the courts.

A striking instance of this tendency is to be found in the so-called Workmen's Compensation Acts which have been placed upon the statute books in a score or more of states during the last few years.

Out of nineteen of these acts passed prior to the year 1914, not one (with the possible exception of the Kansas act) provides for the determination of the facts by the old-fashioned method of a jury trial. The majority of them provide for the trial of disputed facts by an arbitration committee with revision by a commission, or by the commission itself in the first instance, and if there be a judgment entered (which is the case in many of the laws) it is entered as matter of course on the decision of the committee or commission and is not generally subject to review, except a review in the nature of a common law *certiorari* which simply ascertains whether the tribunal has acted within its jurisdiction. Two or three of the laws provide for the trial of the issues by a judge of a court of general jurisdiction, but even in these instances the trial is summary, no jury is called, and every means is taken to free the proceeding from the ordinary rules of procedure and evidence.

The same tendency is to be observed in other modern laws, such, for instance, as the laws regulating public utilities in the various states, in which the frequently recurring controversies of fact between the utility on the one side and the citizen or the public on the other are almost invariably tried and decided by a commission or by some other administrative board or officer subject perhaps to review by the courts by *certiorari* or some like remedy.

This feature of these very important laws is certainly calculated to arrest the serious attention of the lawyer and the judge. If the issues of fact arising under these laws can be more satisfactorily determined by administrative boards than by the courts, why should not the same principle apply to other questions of fact and why should not the courts ultimately retire from business as the triers of such questions and only survive as reviewers of the acts of administrative boards to determine whether or not they have acted within their jurisdiction?

Unquestionably this new policy reverses the precedents of the past. The determination of controversies of fact by courts rather than by executive or administrative officials has long been a marked

feature of our law; indeed this has been one of our boasts. Our constitutions with remarkable unanimity declare that government is divided into three coördinate branches — the executive, the legislative, and the judicial — each supreme in its own sphere and each scrupulously prohibited from encroaching on the exclusive field of activity of either of the others. In addition to this both state and federal constitutions carefully preserve the right of trial by jury as one of the very cornerstones of the temple of liberty; and yet in spite of all this the legislators of these early days of the twentieth century seem to be practically unanimous in the opinion that controversies between employer and employee relating to injuries received in the service should be passed upon by boards of arbitration or administrative commissions or officials rather than by the courts. I am not suggesting that there is any doubt as to the constitutionality of such provisions as these: they have been uniformly and rightly sustained upon the general principle that an administrative governmental agency is frequently required to ascertain and decide disputed questions of fact in order to be able properly to perform its purely administrative duties in the enforcement of a given law, and that in so doing it is not exercising judicial power in the constitutional sense although it acts quasi-judicially.

Nevertheless the judicial branch of the government is created for the express purpose, among others, of determining controversies of fact, and there is nothing in the nature of the controversies in question which substantially differentiates them from others or makes them inappropriate for determination by the courts. Moreover we have no lack of courts. American legislators are in fact surrounded by a multitude of courts. There are courts to the right of them and courts to the left of them; courts of general and courts of limited jurisdiction; courts superior and courts inferior; courts of law and courts of equity; courts municipal and courts rural; courts of first instance and courts of appeal; courts civil and courts criminal; state courts and federal courts — all equipped with judges supposed to be experts in the determination of controversies, all specially commissioned to do just that business, all provided with the necessary machinery to do it, and all paid out of the public treasury. Why should not this expert governmental agency which is already in existence be put into service and its wisdom and experience taken advantage of? Why should new

agencies be created at additional expense to the public when there already exists so complete a system?

This "why" seems to me a very important one, and one which is well worth the study of the lawyer and the publicist. Before attempting a reply to this question let me quote the following words from the address of Elihu Root before the American Bar Association in October, 1914. Among other things Mr. Root said:

"American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers, but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute and go to him and tell their stories and accept his judgment."

I thank Mr. Root for these sentences. In my judgment they contain more wisdom on the subject of legal procedure than has ever been put in the same compass before or since. They express the fundamental principle, or what ought to be the fundamental principle, of procedure with a clearness and simplicity which has not been approached, and they also suggest the answer to the "why."

American legislators of the present day are very largely composed of business men, farmers, and practical laymen of all classes. These practical men made up their minds to remedy in some way the abuses of personal injury litigation between employer and employee, and they took the determination of questions of fact from the courts because they were satisfied that the courts had made a failure of it; in other words, they wanted these questions settled in a practical, expeditious, and businesslike manner and they were quite sure that the courts did not do business in that way.

By their action they have said in effect to the American courts: "You do not do business in a businesslike way, hence we are compelled to create a tribunal that will."

This is a serious indictment. It cannot be ignored, laughed away, or met by mere denials. It must be answered and defended against so far as there may be a defense, and if there be no complete defense there should be no delay or false pride in admitting the fact and making haste to apply the remedy.

I am not disparaging the work of the American courts. Charged

with duties and loaded with responsibilities such as have been imposed upon no other courts, they have, on the whole, acquitted themselves with credit and are entitled to the confidence and respect of every American citizen. This is not saying, however, that their methods are perfect or that there may not be much improvement in procedure.

For myself, I believe there is very substantial basis for the dissatisfaction felt by the practical laymen with the methods used by trial courts generally in the trial of jury cases.

I pass with mere mention the difficulties resulting from extreme niceties of pleading and procedure as well as the unnecessary delays which attend our too numerous appeals from intermediate orders and our frequent new trials. These things have indeed done good service in the great cause of impeding the prompt and businesslike administration of justice, but the matters which I wish now to speak of are matters arising during the conduct of the trial.

There is too much ground for the charge that our jury trials frequently resemble exhibitions of refined legal hermeneutics, or exercises in intellectual gymnastics for the benefit of the lawyers, rather than earnest and practical endeavors to determine a disputed question of fact for the benefit of clients.

Take, for instance, the ancient rule of evidence excluding hearsay testimony. The general principle that hearsay evidence is apt to be unreliable is certainly correct. It may be easily manufactured, it incurs the risk of error resulting from two fallible memories instead of one, and the original teller of the tale is not before the jury nor can he be put under oath. Nevertheless, the enforcement of an inflexible rule that hearsay evidence is never to be received and that if received the judgment must be reversed and the action retried does not strike the practical layman as good common sense, and he has much to justify that conclusion.

Let not the profession be unduly alarmed. I do not advocate the wholesale admission of hearsay evidence, but I do suggest that the ironclad rule of exclusion should be substantially modified. Why not apply something like the same rule which any sensible man applies when he is endeavoring to settle some question of fact upon which his own action depends? He does not lift up his hands in holy horror if a piece of hearsay evidence comes his way, nor does he close his ears to it. If he be fair and honest he remembers

that it is hearsay, he makes allowance for the possible treachery of two memories, he considers the probable truthfulness of the two unsworn witnesses, and he finally rejects it or gives it such weight in the scale as it seems that it ought to have in view of all the circumstances. So if a person in whose truthfulness one has entire confidence relates a statement made by a third person also known to be truthful, his statement will readily be believed even though opposed by the direct testimony of one who claims to have been an eyewitness but who is known to be untruthful. The fact is that we are constantly acting on hearsay evidence in the most important affairs of life. The rigid rule of exclusion originated at a time when jurymen were supposed to be mentally unable to hear a piece of hearsay evidence without giving it the same weight as the direct evidence of a truthful witness, a time when they were treated as children who could not be trusted to act like adult reasonable beings but must be provided with "blinders" to prevent the eyes from wandering outside of a certain very narrow field of vision.

These conditions have changed. Juries selected under modern laws are generally composed of practical, level-headed men of affairs who are entirely capable of making the proper allowance for the inherent weaknesses of hearsay evidence and who want to hear the entire case just as an arbitrator would.

My suggestion is that the rule should be that hearsay evidence is *primâ facie* incompetent but that the trial court in its discretion may admit it when of opinion that it possesses probative value and that such admission is not to be considered as error except in case of an abuse of discretion. Such a change of rule as this would naturally demand (as it seems to me) that the trial judge should have power to caution and advise the jury not only as to the weight of such evidence generally but as to the apparent truthfulness of the witnesses in the instant case and the allowance which in the opinion of the trial judge ought to be made because of the hearsay character of the testimony.

This brings me to the consideration of another feature of our trial procedure which tends to reduce the efficiency of our courts. I refer to the rule, which is almost universal in the state courts, prohibiting the trial judge from expressing an opinion as to the weight of the evidence or the credibility of the witnesses. Instead

of summing up the case and giving the jury something like a luminous review of the evidence with helpful suggestions which his experience and legal training fit him to give, he must confine himself strictly to a colorless statement of legal principles and leave the jury to apply them to the case as best they may.

It is not difficult to see the origin of this rule. The early English colonist had a very clear recollection of the arbitrary and tyrannical methods of the English judges of the seventeenth and eighteenth centuries, the judges who deemed it their duty to carry out the wishes of the king and who hesitated not to browbeat accused persons, force convictions, imprison honest jurymen, and bend the law to accomplish their purpose.

Against such judges the jury was the only defense of the citizen, and the jury must be free and untrammelled. There are no such conditions now. Our judges do not represent the king nor any central administrative power. So far as the state courts are concerned nearly all of the judges are elected by the people and may be retired at the end of their terms by the vote of the people. It is as improbable that such judges should desire to influence the jury for any ulterior purpose as it is lamentable that they are debarred from aiding the jury in a sphere where they are peculiarly fitted to render aid.

It will be said perhaps that it would be unwise to vest such power in the judges on account of the danger that it might be abused by unworthy judges. The same argument exists against the vesting of power in any officer or board. It is possible that it may be abused, but we must vest it somewhere if we are to have government by law; besides, if the power be abused the abuse may always be corrected on appeal. In my judgment efficiency suffers greatly by the rule which prevents the trial judge from assisting the jury by a careful summing up of the case.

Following the same general line of criticism I think it may be said that American trial judges too frequently fail to exercise control over the proceedings in their own courts with that vigor and decision which a judge should exercise. The trial judge should be the master if his court is to produce good results; he must be something more than the moderator of a debating society.

Take, for instance, the examination of jurymen on the *voir dire*; we all know to what lengths it is carried by counsel and how much

valuable time is frequently spent in the examination and reëxamination of prospective jurymen on all sorts of collateral questions which only remotely bear on the question of their competency. Counsel should of course have the right to ascertain whether the proposed jurymen are interested or prejudiced, but the trial judge should promptly interfere after this opportunity has been given and it becomes apparent that the privilege is being abused. So also with regard to cross-examination of witnesses the same criticism may often be justly made. It is allowed to go to extreme and absurd lengths; the real issue is obscured by false or collateral issues which are dragged into the case and which court and counsel finally are unable to distinguish from the real issues.

Such examples of failure to control the trial by the judge, to say nothing of such things as the unrebuked browbeating of witnesses, ceaseless trivial objections to evidence, and well-nigh endless discussions of such objections, rightly cause the gorge of the practical layman to rise and move him to denounce courts and lawyers as unpractical and unfitted to deal with business controversies in a day when business is done by telephone and telegraph instead of by the mail-coach.

It is not to be inferred that the courts have been responsible for all the defects and shortcomings in court procedure which are criticised by the practical citizen. The legislative branch is by no means blameless. Take, for instance, the statutory provision which exists in most of the states to the effect that the failure of an accused person to take the witness stand shall not raise any inference of guilt. Such a provision is really an affront to the reason, an attempt to place a sort of padlock on the intellect. The mind is not subject to the mandates of the will, certainly not the legislative will. Nevertheless, the trial courts must give this instruction to the jury when it is requested, or commit reversible error.

Recently a trial judge in one of our western states told me of the following experience with the administration of this statute: In the trial of an important criminal case where the evidence for the state was quite satisfactory, the defendant did not offer himself for a witness, and upon request of the defendant's counsel and in obedience to the statute the judge gave to the jury the caution that they must not base any inference of guilt upon this fact. The jury went out and were gone a long time; they came back for

further instructions and again went out, and finally, much to the judge's relief, brought in a verdict of guilty. A little later the judge met one of the jurymen, a very intelligent business man, and the conversation turned on the case. After some comment on its facts the jurymen told the judge that the reason for the difficulty experienced by the jury lay in the charge that no unfavorable inference could be drawn from the failure of the accused to testify in his own behalf, and the jurymen said further: "Now, Judge, I have been wondering why you gave the jury that charge." To this the judge replied, "I gave it because I am compelled to do so, — the statute of the state says so." "Well," replied the juror, "that may be the law, but it is not good sense."

The jurymen unconsciously formulated the business man's criticism of the methods of the courts. They do not seem to him to be good sense. It certainly is not good sense when a judge tells a jury that he may use the information gained by a view of premises or property to assist him in applying the evidence but cannot use it as evidence; it is not good sense when a judge is obliged to close his eyes to the law of another state because it was not formally introduced in evidence when in fact the book is before him; and it is not good sense when a trial court cannot use standard scientific and technical works in advising both himself and the jury as to a technical question which arises in the case.

The gist of the matter is, as it seems to me, not only that trial judges should more effectively dominate the situation in the trial of cases, but that the courts should possess much more of the freedom of action and flexibility of procedure which is characteristic of the administrative tribunals of which I have spoken. They should be able to use more of the methods used by the ordinary citizen in ascertaining truth. There is, to my mind, no good reason why advances should not be steadily and rapidly made along these lines.

Courts must administer the law in a practical way, as far as possible, "along the lines of laymen's understanding and mental processes" if they are to commend themselves to laymen. They must move forward with the race if they would maintain their commanding position in the administration of governmental affairs.

J. B. Winslow.

THE PERSONALITY OF ASSOCIATIONS

I

THE state knows certain persons who are not men. What is the nature of their personality? Are they merely fictitious abstractions, collective names that hide from us the mass of individuals beneath? Is the name that gives them unity no more than a convenience, a means of substituting one action in the courts where, otherwise, there might be actions innumerable? Or is that personality real? Is Professor Dicey right when he urges ¹ that "whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted"? Does our symbolism, in fact, point to some reality at the bottom of appearance? If we assume that reality, what consequences will flow therefrom?

Certainly no lawyer dare neglect the phenomena of group life, even if on occasion ² he denies a little angrily the need for him to theorize about them. For man is so essentially an associative animal that his nature is largely determined by the relationships thus formed. The churches express his feeling that he has need of religion. His desire for conversation and the newspapers results in the establishment of clubs. The necessity of social organization gave birth to the state. As his commercial enterprise began to annihilate distance, the trading company came into being. It would not, one urges, be over-emphasis to assert that in every sphere of human activity associations of some kind are to be found. They are the very life-breath of the community.³

And, somehow, we are compelled to personalise these associations. They demand their possessive pronouns; the church has "its" bishops. They govern a singular verb; the railway company

¹ LAW AND PUBLIC OPINION, p. 165.

² See, for instance, H. A. SMITH, LAW OF ASSOCIATIONS (1914), p. 129.

³ On the relation between individual personality and social groups the reader will find much of deep interest in WILFRED RICHMOND, PERSONALITY AS A PHILOSOPHICAL PRINCIPLE (1900). I personally owe much to this fascinating book.

"employs" servants. The United States of America is greater than all Americans; it becomes a single individual, and fraternises, Jonathan-wise, with a John Bull in whom all Englishmen have their being. The Bank of England is — the phrase, surely, is remarkable — the "little old lady of Threadneedle Street"; but no one would speak of seven distinguished merchants as a little old lady. The House of Commons is distinct from "its" members, and, no less clearly, it is not the chamber in which they meet. We talk of "its" "spirit" and "complexion"; a general election, so we say, changes "its" "character." Eton, we know well enough, is not six hundred boys, nor a collection of ancient buildings. Clearly, there is compulsion in our personalising. We do it because we must. We do it because we feel in these things the red blood of a living personality. Here are no mere abstractions of an over-exuberant imagination. The need is so apparent as to make plain the reality beneath.

II

Now lawyers are practical men dealing with the very practical affairs of everyday life, and they do not like, in Lord Lindley's phrase,⁴ "to introduce metaphysical subtleties which are needless and fallacious." The law, so they will say, knows persons; by Act of Parliament⁵ "persons" may include bodies corporate. Persons are the subjects of rights and duties which the courts will, at need, enforce. If a body corporate is a person, it will also be the subject of rights and duties. If it is a person, it is so because the state has conferred upon it the gift of personality; for only the state can exercise that power. And the terms of such conference are strictly defined. The corporation is given personality for certain purposes to be found in its history, in its charter, its constituting act, its articles of association. The courts will say whether certain acts come within those purposes; whether, to use technical terms, they are *intra* or *ultra vires*. This limitation is in the public interest. "The public," so the courts have held,⁶ "is entitled to hold a registered company to its registered business." The company

⁴ Citizens' Life Assurance Co. v. Brown, [1904] A. C. 423, 426.

⁵ 52 & 53 VICT., c. 63, § 19.

⁶ Attorney-General v. Great Eastern Ry. Co., L. R. 11 Ch. D. 449, 503 (1879), per Lord Bramwell.

has a personality; but it has a personality capable only of very definitised development.

Why is it so limited? English lawyers, at any rate, have no doubt upon this question. The corporation is the creature of the state.⁷ Its will is a delegated will; its purpose exists only because it has secured recognition. And, so the lawyers will tend to imply, it is in truth a fictitious thing. Persons, they know well enough, are human beings; the corporation is invisible and *in abstracto*.⁸ It has no human wants. "It cannot," so an American judge has said,⁹ "eat or drink, or wear clothing, or live in houses"; though hereto a sceptic might retort that a theory of domicile has given some trouble, and ask if there is not a solid reality about the dinners of the Corporation of London. "It is," said Marshall, C. J.,¹⁰ "an artificial being, invisible, intangible, and existing only in contemplation of law" . . . "it is precisely," he says again, "what the act of incorporation makes it." "Persons," said Best, C. J., in 1828,¹¹ "who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by usurping on his prerogative."

Nor are the textbook writers less definite. "They are legal persons," says Austin,¹² "by a figment, and for the sake of brevity in discourse." "To the existence of all corporations," wrote Kyd in 1793,¹³ "it has long been an established maxim that the King's consent is absolutely necessary." "Ten men," notes Professor Salmond satirically,¹⁴ "do not become in fact one person because they associate themselves together for one end any more than two horses become one animal when they draw the same cart." "The most marked distinction," Mr. Holland has written in a famous textbook,¹⁵ "between abnormal persons is that some are natural . . . while others are artificial . . . which are treated by law for certain purposes as if they were individual human beings."

⁷ *I. e.*, they accept the "concession" theory, so called. That they have accepted the "fiction theory" is denied by Sir F. Pollock in the LAW QUART. REV. for 1911.

⁸ Sutton's Hospital Case, 10 Co. 13 (1612).

⁹ Darlington v. Mayor, etc. of New York, 31 N. Y. 164, 197 (1865).

¹⁰ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 636 (1819).

¹¹ Duvergier v. Fellows, 5 Bing. 248, 268.

¹² JURISPRUDENCE, Lect. XII.

¹³ 1 TREATISE ON CORPORATIONS, p. 41.

¹⁴ JURISPRUDENCE (ed. of 1902), p. 350.

¹⁵ JURISPRUDENCE, 11 ed., p. 385.

Here is clear doctrine enough — a vivid picture of an all-absorptive state. But when this supposed limitation has once been admitted, it is evident that the state is compelled to do remarkable things with the bodies it has called into being. It fails to regulate them with the ease that might be desired. The definition of *ultra vires*, for example, has become a formidable problem; there seems not a little of accident in the formulation of its principles. Corporations will have a curious habit of attempting perpetually to escape from the rigid bonds in which they have been encased. May we not say that, like some Frankenstein, they show ingratitude to their creators? Or, as artificial things, must we deem them incapable of such thought? A corporation will possess itself of an empire, and resent¹⁶ interference with its domain. An American colony will incorporate itself; and when its creator shows signs of wanton interference, will take the lead in rebellion against the state which, in legal theory, at any rate, gave it birth. Truly the supposed sovereignty of the state is not apparent in the relations thus discovered. The orthodox doctrine needs somewhat closer examination before we accept its truth.

III

But even when we have so examined, there are associations which technically at least are not corporations. That trust which Maitland taught us to understand as so typically English will embrace many of them under its all-protecting fold. Contract, as in the club, will account for much, and with the aid of a little fiction we need have no fear of theory. A mighty church will in Scotland be a trust and not a corporation. In America the operations of certain trusts which are not corporations will necessitate a famous Act of Congress. For otherwise they can hardly come into the courts. They have no name by which to be sued. To the law, they are not persons, have no personality; they are bodies unincorporate, bodies — the thought is charmingly English — which are bodiless. Yet, curiously, the technical formulæ do not by their absence reveal any essential lack of corporate character. The Stock Exchange has, in any real meaning of the term, a personality as assuredly effective as that of Lloyds. If, to the law, they are essentially distinct, to practical men and women it seems useless to

¹⁶ J. S. MILL, AUTOBIOGRAPHY, p. 143.

insist on the distinction as other than an empty formalism. The Stock Exchange is simply a property vested in trustees for the benefit of a few proprietors. Is it? Dare those trustees use it as property in that unpublic sense? Dare they so claim it and retain the respect of men with eyes to see? The technical distinction only made Archbishop Laud impatient when a Puritan trust had ruffled his temper.¹⁷ Sour Bishop Montague who avowed that he had "spent some time in reading bookes of the Lawe," was beside himself at the unincorporate character of Lincoln's Inn.¹⁸ Certain words of condemnation died out on Lord Eldon's lips when he thought of the silver cup the Middle Temple treasured. Here, as it seemed, was virtual corporateness, without the state's blessing of incorporation. Wrong, may be, it was thus to presume on kingly right; yet, of a truth, it was also significant.

Significant in what sense? In the sense, we argue, that legal practice has improved on legal theory. The judges builded better than they knew; or, mayhap, they have added yet another to the pile of fictions so characteristic of English law. If corporations can alone come up the front stairs, then they will admit the unincorporate association at the back. For, they know well enough, the life of the state would be intolerable did we recognise only the association which has chosen to accept the forms of law.

Clearly there is much behind this fiction-making. A sovereignty that is but doubtfully sovereign, an unincorporate body of which the bodiliness may yet equitably be recognised — certainly our fictions have served to conceal much. What, as a fact, is their justification? Why do they still invite, as they receive, a lip-given, if a heart-denied, profession of faith?

IV

When the history of associations which have been technically incorporated comes to be written, one clear generalisation as to its tenour during the nineteenth century will be admitted: the courts have been in practice increasingly compelled to approximate its position to that of an ordinary individual. The history has not been without its hesitations. The clear and vigorous mind of

¹⁷ 7 GARDINER, HISTORY OF ENGLAND, p. 258. Cf. Maitland's introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, p. xxxiii.

¹⁸ 2 BLACK BOOK OF LINCOLN'S INN, pp. 332-3.

Lord Bramwell, for instance, left the emphatic mark of his dissent from its tendency written deep on English law.¹⁹ The evolution, dating, so far as one can see, from no earlier time than the forties of last century,²⁰ of the doctrine of *ultra vires*, has in many ways acted as a limiting factor. Certain philosophic difficulties, moreover, as the significance of the *mens rea* in criminal liability, have proved stumbling blocks of a serious kind. Yet, on the whole, the progress is clear. The corporation is an obvious unit. It has rights and duties. It acts and is acted upon. The fact that its actions are of a special kind is not to prevent the courts from getting behind the visible agents to the invisible reality. If it is civilly reprehensible, it must bear the burden of its blameworthiness. Should it be guilty of crime the courts will, indeed, be less confident, but, as we shall see, the thin edge of the wedge has already been inserted. It needs but a little courage, and the reality of corporate crime will pass into the current coin of legally accepted doctrine.

Let us look at this tendency in some little more detail. Let us take, as a starting point, the corporate seal. It is but three quarters of a century since Rolfe, B., was laying down with emphasis that the seal was "the only authentic evidence of what the corporation has done or agreed to do."²¹ Within thirty years that doctrine is obsolete. The seal, Cockburn, C. J., will declare,²² as it seems to us almost lightly, "is a relic of barbarous antiquity," and will establish that the contracts of a trading corporation, made in pursuit of trade purposes, do not need that "only authentic evidence" of which Rolfe, B., had spoken. Nor has Parliament been less generous.²³ It is not now necessary, we know further, to use the seal in contracts of daily occurrence.²⁴ Nor may the absence of the seal be used to defeat the ends of justice. Work performed for purposes incidental to the corporate end must be paid for even when

¹⁹ See especially his remarks in *Abrath v. North Eastern Ry. Co.*, 11 A. C. 247, 252 (1886).

²⁰ Mr. Carr in his brilliant essay on the Law of Corporations dates its origin from *Colman v. Eastern Counties Ry. Co.*, 16 L. J. (Ch.) 73 (1846). I have been unable to find an earlier case.

²¹ *Mayor, etc. of Ludlow v. Charlton*, 6 Mee. & W. 815 (1840).

²² *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617 (1869).

²³ 30 & 31 VICT., c. 131, § 137.

²⁴ *Wells v. Mayor, etc. of Kingston-upon-Hull*, L. R. 10 C. P. 402 (1875).

the contract is unsealed and the corporation public in its nature.²⁵ If Parliament lays it down that urban authorities in their sanitary pursuits²⁶ must use the seal for all contracts over £50 in value,²⁷ that is an exception sufficient in itself to validate the general rule; nor do we feel aught save harshness in Lord Bramwell's grim comment upon its enforcement.²⁸

The change is worth some little thought. We end the century with a doctrine almost entirely antithetic to that with which it began. The seal, once so lauded as alone authentic, a Chief Justice dismisses as barbarously antiquated. Why? The inference is clear. The seal hinders the free play of corporate activity, just as the robes of state hide beneath them the humanity of a king. And just as the latter will have his withdrawing-room, where, free from ceremonial, he may be himself, so will the corporation put off its seal that '(if we may invoke a relic of barbarous anthropomorphism) its limbs may have free play. The corporation acts, seal or no seal. So it is right that the courts should look beneath the stiff encasement of formalism to the living reality which moves there.

We turn to contract. We approach it warily, for here is the head and center of fictional security. Here, we shall be told, it is finally made evident that the corporation exists nowhere save in legal contemplation. For what do we find? Take first the association incorporate by Act of Parliament. Beyond the four corners of its articles of association no movement is possible.²⁹ Even the corporation which the common-law prerogative has made will have limitations upon its capacity. It cannot do what it will. It has been created for a specific purpose. It must conform to that purpose, because it is the creature of those who called it into being.³⁰

Now this theory of *ultra vires* is fundamental in the law of corporations. What is to be said for it? This, of a certainty, that it is in some wise needful to protect the corporators. A man who gives

²⁵ *Clarke v. Cuckfield Union*, 21 L. J. (Q. B.) 349 (1852); *Lawford v. Billericay Rural District Council*, L. R. [1903] 1 K. B. 772.

²⁶ The limitation is that of *Joyce, J. Douglass v. Rhyl Urban District Council*, L. R. [1913] 2 Ch. 407.

²⁷ 38 & 39 VICT., c. 55, § 174.

²⁸ *Young & Co. v. Mayor, etc. of Leamington*, 8 A. C. 517 (1883).

²⁹ *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653 (1875).

³⁰ But § 9 of the Companies Consolidation Act of 1908 allows the alteration of the memorandum by special resolution. This is a great advance.

his money to a railway company does not expect it to engage in fishing; he ought to be protected against such activity. But an act incidental to the purposes of the company is not *ultra vires*. What is so incidental? It is incidental to the business of the South Wales Railway Company to run steamboats from Milford Haven;³¹ but that function was seemingly beyond the competence of the Great Eastern.³² One steamship company may, without hindrance, sell all its vessels;³³ but another company makes the mistake of retaining two of its boats, and its act is without the law.³⁴ There were two railway companies within recent memory which agreed to pool their profits and divide them with judicial blessing;³⁵ but two other railway companies speedily discovered their powerlessness when they attempted partnership.³⁶ It is fitting, so the courts have held, that Wigan and Ashton should supply their citizens with water;³⁷ but there was, so we may suppose, something unfitting when Southampton and Sheffield attempted that enterprise.³⁸ But perhaps the nadir of such confusion is seen by anyone who contrasts *Stephens v. Mysore Reefs, etc. Co., Ltd.*³⁹ with *Pedlar v. Road Block Gold Mines of India, Ltd.*⁴⁰

Logic here there certainly is not, though the basis of the distinction is easy to understand. "Where a corporation," said Coleridge, J.,⁴¹ "has been created for the purpose of carrying on a particular trade, or making a railway from one place to another, and it attempts to substitute another trade, or to make its railway to another place, the objection is to its entire want of power for the new purpose; its life and functions are the creation of the legislature; and they do not exist for any other than the specified purpose; for any other, the members are merely unincorporated individuals." But the doctrine results in manifest injustice. A

³¹ *South Wales Ry. Co. v. Redmond*, 10 C. B. N. S. 675 (1861).

³² *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1 (1846).

³³ *Wilson v. Miers*, 10 C. B. N. S. 348 (1861).

³⁴ *Gregory v. Patchett*, 33 Beav. 595 (1864).

³⁵ *Hare v. London & N. W. Ry. Co.*, 2 J. & H. 80 (1861).

³⁶ *Charlton v. Newcastle & Carlisle Ry. Co.*, 5 Jur. N. S. 1096 (1859).

³⁷ *Bateman v. Mayor, etc. of Ashton-under-Lyne*, 3 H. & N. 323 (1858), and *Attorney-General v. Mayor, etc. of Wigan*, 5 DeG. M. & G. 52 (1854).

³⁸ *Attorney-General v. Andrews*, 2 Mac. & G. 225 (1850); *Sheffield Waterworks Co. v. Carter*, 8 Q. B. 632 (1882).

³⁹ L. R. [1902] 1 Ch. 745.

⁴⁰ L. R. [1905] 2 Ch. 427. See especially the remarks of Warrington, J., at p. 437.

⁴¹ *Mayor, etc. of Norwich v. Norwich Ry. Co.*, 4 E. & B. 397, 432 (1855).

company has by its charter the right to borrow not more than a specified sum; it borrows more. It is held that the lenders cannot sue for the surplus.⁴² Yet it is obviously unjust that a corporation should thus benefit by an error of which it has been cognizant. It is surely an unwise restriction of business enterprise so closely to restrict the interpretation of powers as to refuse a company the legal benefit of its commercial capacity to build a railway.⁴³ A corporation can be prevented from contributing to a charity;⁴⁴ it may, on the other hand, show gratitude to its servants.⁴⁵ It is clear enough that we have no straight rule of construction to guide us. It is held that a corporation "may" not do certain things. Does that imply that it should not have done so, or that it is legally incapable — "stricken with impotence" is a distinguished lawyer's forcible phrase⁴⁶ — of doing them? Is an *ultra vires* act not a corporate act? The courts would seem to uphold this view. "The question is not," said Lord Cairns in the *Ashbury* case,⁴⁷ "as to the legality of the contract; the question is as to the competency and power of the company to make the contract." But that is not a very helpful observation when it is borne in mind that *ultra vires* acts are performed every day. And if the courts hold such acts *a priori* illegal, why do they time and again enforce them in order to prevent harshness? Is not that a virtual admission of their corporateness? Such admission can only mean that in the great realm of contract, as in the case of the seal, we cannot confine the personality of a corporation within the four walls of a document. We are in fact compelled to abandon the doctrine of special capacity. We have to admit that a person, whether a group person or a human being, acts as his personality warrants. Legal theory may deny the fact of a contract which has obviously taken place; but in that event it is only so much the worse for legal theory.

For it results in the divorce of law and justice. A corporator, for instance, severs his connection with a corporation in a manner that

⁴² *Wenlock v. River Dee Co.*, 10 A. C. 354 (1885).

⁴³ As in the great *Ashbury* case.

⁴⁴ *Tomkinson v. South Eastern Ry. Co.*, L. R. 35 Ch. D. 675 (1887).

⁴⁵ *Hampson v. Price's Patent Candle Co.* And yet an able writer can argue that the existence of corporate gratitude does not come within the lawyer's purview. SMITH, *LAW OF ASSOCIATIONS*, pp. 130-1.

⁴⁶ Mr. E. Manson in 12 *ENCYCLOPEDIA OF THE LAWS OF ENGLAND*, 1 ed., p. 360.

⁴⁷ *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, 672 (1875).

is *ultra vires*; ten years later he is held responsible for its debts.⁴⁸ Of a surety, no man will claim justice or sweet reasonableness for such an attitude. The courts, again, in the case of a man who has made a contract and then feels it irksome, will not admit the plea that he was originally incapable of making it. They will say with Wilmot, C. J., that "no polluted hand shall touch the pure fountain of justice."⁴⁹ But if the hand be a corporate hand, as, for instance, in *Hall v. Mayor, etc. of Swansea*,⁵⁰ they would have no hesitation in admitting the pollution.

What are we to say? Only one thing surely, and that is that the doctrine of *ultra vires* breaks down when it is tested. It is not true because it fails to conform to the canon of scientific hypothesis: it does not fit the facts. We assume the artificiality of our corporation. We suppose that it is no more than we have made it, with the result that common sense must be thrown to the winds. What, in brief, the theory compels us to urge is this, that a class of acts may be performed by the corporation which are not corporate acts. Is it not better to risk a little for the sake of logic? Our fiction-theory may, indeed, break down; but we shall bring the law in closer harmony with the facts of life. We shall then say that the corporation, being a real entity, with a personality that is self-created, and not state-created, must bear the responsibility for its actions. Our state may, in the result, be a little less Hegelian, a little less sovereign in its right of delegation. Therein it will only the more certainly make a direct march upon the real.

V

The corporation has rights and liabilities in tort. Here, again, the tendency has been more and more to make it approximate in situation to the ordinary individual. So long ago as the reign of Henry VII the corporation could bring an action for trespass.⁵¹ When a patron of a living it could bring an action of *quare impedit*.⁵² It can sue for libel where it can show that its property is affected,⁵³ though it is not clear that it could sue for words spoken in deroga-

⁴⁸ *In re Stanhope*, 3 DeG. & Sm. 198 (1850).

⁴⁹ *Collins v. Blantern*, 2 Wilson 341, 350 (1767).

⁵⁰ 5 Q. B. 526 (1844).

⁵¹ Y. B. 7 HEN. VII, pl. 9.

⁵² *Chancellor, etc. of Cambridge v. Norwich*, 22 Viner's Abr. 5 (1617).

⁵³ *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87 (1859); *South Hetton Coal Co. v. North-Eastern News Ass'n*, L. R. [1894] 1 Q. B. 133.

tion of its honour or dignity.⁵⁴ This is, so we are told, due to the physical limitations to which it is subject. "It could not sue," said Pollock, C. B.,⁵⁵ "in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." But is this, in fact, true? No one would think of charging an association with incest or adultery. But it can be sued for malicious libel,⁵⁶ for assault and imprisonment,⁵⁷ for fraud and deceit,⁵⁸ and, after a long struggle in which the formidable Lord Bramwell played a noteworthy part, for malicious prosecution.⁵⁹ Now when this formidable list of torts is considered it seems curious to say that the corporation cannot sue for libel that touches its honour or dignity. The reason, so far as one can see, is twofold. It is, in the first place, assumed *ipso facto* that the corporation has no mind to feel. It is no more than a way of dealing with certain rights in property in such a way that they can be conveniently protected by the courts. The doctrine of agency, moreover, is used as a means of avoiding the complex metaphysical problem of what is behind the agent. This was well shown in Lord Lindley's remarkable judgment in *Citizens' Life Assurance Co. v. Brown*. "If it is once granted," he said, "that corporations are for civil purposes to be regarded as persons, *i. e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals." In that case, clearly, the actual tort is the act of the agent and the principal is reduced to a mere fund from which adequate compensation may be obtained. But is that in truth a satisfactory method of procedure? Are the "metaphysical subtleties" of which Lord Lindley spoke so deprecatingly in truth "needless and fallacious?" Is it not in fact necessary to have some clear view of their nature if a true decision is to be reached?

⁵⁴ *Mayor, etc. of Manchester v. Williams*, L. R. [1891] 1. Q. B. 94.

⁵⁵ *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87 (1859), at p. 90.

⁵⁶ *Whitfield v. South-Eastern Ry. Co.*, 27 L. J. (Q. B.) 229 (1858).

⁵⁷ *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314 (1851).

⁵⁸ *Barwick v. Eng. Joint Stock Bank*, L. R. 2 Ex. 259 (1867).

⁵⁹ *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423, 426. The story of the struggle is well told in Mr. Carr's book, pp. 78-87.

In order to see this aspect in a clearer light let us turn to the criminal liability of corporations. It is now well established that a corporation may be indicted for misfeasance,⁶⁰ for obstruction,⁶¹ under the Lotteries Act ⁶² (though here the courts refused to admit an indictment of the corporation as a rogue and vagabond), for selling impure food ⁶³ and for adulterating milk.⁶⁴ But in all these cases conviction has been obtained on the basis of a supposed liability for an agent's act. This is well brought out in a remark of Alverstone, C. J., "I think that we ought to hold that a corporation may be liable . . . unless *mens rea* is necessary in order to constitute the offence."⁶⁵ But that is the exact point. Is a corporation to be held guiltless where the presence of *mens rea* is necessary to the crime? A laundry company fails adequately to protect its machinery in accordance with law, and one of its employees is killed. There was clear criminal negligence; but on an indictment for manslaughter the judge, a little reluctantly, refused to allow the action to proceed.⁶⁶ In the next year a railway company caused the death of some of its passengers through not keeping a bridge in proper repair; here again, though with obvious difficulty, the court thought the demurrer must be admitted.⁶⁷ Clearly, the problem of whether a corporation can have a *mens rea* has, if sometimes a little doubtfully, been answered in the negative.⁶⁸ Taken with the cases in tort, we must collect the opinion that it cannot have a mind at all.

VI

Yet we cannot, in fact, do without that mind. Just as we have been compelled by the stern exigencies of events to recognise that the corporation is distinct from its members, so, too, we have to recognise that its mind is distinct from their minds. A corporation votes an annual pension to a servant; its gratitude is not merely

⁶⁰ *Queen v. Birmingham & Glouc. Ry. Co.*, 3 Q. B. 223 (1842).

⁶¹ *Queen v. Great North of England Ry. Co.*, 9 Q. B. 315 (1846).

⁶² *Hawke v. Hulton & Co.*, L. R. [1909] 2 K. B. 93.

⁶³ *Pearks, etc. v. Ward*, L. R. [1902] 2 K. B. 1.

⁶⁴ *Chuter v. Freeth, etc.*, L. R. [1911] 2 K. B. 832.

⁶⁵ Cited in *Pearks, etc. v. Ward*, L. R. [1902] 2 K. B. 1, at p. 8.

⁶⁶ *Queen v. Great West. Laundry Co.*, 13 Manitoba Rep. 66 (1900).

⁶⁷ *Union Colliery Co. v. H. M. The Queen*, 31 Can. Sup. Ct. 81 (1900).

⁶⁸ Perhaps Lord Bowen in *Queen v. Tyler & International Commercial Co., Ltd.*, felt some difficulty also. L. R. [1891] 2 Q. B. 588. See especially pp. 592, 594, 596.

the gratitude of the individual members expressed in a single term, for one of those members will endeavour to restrain its generosity.⁶⁹ So it may well be urged that in the cases of manslaughter noted above a penalty ought to be exacted in some wise commensurable with the offence. When we talk of a company as a "bad master," there is surely reality behind that phrase. Individually its members are probably meek and kindly; but the company is differently constituted. Where that "badness" passes into the region in which it becomes criminally culpable, the company ought to suffer the penalty for its blameworthiness. Certainly it does so suffer when it is morally but not legally at fault. Its men work for it with less zeal. It finds it difficult to retain their services. The quality of its production suffers. It loses ground and is outstripped in the industrial race. Why the courts should refuse to take cognizance of that which is an ordinary matter of daily life it is difficult indeed to understand. Take, for example, the charge of manslaughter. Any student of workmen's compensation cases will not doubt that in a choice between the adoption of a completely protective system and the possibility of an occasional accident, there are not a few corporations anti-social enough to select the latter alternative. Human life, they will argue, is cheap; the fencing, let us say, of machinery is dear. But admit the existence of the corporate mind and that mind can be a guilty mind. It can be punished by way of fine; and if it be mulcted with sufficient heaviness we may be certain that it will not offend again. What is the alternative? To attack some miserable agent who has been acting in the interest of a mindless principal, an agent, as Maitland said,⁷⁰ who is the "servant of an unknowable Somewhat." But if that Somewhat be mindless, how can it have selected an agent? For selection implies the weighing of qualities, and that is a characteristic of mind.

VII

When, therefore, we look at the association which has chosen to incorporate itself, we cannot but feel that less than the admission of a real personality results in illogic and injustice. It is purely arbitrary to urge that personality must be so finite as to be distinc-

⁶⁹ *Cyclists' Touring Club v. Hopkinson*, L. R. [1910] 1 Ch. 179.

⁷⁰ Introduction to GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE*, p. xl.

tive only of the living, single man.⁷¹ Law, of a certainty, is not the result of one man's will, but of a complex fusion of wills. It distils the quintessence of an infinite number of personalities. It displays the character not of a Many, but of a One, — it becomes, in fact, unified and coherent. Ultimately pluralistic, the interactions of its diversities make it essentially, within the sphere of its operations, a single thing. Men obey its commands. It acts. It influences. Surely it is but a limitation of outlook not to extend the conception of personality into this incorporeal sphere.

It is urged that to neglect this is to commit injustice where the corporation is concerned. Even less happy shall we feel when we turn to the association that is, oddly enough, termed voluntary; as if your unincorporate body were any less the result of self-will than its corporate analogue. We shall find no law of associations. What we shall find is rather a series of references to the great divisions, contract, tort, and the like, of ordinary law. For here, in the legal view, we have no bodiliness, nothing more than a number of men who have contracted together to do certain things, who, having no corporate life, can do no more than those things for which the agreement has made stipulation. Legally they are no unit, though to your ordinary man it is a strange notion that a Roman Church, a Society of Jesus, a Standard Oil Trust — the most fundamentally unified persons, so he would say, in existence — should be thus devoid of group will because, forsooth, certain mystic words have not been pronounced over them by the state. Laughable to most of us this may indeed be; yet none the less certainly is it good law.

We take the voluntary society in contract. Its acts are *ultra vires* unless they were clearly implied in the original agreement. You join a club. An unwise draftsman has failed through inadvertence to make binding the right to change the rules. When, therefore, the club falls on evil days and changes its subscription you may refuse to pay on the ground that you have not contracted to do so.⁷² It does not matter that the subscription had been already raised several times; it does not matter that you had assented to the previous changes; that there was practical unanimity among

⁷¹ Cf. F. H. BRADLEY, *APPEARANCE AND REALITY*, p. 532. "For me a person is finite or is meaningless."

⁷² *Harington v. Sendall*, L. R. [1903] 1 Ch. 921.

the members as to the need for the change; that without it the whole future of the club was jeopardised. Of all this the courts made entire abstraction. The contract is a fundamental agreement which cannot admit of change. A society clearly living a life of its own will be denied the benefits of that life because it has failed to take advantage of a section in an Act of Parliament.

Nor is the full significance of this judgment clear until one places it side by side with the case of *Thellusson v. Valentia*.⁷³ The Hurlingham Club from its origin indulged in pigeon-shooting. It was decided to do so no longer, and the plaintiff sought to obtain an injunction preventing the change on the ground that he had contracted for this sport on joining the club. Yet it was held that the change came under the clause admitting the alteration of the rules and was not a fundamental change. It surely will not be argued that a change in a subscription rate is any more fundamental than this. As a plain matter of common sense it is surely obvious that if a society can do the one thing the other should be permitted. If the courts will not protect the prejudices of members whose sporting tastes verge on the antiquarian, why should it protect those whose social tastes verge on the sullen disagreeableness of the boor?

Nor are matters improved when the trust conceals the reality of this group life. The trust, says Maitland,⁷⁴ "has served to protect the unincorporated *Genossenschaft* against the attacks of inadequate and individualistic theories. We should all agree that if an *Anstalt* or a *Genossenschaft* is to live and thrive it must be efficiently protected by law against external enemies." If it is to live *and thrive* — let us repeat the words in the way in which we would wish the emphasis to lie. The association is to thrive. It is not to have its life cramped, its development impeded. It is to be sheltered against the attacks of men willing to take advantage of its corporality. So, at least one would think, the trust came into being. And yet it is in precisely the opposite way that the courts have interpreted their purpose. Men's minds may change. Their purposes may change. Not so the purposes of men bound together in an association. The famous Free Church of Scotland case needs no retelling; the House of Lords chose to regard its life as fixed

⁷³ L. R. [1907] 2 Ch. 1.

⁷⁴ 3 COLL. PAPERS, p. 367.

for it by the terms of a trust — not seeing that the fact that the church has a life must necessarily connote its right to develop the terms on which that life is lived.⁷⁵ Certain eloquent words of Lord Macnaghten, spoken in his dissenting judgment, serve to make clear the opportunity the highest English tribunal chose to neglect. “Was the Church,” he asked, “thus purified — the Free Church — so bound and tied by the tenets of the Church of Scotland prevailing at the time of the Disruption, that departure from those tenets in any matter of substance would be a violation of that profession or testimony which may be called the unwritten charter of her foundation, and so necessarily involve a breach of trust in the administration of funds contributed for no other purpose but the support of the Free Church — the Church of the Disruption? Was the Free Church by the very condition of her existence forced to cling to her Subordinate Standards with so desperate a grip that she has lost hold and touch of the Supreme Standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?”⁷⁶ We must, surely, accept the point of view of Lord Haldane when he argued that “the test of the personal identity of this Church lies not in doctrine but in its life.” To insist on the strictest adherence to the letter of a trust means that the dead hand shall regulate the living even when they have outgrown that hand’s control, sixty or six hundred years after its decease. Is there any answer to the protest of Mill when he urged that no person ought thus to be exercising the rights of property six hundred years after his death?⁷⁷ It is more plausible to take one’s stand on the spirit of the trust. It would not in substance have been far removed from the doctrine of *cy près* for the House of Lords to have granted the right of self-development to the beneficiaries of a trust. It is clear, for instance, that religious interpretation has vastly changed since the advent of Darwinism. Would the courts have deprived a church which had so modernised its creed as to take account of the new knowledge from enjoying gifts left to it in a pre-Darwinian age? It is not, at any rate, insignificant that the justice of the courts had speedily to be remedied by Act of Parliament.

⁷⁵ On all this DR. J. N. FIGGIS, *CHURCHES IN THE MODERN STATE*, is of very high value.

⁷⁶ Orr, report of Free Church of Scotland case, p. 573. S. C. 4 F. 1083 (1902).

⁷⁷ I DISSERTATIONS AND DISCUSSIONS, p. 36.

It is no light stumbling-block that this cover of trusteeship has proved. It may be that the trustees of a club will incur liabilities on that club's behalf, though the rules have failed to provide for their indemnity. In that event the members will be able to avoid payment on the ground that they have contracted for no more than their subscriptions, even though the club (and they as its members) enjoy the benefit of the trustees' action.⁷⁸ Yet it would appear to the man in the street more equitable to make the club pay for that of which it enjoys the benefit. If, for example, the committee of a football club employs an incompetent person to repair a stand which collapses, sanity would appear to require that just as the club would have enjoyed the profits, so, on the collapse of the stand, it is right that it should suffer the penalties. Yet the courts, taking their stand on the principles of the law of contract, held that the members of the committee were responsible and must pay as individuals.⁷⁹ This is surely the violation of the ordinary principle of English law that he who holds property must bear its burdens no less than enjoy its advantages; nor should an agency or trusteeship obscure the real relation. A case can be conceived, can easily arise, where, without any knowledge on the part of the trustees, and by sheer misadventure on the part of one of their servants, they become liable for damages and the members go scot free. This is surely the *reductio ad absurdum* of legal formalism. Had the Privy Council in *Wise v. Perpetual Trustee Co.* applied the perfectly straightforward doctrine of *Hardoon v. Belilios*⁸⁰ no injustice would have thus occurred.

And the contractual theory of voluntary associations can result in fictions compared to which the supposed fiction of corporate personality has less than the ingenuity of childish invention. If you buy a liqueur in a club that does not, in the eyes of the law, constitute a sale. What was before a joint interest of all the members has been magically released to you just at the moment when you expressed your desire to the club waiter, with the result that you can drink in safety.⁸¹ Is it worth while thus to strain reality for the sake of inadequate theory?

⁷⁸ *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139.

⁷⁹ *Brown v. Lewis*, 12 T. L. R. 455 (1896).

⁸⁰ [1901] A. C. 118.

⁸¹ *Graff v. Evans*, 8 Q. B. D. 373 (1882).

Certain property rights serve to bring out the failure of the contractual attitude with striking clearness. The luckless fate of Serjeants' Inn, of Clements' Inn, and Barnard's Inn shows how disastrous can be the attempt to conceal corporateness to the public interest.⁸² No one believes that the distribution of their property among the surviving members fulfilled the pious purpose of their founders. The property of the unincorporate association can now be taxed⁸³ (and for income tax at that); but the courts did not tell us whether this was a new method of double taxation or an attempt to recognise the fact of corporateness. The fact that the fishermen of the Wye had for a period certainly not less than three centuries had a perfectly unquestioned user, had therein acted exactly as, in like circumstances, a prescriptive corporation would have acted,⁸⁴ did not persuade the Lords to regard them as having rights against the technical owners of the land.⁸⁵ It were surely an easier as well as a wiser thing to give to this obvious unit the title of unity.

Yet another curiosity deserves some notice. The courts do not regard a volunteer corps as a legal entity, so that it cannot be bound by contract. It can become bound only by particular members pledging their liability on its behalf, not for it as agents but for themselves as principals. So a commanding officer of a volunteer corps will be held responsible for uniforms supplied to the corps;⁸⁶ though, anomalous as it may seem, he is not responsible to the bankers of the battalion for its overdraft.⁸⁷ If a corps cannot have a liability for uniforms, why can a liability for its overdraft exist? And, further, if "it" is no legal entity at all, why do we use collective nouns with possessive pronouns and singular verbs?

Now in all conscience these are absurdities enough; yet note what has followed from the denial of a right to sue and be sued. It was the mere accident of his membership of the Middle Temple which made Lord Eldon grant to a body of Free Masons the right to a

⁸² See a deeply interesting letter in the *TIMES* for April 10, 1902.

⁸³ 48 & 49 VICT., c. 51, and *Curtis v. Old Monkland Conservative Ass'n*, [1906] A. C. 86.

⁸⁴ *In re Free Fishermen of Faversham*, L. R. 36 Ch. D. 329 (1887).

⁸⁵ *Harris v. Chesterfield*, [1911] A. C. 623. Lord Loreburn read a valuable dissenting judgment.

⁸⁶ *Samuel Brothers, Ltd. v. Whetherly*, L. R. [1908] 1 K. B. 184.

⁸⁷ *National Bank of Scotland v. Shaw*, [1913] S. C. 133.

representative action. It might have been, as he said,⁸⁸ "singular that this court should sit upon the concerns of an association, which in law has no existence," but it was just because it had an existence in life that the law had to take some account of it. "The society must," as Eldon saw, "some way or other be permitted to sue." Why? Because without that permission the gravest injustice would occur and to refuse it is to negative the whole purpose for which the courts exist. It was, again, a great advance when a private Act of Parliament enabled a voluntary society to sue in the name of its chairman.⁸⁹ But it does not go far enough. The entities the law must recognise are those which act as such, for to act in unified fashion is — formality apart — to act as a corporation. When the Scottish courts upheld a verdict against the libellers of "the Roman Catholic authorities of Queenstown," they knew that no corporation had been libelled, but a body of men to be regarded as a unit for practical purposes. That body had suffered in reputation from the libel; it was right and fitting that it should receive compensation.⁹⁰ And when a voluntary society in the pursuit of its functions libels a company without justice, it seems rational, even if it is legally an innovation, to make the society pay.⁹¹

Nothing has brought into more striking prominence the significance for practical life of this controversy than the questions raised in the last decade and a half by trade-union activity. Of the rights and wrongs of their policy great authorities have written;⁹² and it is not now needful to discuss at length the decisions of the courts. But this much may at least be said: that just as surely as the decision of the House of Lords marked, in the great *Taff Vale* case,⁹³ a vital advance, so, no less surely, did its decision in the *Osborne* case⁹⁴ mark a reactionary step. The *Taff Vale* case decided, as it appears to us, quite simply and reasonably, that a trade union must be responsible for the wrongs it commits, — a

⁸⁸ *Lloyd v. Loaring*, 6 Ves. 773, 778 (1802).

⁸⁹ *Williams v. Beaumont*, 10 Bing. 260 (1833).

⁹⁰ *Brown v. Thomson & Co.*, [1912] S. C. 359.

⁹¹ *Greenlands, Ltd. v. Wilmshurst*, L. R. [1913] 3. K. B. 507.

⁹² See particularly the Report of the Royal Commission on Trade Disputes, 1906; the preface to the 1911 edition of WEBB, *HISTORY OF TRADE UNIONISM*; and above all, the brilliant articles of Professor Geldart in 25 HARV. L. REV. 579 and POL. QUART. for May, 1914.

⁹³ [1901] A. C. 426.

⁹⁴ [1910] A. C. 87.

point of view which so impressed the Royal Commission that they did not recommend the reversal of the judgment.⁹⁵ The Osborne case decided that a method of action which a trade union thinks necessary for its welfare and protection may be illegal because it is political and not industrial in its scope — political objects being *eo nomine* beyond the province of a trade society. But that is surely a too narrow interpretation of the facts. Where does a political object end and an industrial object begin? It is obvious to anyone who has eyes to see that at every point modern politics is concerned with the facts of everyday life in its industrial aspect. Therein they clearly touch the worker, and the trade union is an association formed for his protection. On this view the political activity of trade unions means no more than giving emphasis to one particular branch of their industrial policy. It is, then, one would urge, open to the courts to declare the transaction void on grounds of public policy;⁹⁶ but it is probable that they would pay dearly for so doing in the loss of the respect in which they are held. It is wiser when dealing with the group person not to interfere with its individual life. The experience of the Privy Council as an ecclesiastical tribunal might herein have given a lesson to the House of Lords. There was it sternly demonstrated that the corporation of the English Church — a corporation in fact if not in law — will not tolerate the definition of its doctrine by an alien body.⁹⁷ The sovereignty of theory is reduced by the event to an abstraction that is simply ludicrous. It may well be urged that any similar interference with the life of trade unions will result in a not dissimilar history.

VIII

We have travelled far, but at least there has been direction in our travelling. We have asked a question: is corporate personality a real thing? Is the collective will that is the inevitable accompaniment of that personality but a figment of the imagination? The thesis that has been here maintained is a simple one. It is that when the man in the street calls (let us say) Lloyds and the Stock Exchange corporations he is profoundly right in his perception.

⁹⁵ Report, p. 8.

⁹⁶ As Lord Shaw did in the House of Lords, and, in part, Farwell and Fletcher Moulton, L. J. J., in the Court of Appeal below.

⁹⁷ See on this the Report of the Royal Commission on Ecclesiastical Discipline of 1906 *passim*.

He has brushed aside the technicalities of form and penetrated to the reality, which is but a cloud serving not to reveal but to obscure. This, it may be pointed out, Erle, J., perceived nearly sixty years ago.⁹⁸ "According to the plaintiff," he said, "it is supposed to be a corporation created for the purpose of the navigation, and having the legal incidents of its existence limited for that purpose. But it appears to me that, by common law, the creation of a corporation conferred on it all the rights and liabilities in respect of property, contracts and litigation which existence confers upon a natural subject, modified only by the formalities required for expressing the will of a numerous body." Here, at any rate, is the basis of much-needed innovation. A corporation is simply an organised body of men acting as a unit, and with a will that has become unified through the singleness of their purpose. We assume its reality. We act upon that assumption. Are we not justified in the event?

After all, our legal theories will and must be judged by their applicability to the facts they endeavour to resume. It is clear enough that unless we treat the personality of our group persons as real and apply the fact of that reality throughout the whole realm of law, what we call justice will, in truth, be no more than a chaotic and illogical muddle.

English lawyers, it is said, have a dislike of abstractions. Such excursions as this into the world of legal metaphysics have for them the suspect air of dangerous adventure. But life, after all, is a series of precipices, and we have to act upon the assumptions we make. Here we urge a radical thesis; we say that the distinction between incorporate and voluntary association must be abolished. We say that the trust must be made to reveal the life that glows beneath, that we must have the means of penetrating beyond its fictitious protectiveness. No one doubts that the change will be vast. No one doubts that the application will need courage and high resolve. But it is in its very difficulty that we shall find its supreme worth.

IX

A last word remains to be said. If what we have here been urging is true, it reacts most forcibly upon our theory of the state.

⁹⁸ *Bostock v. North Staffordshire Railway Co.*, 4 E. & B. 798, 819 (1855).

⁹⁹ *De Mon.*, c. 15.

Thus far, for the most part, we have sought its unification. We have made it intolerant of associations within itself — associations that to Hobbes will appear comparable only to “worms within the entrails of a natural man.” As a result we have made our state absorptive in a mystic, Hegelian fashion. It is all-sovereign and unchallengeable. It has, if it be the papal state, and the Pope its personification, the *plenitudo potestatis*; be it imperial, its emperor is *legibus solubus*; be it Britannic, its parliament has, as De Lolme somewhat whimsically pointed out, no limit in power save the laws of nature. We seem, when we front the state, to cry with Dante that the *maxime unum* must be the *maxime bonum*,⁹⁹ and with Boniface VIII that there is heresy in political dualism.¹⁰⁰ Admirable enough this may be in theory; of a certainty it does not fit the facts. We do not proceed from the state to the parts of the state, from the One to the Many, on the ground that the state is more unified than its parts. On the contrary, we are forced to the admission that the parts are as real, as primary, and as self-sufficing as the whole. “The pluralistic world,” said James,¹⁰¹ “is . . . more like a federal republic than an empire or a kingdom. However much may be collected, however much may report itself as present at any effective center of consciousness or action, something else is self-governed and absent and unreduced to unity.” But sovereign your state no longer is if the groups within itself are thus self-governing. Nor can we doubt this polyarchism. Everywhere we find groups within the state which challenge its supremacy. They are, it may be, in relations with the state, a part of it; but one with it they are not. They refuse the reduction to unity. We find the state, in James’ phrase, to be distributive and not collective. Men belong to it; but, also, they belong to other groups, and a competition for allegiance is continuously possible. Here, as a matter of history, we find the root of Mr. Gladstone’s attack on the Vatican decrees of 1870. An allegiance that is unreduced to unity appeared to him without meaning. Yet it is obvious that every great crisis must show its essential plurality. Whether we will or no, we are bundles of hyphens. When the centers of linkage conflict a choice must be made.

¹⁰⁰ See the Bull Unam Sanctam, c. 1, Ex. Com. 1, 8.

¹⁰¹ A PLURALISTIC UNIVERSE, p. 321. The whole book has vital significance for political theory; see especially the fifth lecture.

Such, it is submitted, is the natural consequence of an admission that the personality of associations is real and not conceded thereto by the state. We then give to this latter group no peculiar merit. We refuse it the title of creator of all else. We make it justify itself by its consequences. We stimulate its activities by making it compete with the work of other groups coextensive with or complementary to itself. As it may not extinguish, so it may not claim preëminence. Like any other group, what it is and what it will be, it can be only by virtue of its achievement. So only can it hope to hand down undimmed the torch of its conscious life.

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JUST COMPENSATION IN EMINENT DOMAIN. — There has been much confusion, in the authorities, on the measure of damages in eminent domain proceedings. In *New York v. Sage*, 36 Sup. Ct. Rep. 25, the Supreme Court has helped materially to clarify the issues. In valuing a farm taken by New York City to form a portion of a great reservoir, the commissioners awarded a certain sum for the "land and buildings," and a certain further sum for "reservoir availability." The case was removed to the federal courts on diversity of citizenship. In overturning the award, the court decided that the only explanation of the itemization was that the first sum was the actual total market value, and that the commissioners thought that the value gained by the very act of taking was to be shared between the city and the owner. Assuming this to be the correct interpretation, the award obviously could not be sustained. The question is what the owner loses, not what the taker gains.¹ But since every intendment is to be made in favor of an award,²

¹ *Boston Chamber of Commerce v. Boston*, 217 U. S. 189; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Lambert v. Giffin*, 257 Ill. 152, 100 N. E. 496; *United States v. Taffe*, 78 Fed. 524. Yet where compensation for the taking of an abandoned stretch of railroad track was allowed upon the basis of cost of construction, the taker's gain was practically made the basis of assessing damages. *Cohen v. St. Louis, F. S. & W. R. Co.*, 34 Kan. 158, 8 Pac. 138. There are, of course, cases where market value breaks down altogether as a measure of just compensation. *Postal Tel. Cable Co. v. Louisiana Western R. Co.*, 49 La. Ann. 1270, 22 So. 219.

² See *McGovern v. New York*, 229 U. S. 363, 371.

there is much to be said for the interpretation evidently adopted by the Circuit Court of Appeals,³ as well as the District Court,⁴ in this case, that reservoir availability was intended by the commissioners as only an element in actual market value.

The Supreme Court clearly states, however, that any portion of the market value caused by the expectation of the taking by eminent domain should not be allowed as damages. There is much authority, both English and American, against this view,⁵ and it seems to mark a departure, even in its own jurisdiction.⁶ If there is an appreciable possibility that the land may be wanted for the purpose in question by purchasers not armed with compulsory powers, the chance forms an element of market value which unquestionably must be considered.⁷ But where, as is certainly the case in constructing railroads, and must generally be the case in constructing a very large reservoir, the market is not appreciably affected by such a possibility, this reasoning fails.⁸ Two grounds might

³ *In re Bensel*, 206 Fed. 369.

⁴ *In re Ashokan Dam*, 190 Fed. 413.

⁵ In the leading English case, the Court of Appeals clearly formulated the issue, and arrived at the opposite conclusion. See *In re Lucas*, [1909] 1 K. B. 16, 28. The court distinguished between the enhancement of market value due to the "probability" of eminent domain proceedings, and the enhancement due to the "realized probability," after the proceedings have been initiated, and concludes that the former, but not the latter, should be an element in computing damages. See also *Sidney v. North Eastern Ry. Co.*, [1914] 3 K. B. 629. The prevailing view is clearly stated by the Massachusetts court in *Moulton v. Newburyport Water Co.*, 137 Mass. 163, 167: "Such chance or probability, [i.e. that the land might be used as a source of water supply by a company with power of eminent domain] must needs enter to some extent into the market value itself: and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it." For other American cases see note 8, *infra*.

⁶ In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 77, the court, in allowing "lock availability" as an element in value, said: "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."

⁷ This seems to be the true ground on which *Boom Co. v. Patterson*, 98 U. S. 403, can be supported. The court allowed compensation for the availability of land for boom purposes, mentioning the fact that there might have been a demand for the land for these purposes by purchasers without compulsory powers. The case has been widely interpreted, however, as standing for a broader doctrine. See *United States v. Chandler-Dunbar Co.*, *supra*, 229 U. S. 53, 77; *Webster v. Kansas City & S. Ry. Co.*, 116 Mo. 114, 119, 22 S. W. 474, 475; *San Diego Land and Town Co. v. Neale*, 78 Cal. 63, 69, 20 Pac. 372, 375.

Perhaps the following cases may rest upon the possibility of such purchasers, the reservoir being comparatively small. *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123; *Brown v. Forest Water Co.*, 213 Pa. St. 440, 62 Atl. 1078; *Matter of Trustees of College Point*, 5 T. & C. (N. Y.) 217. Where the owner intends to use the land himself to supply nearby towns with water, he may not show this fact in evidence. *Farmer v. Stillwater Water Co.*, 99 Minn. 119, 108 N. W. 824. Nor may he swell the damages by showing the possibility of getting authority to carry the water to nearby towns. *Moulton v. Newburyport Water Co.*, 137 Mass. 163. But if it were possible for him so to use his land it would be possible for a purchaser without compulsory powers to so use it, and thus the case would be proper for allowing the special availability to be shown.

⁸ The railroad availability of property has been repeatedly allowed as an element in value. *Currie v. Waverly*, etc. R. Co., 52 N. J. L. 381, 20 Atl. 56; *Webster v. Kansas City & St. Ry. Co.*, 116 Mo. 114, 22 S. W. 474; *Johnson v. Freeport*, etc. R. Co., 111 Ill. 413; *Sidney v. North Eastern Ry. Co.*, [1914] 3 K. B. 629. See LEWIS,

be suggested on which a prospective demand for property by a body armed with compulsory powers could be made the basis of a higher valuation in eminent domain proceedings. It may often be the case that the tribunals fixing the compensation are more favorably disposed toward landowners than the condemning corporations, and may tend to award more than the fair value of the land. Certainly if this cause is operative at all, it is unfortunate enough of itself without recognition by the law of its reflection in market value. The argument leads to the result that the court must instruct the jury in assessing damages to take into account its own probable bias in favor of one of the parties. Again, it might be urged that to avoid the trouble and expense of compulsory proceedings, corporations may be willing to buy the land for more than it would be worth for purposes other than those for which it is to be used.⁹ Yet if it has in fact been put to the expense of such proceedings, it is not just to require it to pay the expense over again, as a part of the award.

Generally, however, the courts have not assigned any particular reason for their decision, but have assumed without further analysis that a prospect of compulsory taking enhances the market value of the land, and should be reflected in the compensation allowed. It is submitted that the whole doctrine leads to a perpetual trip around a vicious circle. If the prospect of a generous award is reflected in a higher market value, and this higher market value is then made the basis for an increased award, it follows that the promise of this larger award will once more enhance the value, and that, conformably with the theory, a new increment must be added to the award. An infinite series results.

The decision in the principal case would therefore be sound, even if the interpretation put upon the award by the lower court is the correct one. Not only was it erroneous to add an item for "reservoir availability," but if that item was already an element in the sum awarded as market value the item should have been deducted from that sum to reach a just result.¹⁰ To allow a purchaser to exact a high price for his lands simply because they are very necessary to the public is to defeat the whole purpose of eminent domain.¹¹

EMINENT DOMAIN, 3 ed., § 707. The English cases uniformly allow reservoir availability. *In re Lucas*, [1908] 1 K. B. 571, [1909] 1 K. B. 16; *In re Gough*, [1904] 1 K. B. 417; *Riddell v. Newcastle, etc. Water Co.*, Brown & Allen, Compensation, 678; *In re Countess Ossalinsky*, *ibid.*, 659. Bridge site availability has been considered, although purchasers without compulsory powers must be rare. *Young v. Harrison*, 17 Ga. 30; *Little Rock, etc. R. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792. The United States Supreme Court has allowed lock availability. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

⁹ It is unreasonable to suppose that a purchaser armed with eminent domain powers would allow itself to be taken advantage of. See *Minnesota Rate Cases*, 230 U. S. 352, 451. Although it is perhaps true that but a small percentage of the property acquired for public purposes is through the actual exercise of the power. See *Little Rock, etc. R. Co. v. Woodruff*, 49 Ark. 381, 393, 5 S. W. 792, 795. And it is common to require that a petition show a failure to agree. See MILLS, EMINENT DOMAIN, § 107.

¹⁰ *Matter of Simmons*, 130 App. Div. (N. Y.) 350, 195 N. Y. 573; *Union Depot, etc. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626; *United States v. Seufert Bros. Co.*, 78 Fed. 520; *Matter of Boston, etc. R. Co.*, 22 Hun (N. Y.) 176; *Black River, etc. R. Co. v. Barnard*, 9 Hun (N. Y.) 104.

¹¹ If the case is rested on the broad doctrine here outlined, it involves only the establishment of a rule for the federal courts, and not an overturning of settled law in the states, for the Supreme Court will not decide questions in the law of damages under

THE DISQUALIFICATION OF JUDGE HILLYER IN THE COLORADO STRIKE CASES. — At common law the only ground for the disqualification of a judge was a pecuniary or personal interest in the subject matter of the cause.¹ But there are statutes in almost all the states providing that a judge is disqualified if he has been of counsel or if he is biased or prejudiced.² The party objecting must put in a verified affidavit that the judge is prejudiced or interested. Ordinarily the facts on which the conclusion is based must be positively stated,³ but in some states a mere statement of the conclusion is enough.⁴ The latter rule, however, seems unwise, for it offers an easy method of delaying the proceedings without the check imposed by the danger of a prosecution for perjury if false facts are stated in the affidavit. It is usually held that the disqualification statutes are mandatory, and that when a proper affidavit is filed the judge is *ipso facto* disqualified, and has no jurisdiction. That is, the judge may pass upon the sufficiency of the affidavit, but not upon the truth of the facts stated therein;⁵ it is the imputation of prejudice, not the actual existence of the alleged grounds of imputation, which causes the disqualification. Any other rule would violate the well-settled principle that a man cannot be judge in his own cause, and practically defeat the purpose of the statutes, since it is only in extreme cases that a man can realize his prejudice.⁶ Moreover, a decision on the truth or falsity of the allegations would be a decision of a question of fact, and not reviewable, except for abuse of discretion. Nevertheless, a few states have adopted a contrary rule,⁷ and others, though follow-

the due process clause of the Constitution. *McGovern v. City of New York*, 229 U. S. 363.

¹ *People v. Williams*, 24 Cal. 31 (prejudice). See *People v. Compton*, 123 Cal. 403, 56 Pac. 44, 48.

² For typical statutes, see U. S. COMP. STAT. 1913, § 988; MILLS ANN. STAT. (COLO.), § 7692; MONT. REV. CODES, § 6315.

Generally, only one judge may be disqualified in each case; but the Montana statute permits five disqualifications. See *State v. Clancy*, 30 Mont. 529, 77 Pac. 312.

³ *Ex parte Am. Steel Barrel Co.*, 230 U. S. 35; *Powers v. Reynolds*, 89 Ky. 259, 12 S. W. 298. See *Erbaugh v. People*, 57 Colo. 48, 52, 140 Pac. 188, 190; *People v. Findley*, 132 Cal. 301, 304, 64 Pac. 472, 473.

⁴ *Lincoln v. Territory*, 8 Okl. 546, 58 Pac. 730; *State v. Palmer*, 4 S. D. 543, 57 N. W. 490.

⁵ *Powers v. Commonwealth*, 114 Ky. 237, 70 S. W. 644; *Murdica v. State*, 137 Pac. 574 (Wyo.); *State v. Palmer*, 4 S. D. 677, 62 N. W. 631; *Erbaugh v. People*, 57 Colo. 48, 140 Pac. 188; *Cox v. United States*, 100 Fed. 283.

The normal way to attack the judge's ruling in such a case is by writ of error; but an application for a writ of prohibition is also a proper method, even though the judge, and not the court, loses jurisdiction. This is true whether the judgment is voidable, on account of a common-law disqualification, or void, as when the disqualification is statutory. *Forest Coal Co. v. Doolittle*, 43 W. Va. 210, 46 S. E. 238; *North Bloomfield Gravel Mining Co. v. Keyser*, 58 Cal. 315. See *Dimes v. Grand Junction Canal*, 3 H. L. 759, 785; *Moses v. Julian*, 45 N. H. 52, 54.

Of course, when the application is for a change of venue on account of popular feeling, counter affidavits may be filed, and the judge must pass on the facts. See *State v. Palmer*, 4 S. D. 543, 545, 57 N. W. 490, 491.

⁶ The late Judge Brewer is quoted in *Lincoln v. Territory*, 8 Okl. 546, 58 Pac. 730, as saying, "All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it."

⁷ *State v. DeMaio*, 70 N. J. L. 220, 58 Atl. 173; *Moses v. Julian*, 45 N. H. 52. This rule is usually based on the wording of the local statutes. Thus, *Cox v. United*

ing the majority rule if the affidavits are uncontradicted, permit the filing of counter affidavits, and allow the recused judge to pass upon the evidence.⁸ Perhaps the matter could be most easily and satisfactorily handled by the submission of the affidavits directly to a superior court on an application for prohibition. This method would avoid the absurdity of forcing the trial judge to decide whether certain acts which he knows are false would, if true, be sufficient to constitute prejudice in law.

The most difficult question, however, in these cases is to determine what constitutes the interest or prejudice that the statute provides for. It is clearly settled that any pecuniary interest, however small, in the result of the case is a ground for recusation.⁹ Many cases hold, however, that a judge will not be disqualified on the ground of bias unless he is prejudiced against the defendant personally,¹⁰ or has been of counsel in the same cause between the same parties.¹¹ A recent Colorado case shows a salutary tendency to disregard these technical rules, and consider the question from a practical, common sense standpoint. *People v. Hillyer*, 152 Pac. 149.¹² During the recent coal strike, several of the miners were indicted for murder and other crimes alleged to have been committed in the course of the conflict resulting from the strike, and were to be tried before Judge Hillyer. They put in affidavits alleging that Hillyer had acted as counsel for the mine owner in similar cases against other strikers; that the defense intended to apply for a change of venue on the ground of popular prejudice, and that the judge had a pre-formed opinion contrary to their contention on that question; and that Judge Hillyer was a strong partisan of the mine owners, having condemned the strikers and their cause in vigorous language. Judge Hillyer refused to disqualify himself, and a writ of prohibition was granted by a majority of the Supreme Court.

When one remembers how high the feeling in Colorado ran at the time of the strike, and the lengths to which the bitter hostility of both sides was carried, it seems almost too obvious for argument that a declared

States, 5 Okl. 701, 50 Pac. 175 (overruled by *Lincoln v. Territory*, 8 Okl. 546, 58 Pac. 730), was decided like the New Jersey case, under a statute which read, "if it shall be shown to the court."

⁸ *Talbot v. Pirkey*, 139 Cal. 326, 73 Pac. 858; *Crouch v. Dakota, W. & M. R. R. Co.*, 18 S. D. 540, 101 N. W. 722. See *Morehouse v. Morehouse*, 136 Cal. 332, 69 Pac. 625.

⁹ *MacMillan v. Spencer*, 28 Colo. 80, 62 Pac. 849; *Magruder v. Swann*, 25 Md. 173; *Ex parte Cornwell*, 144 Ala. 497, 39 So. 354.

But it is sometimes held that the judge is not disqualified if his pecuniary interest is small, and no one else can take jurisdiction in his place. *Matter of Ryers*, 72 N. Y. 1.

¹⁰ *Ingles v. McMillan*, 5 Okl. Cr. 130, 113 Pac. 998; *Bent v. Lewis*, 15 Mo. App. 40; *People v. Findley*, 132 Cal. 301, 64 Pac. 472. See *Johnson v. State*, 31 Tex. Cr. 456, 20 S. W. 985.

¹¹ *Stockwell v. Glaspey*, 160 S. W. 1151 (Tex. Civ. App.); *Bryan v. Austin*, 10 La. Ann. 612; *Blackburn v. Craufurd*, 22 Md. 447; *The Richmond*, 9 Fed. 863; *Trinkle v. State*, 127 S. W. 1060 (Tex. Cr. App.).

But see *State v. Perkins*, 124 La. Ann. 947, 50 So. 805; *Barnes v. State*, 27 Tex. Cr. 461, 83 S. W. 1124; *Woody v. State*, 69 S. W. 155 (Tex. Cr. App.). In these cases the judge was disqualified because he had been counsel for one of the parties in proceedings growing out of the same subject matter, as when the judge in a criminal case was counsel when the same matter came up in civil proceedings.

¹² See RECENT CASES, this issue, p. 459.

partisan of the mine owners, formerly actively engaged in the strife on their side, could not, no matter how good his intentions, give a fair and unprejudiced hearing in a case which directly or indirectly involved the whole issue between the contestants. Nevertheless, two judges of the Supreme Court dissented, and Governor Carlson and Speaker Stewart of Colorado issued statements unfavorably criticizing the decision of the court.¹³ The feeling of the authors of these statements and of the dissenting judges was that such a departure from the technical rules gave too great opportunity for the postponement of trials on account of trivial accusations of prejudice, which would hinder rather than promote justice. For this reason they contended that the prejudice must be against the defendant personally,¹⁴ not against the party or cause he represents, and that the fact that the judge believes the defendant guilty is not enough,¹⁵ since he passes on the law and not on the facts. Of course, certain limits on the power to disqualify for prejudice are essential. Prejudice which would disqualify a jurymen would not necessarily be a sufficient ground for the recusation of a judge, since, as the dissent points out, the judge does not pass directly on the facts.¹⁶ But the line of distinction between personal and party prejudice seems an illogical one, for it is obvious that hostility against the cause which a man represents and for which he is standing in the particular trial is a greater menace to impartiality than mere personal feeling. There seem few real decisions on the point, for in most cases the affiant manages to find facts showing a personal prejudice. In Kentucky, however, there is a line of decisions holding that party prejudice is sufficient to disqualify a judge. Thus it has been held that a judge who was a strong partisan of local option and bitterly hostile to the liquor interests was incompetent to try a prosecution for violation of the liquor statutes.¹⁷ The same rule has been applied to cases arising out of a political campaign.¹⁸ The language of these decisions applies exactly to the Colorado case, and when it is remembered that in addition Judge Hillyer had been of counsel in previous cases involving the same issue, though between different parties, and had a pre-formed opinion on the issue of change of venue for prejudice which he would be compelled to pass on,¹⁹ the justice of the court's result is beyond question.

¹³ See the DENVER NEWS for Aug. 19, 20, 1915. For this information and much valuable comment the writer is indebted to an unpublished article by Mr. Hugh McLean of the Denver Bar.

¹⁴ See n. 9, *supra*.

¹⁵ *Heflin v. State*, 88 Ga. 151, 14 S. E. 112; *State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *Ingles v. McMillan*, 5 Okl. Cr. 130, 113 Pac. 998, *accord*. See *contra*, *Chenault v. Spencer*, 68 S. W. 128 (Ky.).

¹⁶ See *Northampton v. Smith*, 52 Mass. 390. In that case the court said that the same test would not apply, even where the judge decided both the law and the facts. But the weight of authority seems *contra* on the latter point. *Williams v. Robinson*, 60 Mass. 333; *State v. Board of Education*, 19 Wash. 8, 52 Pac. 317.

¹⁷ *Wathen, etc. Co. v. Commonwealth*, 116 S. W. 336 (Ky.); *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785.

¹⁸ *Kentucky Publishing Co. v. Gaines*, 110 S. W. 268 (Ky.); *Powers v. Commonwealth*, 114 Ky. 237, 70 S. W. 644; *Givens v. Crawshaw*, 55 S. W. 905 (Ky.).

¹⁹ It is immaterial that the issue in question may never actually come before the court for decision. *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

THE LEGALITY OF VOTING TRUSTS. — As corporations increased in size, and the stockholders became great in number, constantly varying and widely scattered, the control, and with it the business policy, of a corporation became more and more subject to change. It was inevitable that efforts would be made to avoid this shifting control. The most effective scheme hitherto devised has been the voting trust, an arrangement by which the stockholders, or at least a majority of them, transfer their stock to trustees, who thus get and exercise the power to vote, in return for trust certificates, which are freely transferable subject to the trust.¹ In a recent case such an agreement was held invalid, the holder of a trust certificate being allowed to revoke the agreement at any time.² *Luthy v. Ream*, 110 N. E. 373 (Ill.). An earlier Illinois case sustained such a trust, the question of revocability not being involved and expressly not decided.³ Though at first sight these cases may not appear entirely consistent, the present decision seems really to be a logical application of the reasoning of the earlier case. The court there treated the trust agreement as in substance nothing more than an exercise of proxies by the trustee. Such a construction deprives the voting trust of all its virility. Courts are inclined to look with disfavor on any attempt to make proxies irrevocable, usually holding them revocable notwithstanding contrary provisions, as being mere powers, not coupled with an interest.⁴ But a decisive blow against the use of irrevocable proxies has been dealt by statutes, now very common, limiting the duration of proxies.⁵ The Illinois court seems to have reached a logical result, if the voting trust can be regarded as a mere evasion of the limitations on the use of proxies. But this construction, it is submitted, is erroneous and unfortunate. A voting trust is an entirely different thing from a proxy. It is a real trust; the power to vote is not delegated, but the legal title, which carries with it the power to vote, is transferred. There is no more difficulty in creating a trust of stock than of any other kind of property. Further, the trust is not revocable as a dry trust, since it is really an active trust, both by reason of the power and duty to vote and by the interest each shareholder has in the participation of the others in the agreement.⁶

¹ There is no standard form for voting trusts, the provisions varying according to the requirements of each case. The duration is usually for a fixed term, three or five years being the most common, but a much longer period has occasionally been agreed upon. The trust may terminate upon the declaration of certain dividends, or when the financial condition of the corporation is such, in the opinion of the trustees, as to warrant it. A common provision is to allow the trust to be ended by a vote of a large proportion, say two-thirds, of the holders of the trust certificates. For a full discussion of the terms, in general and in particular, of voting trusts, see CUSHING, VOTING TRUSTS, 20, 36-99.

² For a complete statement of the facts of this case see RECENT CASES, p. 453.

³ *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949.

⁴ *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929. 1 THOMPSON, CORPORATIONS, 2 ed., §§ 883, 884; 2 COOK, CORPORATIONS, 5 ed., § 610. But see *Brown v. Pacific Mail Steamship Co.*, 5 Blatch. (U. S.) 525.

⁵ In New York a proxy is good only for eleven months, unless some other limited time is specified in the proxy, and is always revocable. N. Y. CONSOL. LAWS, 1909, ch. 28, § 26. In Massachusetts a proxy must be executed within six months of the meeting at which it is used. MASS. REV. LAWS, 1902, ch. 110, § 25.

⁶ See *Boyer v. Nesbitt*, 227 Pa. St. 398, 404, 76 Atl. 103, 105. See also the dissenting opinion of Justice Swayze in *Warren v. Pim*, 66 N. J. Eq. 353, 410, 59 Atl. 773, 794.

The only objection to voting trusts must then be based on grounds of policy. To say it is a restraint on alienation seems unfounded, since the trust certificates may be freely bought and sold, subject to the trust. A further frequent objection is that it is against the policy of the law to allow the separation of the voting power from the actual beneficial ownership, and that the voting trust is a mere blind to accomplish this.⁷ Such a policy must be a survival of the obsolete notion, which prevented even voting by proxy,⁸ that shareholders had a duty to participate personally in the management. A sounder view seems to be that it is an independent property right which is perfectly separable.⁹ But the fundamental objection to voting trusts, the one which offers a real basis for attack upon grounds of policy, is the fact that such agreements may, and frequently do, lead to a minority control, since the majority of the majority will ordinarily control the vote of the block of participating stock. Such a control may perhaps be dangerous, but it has undoubted advantages in providing a continuous business policy. Great protection has been furnished in addition by the readiness of the courts to declare these trusts invalid where there has been any suggestion of an improper purpose, or any danger of unfairness to the minority stockholders — a strictness which has sprung from their earlier unmistakable hostility. Indeed it seems that most of these agreements which have come before the courts have been declared invalid for one reason or another.¹⁰ Unfortunately a few cases have gone so far as to declare such trusts void *per se* as contrary to public policy.¹¹ But the more liberal tendency — to which the principal case is a regrettable exception — has been to reject such a flat rule, and to uphold the trust agreements when conceived for a lawful and proper purpose.¹² This is highly desirable, since the voting trust has become a useful instrument in the business world. In practice it is indeed used rather to protect than to injure the stockholder, its most valuable and common application being in cases of reorganization.¹³ In fact its desirability has been so far recognized that in some states it now has express legislative sanction.¹⁴

⁷ See *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 699, 24 S. E. 489, 490. See the opinion of Justice Pitney in *Warren v. Pim*, *supra*, 66 N. J. Eq. 353, 373, 59 Atl. 773, 780. See also 24 HARV. L. REV. 51.

⁸ Although now universally allowed by statute, at common law a stockholder could not vote by proxy. *Taylor v. Griswold*, 14 N. J. L. 222.

⁹ See *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1, 27, 68 S. E. 412, 421; *Warren v. Pim*, *supra*, 66 N. J. Eq. 353, 410, 59 Atl. 773, 795.

¹⁰ *Moses v. Scott*, 84 Ala. 608, 4 So. 742; *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Venner v. Chicago City Ry. Co.*, *supra*, 258 Ill. 523, 101 N. E. 949. See also cases in following footnote.

¹¹ *Harvey v. Linville Improvement Co.*, *supra*, 118 N. C. 693, 24 S. E. 489; *Bridges v. First National Bank*, 152 N. C. 293, 67 S. E. 770; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Warren v. Pim*, *supra*, 66 N. J. Eq. 353, 59 Atl. 773.

¹² *Greene v. Nash*, 85 Me. 148, 26 Atl. 1114; *Boyer v. Nesbitt*, *supra*, 227 Pa. St. 398, 76 Atl. 103; *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1, 68 S. E. 412; *Thompson-Starrett Co. v. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017. See *Brightman v. Bates*, 175 Mass. 105, 111, 55 N. E. 809, 810; *Bowditch v. Jackson Co.*, 76 N. H. 351, 358, 82 Atl. 1014, 1018; 24 HARV. L. REV. 57.

¹³ See CUSHING, VOTING TRUSTS, p. 12 *et seq.*

¹⁴ MD. STAT. 1908, ch. 240; N. Y. CONSOL. LAWS, 1909, ch. 28, § 25.

THE VALIDITY OF CONTRACTS BETWEEN THE PULLMAN COMPANY AND ITS EMPLOYEES EXEMPTING RAILROADS FROM LIABILITY TO THE EMPLOYEES FOR NEGLIGENT INJURIES. — The usual contract between a Pullman employee and the Pullman Company contains a provision exempting from liability for injury to the employees all railroads over whose lines the company operates. It is well settled that, if such a contract is valid, it is available to the railroads as a defense.¹ Contracts exempting a carrier from liability to passengers for negligent injuries are universally held to be void as against public policy.² In this country the same is true, generally at common law³ and often by statute,⁴ of contracts exempting a master from such liability to a servant. The courts have held, however, that in the absence of special circumstances⁵ a Pullman employee is not a servant of the railroad.⁶ And they have usually held that he is not a passenger.⁷ With the failure to put the contract into either of these classes the courts have concluded that it is valid, and this result is followed in a recent case. *Lindsay v. Chicago, B. & Q. R. Co.*, 226 Fed. 23 (C. C. A., 7th Circ.).⁸ It is submitted that this conclusion does not necessarily follow. The terms "servant" and "passenger" are only important in that they denote parties to relations of such a nature that the law considers against public policy their contracts releasing the railroads from the consequences of negligence. The question whether the relation of the Pullman employee to the railroad is also of such a nature merits an independent consideration.

It is a strong policy of the law to enforce contracts freely entered into between the parties.⁹ But in cases where one of the parties is under a sort of economic coercion this policy loses a large part of its force. Hence the courts have refused to enforce against passengers and servants their contracts of exemption, considering that they are compelled, one by the

¹ *Russell v. Pittsburgh, C. C. & St. L. R. Co.*, 157 Ind. 305, 61 N. E. 678; *McDermion v. Southern Pac. Co.*, 122 Fed. 669; *Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705.

² *New York Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611. See HALE, BAILMENTS AND CARRIERS, 529; 26 HARV. L. REV. 742.

³ *Johnson v. Fargo*, 184 N. Y. 379, 77 N. E. 388. See 5 LABATT, MASTER AND SERVANT, 2 ed., 5972; 26 HARV. L. REV. 742.

⁴ See, for example, The Federal Employers' Liability Act, 4 U. S. COMP. STATS. (1913), § 8661.

⁵ *Oliver v. Northern Pac. R. Co.*, 196 Fed. 432.

⁶ *Robinson v. Baltimore & Ohio R. Co.*, 40 App. D. C. 169, affirmed 237 U. S. 84; *McDermion v. Southern Pac. Co.*, *supra*, 122 Fed. 669.

⁷ *Russell v. Pittsburgh, C. C. & St. L. R. Co.*, *supra*, 157 Ind. 305, 61 N. E. 678; *Chicago, R. I. & P. R. Co. v. Hamler*, *supra*, 215 Ill. 525, 74 N. E. 705; *McDermion v. Southern Pac. Co.*, *supra*, 122 Fed. 669. *Contra*, *Jones v. St. Louis Southwestern R. Co.*, 125 Mo. 666, 28 S. W. 883; *Coleman v. Pennsylvania R. Co.*, 242 Pa. St. 304, 89 Atl. 87.

⁸ See RECENT CASES, p. 458, for a statement of the facts.

⁹ In *Baltimore & Ohio R. Co. v. Voigt*, 176 U. S. 498, Shiras, J., in declaring void a contract similar to those under consideration, says, at p. 505, "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

necessity of securing transportation,¹⁰ the other by the necessity of securing work,¹¹ to enter into such agreements. The latter necessity — that of getting employment — is no less present in the contracts now under discussion. The Pullman Company makes the signing of the contract a prerequisite of employment; and the employee is limited in his choice of employers for such work to a very few, if not to one. So, too, if the result of such contracts is contrary to other public interests, the policy of preserving the integrity of private agreements loses much of its cogency. It is true that the ordinary duty of due care may be contracted away in some cases.¹² The law, however, is interested in protecting the life and health of its citizens; and where the relation of the parties is such that the safety of one is largely dependent on the care of another, it is the interest of the law to preserve the incentives to careful conduct. It is considered, as regards the relation of master and servant, that a contract of exemption tends to diminish the necessary care of the master.¹³ The same considerations apply to the contract of the Pullman employee. It has been suggested that the railroad has sufficient inducement to be careful in its liability to passengers and servants and the danger of harm to its property. But the same might be said of a master whose business is such that his negligence might lead to injury to his property and to others not his servants; yet the law does not allow him to contract away liability to his servants, for the greater his responsibility, the stronger his motive to be careful. Another possible consideration to be urged against such contracts is the modern tendency, reflected in statutes, to make a business, and hence indirectly the public, bear the financial burden of injuries to those engaged in the business. Since the Pullman employee could not recover against the Pullman Company, the contract would throw the burden of the injury on him.

Whether in weighing these considerations the balance is for or against the sort of contract here involved is a question of degree, on which there may be a difference of opinion. The passenger contracts are distin-

¹⁰ In *New York Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, Bradley, J., in showing why a carrier should not be allowed to contract away his liability to passengers, says, at p. 379, "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgie or stand out and seek redress in the courts. . . . He prefers rather to . . . sign any paper the carrier presents."

¹¹ In *Johnson v. Fargo*, *supra*, 184 N. Y. 379, 77 N. E. 388, Gray, J., in declaring void a contract exempting a master from liability to his servant, says, at p. 385, "The employer and the employed, in theory, deal upon equal terms; but, practically, that is not always the case. The artisan, or workman, may be driven by need, or he may be ignorant or of improvident character. It is, therefore, for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employees."

¹² *World's Columbian Exposition v. Republic of France*, 38 C. C. A. 483, 96 Fed. 687; *Mehegan v. Boyne City, G. & A. R. Co.*, 141 N. W. 905 (Mich.). *Contra*, *Johnson's Administratrix v. Richmond, etc. R. Co.*, 86 Va. 975, 11 S. E. 829. See also *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 Tex. Civ. App. 367, 380, 116 S. W. 841, 848.

¹³ In *Johnson v. Fargo*, *supra*, 184 N. Y. 379, Gray, J., says, at p. 385, "The state is interested in the conservation of the lives and of the youthful vigor of its citizens, and if the employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not indifference to, the maintenance of proper and reasonable safeguards to human life and limb."

guished because they contravene the carrier's public service duty.¹⁴ But it is submitted that the courts are inconsistent in declaring the contracts between master and servant void, while at the same time upholding the Pullman employees' contracts. In both cases there is the same economic coercion, the same constant dependence for safety on the party seeking immunity, and the same financial burden on the workman. And it should make no difference that in the latter case the contract is with one person and the exemption in favor of another.

"JITNEY BUS" REGULATION. — The rapid rise of the automobile hack, or "jitney bus," has called forth a correspondingly widespread body of legislation, which is the more interesting because of the uniformity of its purpose and its treatment by the courts. Much of this is in the form of municipal ordinances licensing and otherwise regulating the conduct of the business. Though a city has no inherent power either to license or to tax an occupation,¹ that the necessary authority, at least with regard to this particular occupation, is within the delegated powers of most municipalities is sufficiently attested by the large number of such ordinances,² none of which seems as yet to have been disapproved by a court of record. The ultimate power of regulation, however, remains in the state, and an operator, though licensed under a valid municipal ordinance, remains subject to statutory control.³ The normal mode of effecting such control is, by the very nature of the business, through the public service commissions of the various states. Yet in some states, oddly enough, it seems that the commissions have no jurisdiction over these conveyances,⁴ while in others it is certain that no action has as yet been taken by the commissions.⁵ On the other hand, a number of these bodies have assumed jurisdiction through a liberal interpretation

¹⁴ In *New York Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, Bradley, J., says, at p. 378, "In regard to passengers the highest degree of carefulness and diligence is expressly exacted. . . . It is obvious, therefore, that if a carrier stipulated not to be bound by the exercise of care and diligence . . . he seeks to put off the essential duties of his employment."

¹ *City of Chicago v. O'Brien*, 268 Ill. 228, 109 N. E. 10; *City of St. Louis v. Laughlin*, 49 Mo. 559. See 3 McQUILLIN, MUNICIPAL CORPORATIONS, § 987 (pp. 2194-5).

² An exhaustive digest of all ordinances on the subject in the principal cities, up to June 15, 1915, is found in THE UTILITIES MAGAZINE, vol. i, no. 1, p. 28 (July, 1915); reprinted in 46 ELECTRICAL RAILWAY JOURNAL, 314 (Aug. 21, 1915).

³ *Public Service Commission v. Booth*, 155 N. Y. Supp. 568.

⁴ Arkansas, California,* Florida, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri (*semble*), Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, Tennessee, Washington. (For the information in this and the following note, indebtedness to THE UTILITIES MAGAZINE, vol. i, no. 2, p. 23 (Nov., 1915), is acknowledged.)

* Opinion of Commission counsel. This has now been affirmed by a decision of the California Railroad Commission itself. *Western Association of Short Line Railroads v. Hackett*, P. U. R. 1915 F, 997 (Sept. 30, 1915). The jurisdiction in each case is a matter of local statute, of course.

⁵ Connecticut, Idaho, Louisiana, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia, West Virginia.

of their previous statutory powers;⁶ and several legislatures have placed the jurisdiction beyond all doubt by explicit enactment.⁷ In one case the state action has taken the form of making the occupation a misdemeanor unless licensed by a municipality.⁸

These attempts to handle promptly what threatened to become a vexatious problem have met with the general approbation of the courts. In most instances little difficulty has been felt. Thus a city's authorized ordinance as to the licensing of "hackney carriages," couched in general terms, probably is sufficient to cover the case of jitney busses;⁹ and no doubt a general grant of power to license similar modes of conveyance amply justifies a special ordinance for this case.¹⁰ The imposition of such a license naturally involves a classifying of the property, for purposes of practical convenience; but this gives the courts little trouble,¹¹ the bases of the classification being readily apparent.¹²

A more popular phase of the problem has been the necessity of imposing some sort of responsibility for negligent injuries by the drivers. To this end the latter have in many localities been called upon to give a bond to answer in damages. The idea is not a new one. Where in its nature an occupation is apt to cause injury to others, such a bond has frequently been required.¹³ And the jitneys present such an obviously proper case for an application of this principle that this requirement has been unhesitatingly indorsed.¹⁴ The same feeling has evoked in some instances a further provision, calling for a period of training designed to insure the technical competence of the operator. To be sustained, a rule so limiting one's constitutional liberty of pursuit must be clearly reasonable.¹⁵ However, the courts have not felt that in this case the line of reasonableness has thus far been overstepped.¹⁶

It must be admitted that the influence of the street railways seems apparent throughout the legislation on this subject. Thus the estab-

⁶ Arizona, *In re Automobile Traffic on Auto Stage Lines*, P. U. R. 1915 C, 945, decided by the Corporation Commission; District of Columbia, Public Utilities Commission, Case No. 1493; Georgia, *Georgia R., etc. Co. v. Jitney Bus Co.*, P. U. R. 1915 C, 928, decided by the Railroad Commission; Illinois, *Jacksonville R. Co. v. O'Donnell*, P. U. R. 1915 C, 853, decided by the Public Utilities Commission; Maryland, *In re Automobiles & Jitney Busses*, P. U. R. 1915 C, 365, decided by the Public Service Commission.

⁷ COLO. LAWS, 1915, ch. 133; N. Y. LAWS, 1915, ch. 667; R. I. PUB. LAWS, ch. 1263, sec. 4 (adopted Jan., 1915); WIS. LAWS, 1915, ch. 546.

⁸ TENN. ACTS, 1915, ch. 60.

⁹ *State v. Jarvis*, 95 Atl. 541 (Vt.).

¹⁰ *Ex parte Dickey*, 85 S. E. 781 (W. Va.); *Greene v. City of San Antonio*, 178 S. W. 6 (Tex.); *LeBlanc v. City of New Orleans*, 70 So. 212 (La.); *Ex parte Counts*, 153 Pac. 93 (Nev.); *Ex parte Sullivan*, 178 S. W. 537 (Tex.).

¹¹ *Ex parte Cardinal*, 150 Pac. 348 (Cal.); *Nolen v. Riechman*, 225 Fed. 812; *City of Memphis v. State*, 179 S. W. 631 (Tenn.); *Booth v. City of Dallas*, 179 S. W. 301 (Tex.); *Ex parte Dickey*, *supra*, 85 S. E. 781 (W. Va.).

¹² That a classification based on definite criteria is unobjectionable, see *Soon Hing v. Crowley*, 113 U. S. 703; *Oricut Insurance Co. v. Daggs*, 172 U. S. 557, 562.

¹³ *Hawthorne v. People*, 109 Ill. 302; *Bell v. State*, 28 Tex. App. 96, 12 S. W. 410.

¹⁴ *Ex parte Bogle*, 179 S. W. 1193 (Tex.); *Ex parte Cardinal*, *supra*, 150 Pac. 348 (Cal.); *City of Memphis v. State*, *supra*, 179 S. W. 631 (Tenn.); *Greene v. City of San Antonio*, *supra*, 178 S. W. 6 (Tex.); *State v. Howell*, 147 Pac. 1159 (Wash.).

¹⁵ See *Smith v. State of Texas*, 233 U. S. 630.

¹⁶ *Ex parte Cardinal*, *supra*, 150 Pac. 348 (Cal.).

lishment of specified routes and termini for the jitneys, though no doubt a proper exercise of the police power,¹⁷ tends directly to the benefit of the railways, in eliminating the jitney-drivers' practice of monopolizing and specializing upon the profitable short hauls. A limitation upon the fares to be charged is less clearly in the interest of the railways; but it is certainly quite within the police power.¹⁸ Courts should, however, guard against upholding rates which, under the guise of regulation, are designed to be confiscatory.¹⁹ In one recent case the railway has forsaken the rôle of public benefactor and has frankly sought relief by injunction as an injured individual where the jitneys were operating in violation of law.²⁰ Whether the mere infringement of a non-exclusive franchise affords ground for such relief is in some doubt on the authority, though by the better view an injunction will be given.²¹ The court, however, in giving the injunction, took the additional ground that the jitneys, aside from their illegality,²² were a public nuisance in fact, causing the plaintiff special damage. As a general rule, it is undisputed that an injunction may properly issue where these elements concur;²³ and impairment of general pecuniary condition is recognized as sufficient damage.²⁴ Nevertheless, in view of the fact that the diversion of trade from the plaintiff railway was due, not to the annoying character of the jitneys, but rather to their superior attractiveness to the public, as a means of transportation, it seems difficult to trace a proximate connection between the element of nuisance and the plaintiff's damage.

DOES THE FEDERAL EMPLOYERS' LIABILITY ACT SUPERSEDE STATE COMPENSATION LAWS AS TO INTERSTATE COMMERCE?— Since the case of *Gibbons v. Ogden*¹ there has been no room for doubt that the federal

¹⁷ *Ex parte Dickey*, *supra*, 85 S. E. 781 (W. Va.).

¹⁸ *Munn v. Illinois*, 94 U. S. 113.

¹⁹ *Philadelphia Jitney Ass'n v. Blankenburg*, 72 Leg. Intell. 730 (Com. Pleas Ct. of Phila. Co., Pa., June, 1915), appears to give evidence of this tendency.

²⁰ *Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S. W. 635 (Tenn.).

²¹ The right on the part of a public utility operating under a non-exclusive franchise to an injunction against competition not publicly authorized, though in some dispute, seems generally conceded. *Hudspeth v. Hall*, 111 Ga. 510, 36 S. E. 770; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *Cent. R. Co. v. Penn. R. Co.*, 31 N. J. Eq. 475, 493; *Patterson v. Wollmann*, 5 N. D. 608, 67 N. W. 1040; *Bartlesville, etc. Power Co. v. Bartlesville, etc. Ry. Co.*, 26 Okl. 453, 109 Pac. 228; *Douglass' Appeal*, 118 Pa. 65, 12 Atl. 834. *Contra*, *Empire City Subway Co. v. Broadway, etc. Co.*, 87 Hun (N. Y.) 279, 33 N. Y. Supp. 1055, affirmed in 150 N. Y. 555, 54 N. E. 1092. See *McEwen v. Taylor*, 4 Greene (Ia.) 532; *New Eng. Ry. Co. v. Central Ry. & Electric Co.*, 60 Conn. 47, 36 Atl. 1061; *Coffeyville, etc. Gas Co. v. Citizens National Gas, etc. Co.*, 55 Kan. 173, 40 Pac. 326.

²² Acts sanctioned by legislative authority cannot constitute a nuisance, even though if unauthorized they might have amounted to one in fact. *Murtha v. Lovewell*, 166 Mass. 391, 44 N. E. 347; *Davis v. Mayor*, 14 N. Y. 506. The question whether lack of such authority, where required by law, is sufficient to render an otherwise proper act a nuisance, involves the more general problem of the purpose of the legislature; discussed in 27 HARV. L. REV. 317 *et seq.*

²³ 1 HIGH, INJUNCTIONS, 4 ed., § 762.

²⁴ *Draper v. Mackey*, 35 Ark. 497; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Rose v. Groves*, 12 L. J. C. P. 251.

¹ 9 Wheat. (U. S.) 1.

control of interstate commerce is paramount to all state regulation.² As a corollary to this proposition the Supreme Court decided in the case of *Cooley v. Board of Wardens*³ that in certain cases coming within the police power of the state there could be state regulation until Congress had acted; and this doctrine has been consistently followed.⁴ When the federal government has acted, however, all state regulations on the subject are immediately superseded.⁵ A nice problem has frequently been presented as to just what particular subject was intended to be covered by Congress,⁶ but the tendency of the Supreme Court has been to give a broad scope to the federal regulation.⁷ A recent New York decision allows a railroad employee, who was injured while engaged in interstate commerce, to recover under the state Workmen's Compensation Act. *Winfield v. New York Central & Hudson R. R. Co.*, 54 N. Y. L. J. 52, 110 N. E. 614.⁸ The basis of the decision is that the federal Employers' Liability Act⁹ applies only to those cases where the injury was due to negligence, and leaves untouched the field of liability without fault covered by the state statute. This question has been passed upon by four state courts during the last year and has received conflicting answers.¹⁰

It was urged by the lower court in New York¹¹ that the title of the federal act, "An Act relating to the liability of common carriers by railroad to their employees *in certain cases*," indicates that it does not cover all the grounds of liability. As has been pointed out,¹² however, these words were inserted to obviate the possibility of this act being declared unconstitutional, as was the first Employers' Liability Act,¹³ because it

² *Smith v. Alabama*, 124 U. S. 465, 473; *Railroad Co. v. Husen*, 95 U. S. 465; and cases cited *infra* under notes 4 and 6.

³ 12 How. (U. S.) 299.

⁴ *Nashville, C. & S. L. Ry. v. Alabama*, 128 U. S. 96, 101; *Hennington v. Georgia*, 163 U. S. 299; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 437; *Minnesota Rate Cases*, 230 U. S. 352, 402; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280.

⁵ *Gulf, Colorado, & S. F. Ry. Co. v. Hefley*, 158 U. S. 98; *Second Employers' Liability Cases*, 223 U. S. 1; *Chicago, R. I. & Pac. Ry. Co. v. Harwick Farmers Elevator Co.*, 226 U. S. 426; *Adams Express Co. v. Croninger*, 226 U. S. 491, 506; *Erie Railroad v. New York*, 233 U. S. 671; *Houston & Texas Ry. v. United States*, 234 U. S. 342.

⁶ See *Leisy v. Hardin*, 135 U. S. 100; *Reid v. Colorado*, 187 U. S. 137, 146; *Northern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 378; *Savage v. Jones*, 225 U. S. 501, 533; *Erie R. Co. v. New York*, 233 U. S. 671, 683; *Southern Ry. Co. v. Railroad Comm. of Ind.*, 236 U. S. 439.

⁷ It is interesting to note that the New York court took the narrow view as to the effect of the federal Hours of Service Act. *Erie R. Co. v. New York*, 198 N. Y. 369. This act limited the hours of certain employees in interstate commerce to nine. The New York court upheld a state statute limiting the hours to eight on the ground that it merely "raised such limit of safety." The decision was overruled. 233 U. S. 670. The New York court might have said in the present case that they were merely "raising the standard of liability."

⁸ For the facts of this case, see RECENT CASES, p. 459.

⁹ 35 STAT. AT LARGE, Pt. I, p. 65. U. S. COMP. STAT. (1913), §§ 8657-8665.

¹⁰ In addition to the *Winfield* case, *supra*, the New Jersey court reached the same result. *Ronnsaville v. Central R. of N. J.*, 94 Atl. 392; *Hammill v. Pennsylvania R. Co.*, 94 Atl. 313. The Illinois and California courts have come to the opposite conclusion. *Staley v. Illinois Cent. R. Co.*, 109 N. E. 342; *Smith v. Industrial Accident Comm.*, 147 Pac. 600.

¹¹ See *Winfield v. New York Cent. & H. R. R. Co.*, 153 N. Y. Supp. 499, 500.

¹² See *Staley v. Illinois Cent. R. Co.*, 109 N. E. 342, 349.

¹³ *First Employers' Liability Cases*, 207 U. S. 463.

applied to intrastate commerce. There are several things, on the other hand, which point definitely to the conclusion that Congress intended to cover the entire field of employers' liability to employees in interstate transportation by rail. One of the compelling motives for the passage of the act was the desire for uniformity throughout the states, which is apparent from the message of the President urging the passage of the act,¹⁴ and from the report of the judiciary committee of the House.¹⁵ Again, the act was a recognition of the very social and economic factors which have prompted the Workmen's Compensation Statutes, and was the answer of Congress to the problem presented by those considerations.¹⁶ Furthermore, the expediency of making the carriers liable regardless of negligence was considered and rejected by the committees in charge of the bill.¹⁷

The precise point presented here has not been decided by any federal court, but in 1914 the Supreme Court overruled a North Carolina decision¹⁸ upon a point which is very much like the present one. A state statute made the employer absolutely liable for failure to afford the employee a safe place in which to work; but by the federal Employers' Liability Act the carrier was liable only for "any defect or insufficiency due to its negligence." The Supreme Court, in overruling the state court which had applied the local rule, said: "It is settled that since Congress by the Act of 1908 took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws upon the subject are superseded." In addition to this case there

¹⁴ Message of the President to Congress, Jan. 31, 1908, Sen. Doc. 213, 60th Cong., 1st Sess., in Vol. 8, U. S. Doc., 5241, at p. 1, "Interstate employment being thus covered by an adequate national law, the field of intrastate employment will be left to the action of the several states." To the effect that presidential messages may be used in determining the scope of legislation, see *Kepner v. United States*, 195 U. S. 100.

¹⁵ Report of Committee on Judiciary, House Rep. 1386, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5226, at p. 1; and again at p. 3: "It [the present bill] will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the states." See also *Cross v. Chicago, B. & Q. R. Co.*, 177 S. W. 1127, 1130. To the effect that the reports of committees may be used in determining the scope of a statute, see *Holy Trinity Church v. United States*, 143 U. S. 457, 464; *Chesapeake, etc. Tel. Co. v. Manning*, 186 U. S. 238, 246; *Binns v. United States*, 194 U. S. 486.

¹⁶ Report of Committee on Education and Labor. Sen. Rep. 460, 60th Cong., 1st Sess., in Vol. 2, U. S. Doc., 5219, at p. 2. "Yet somebody must assume these risks, and the tendency throughout the world in those countries where the industrial life of the community is thoroughly organized has been to modify the doctrine of negligence so as to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is, upon the whole community. The proposed measure is intended to effect this reasonable reformation in our industrial code." See also *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660, 663.

¹⁷ Report of Committee on Education and Labor, *supra*, at p. 2; Report of Judiciary Committee, *supra*, at p. 96.

¹⁸ *Seaboard Air Line v. Horton*, 233 U. S. 492, 501, reversing 162 N. C. 77. It is interesting to note that this case was not referred to by the New York court, though decided almost eighteen months before their decision and over a year in advance of the argument before them.

have been a number of decisions by the state courts,¹⁹ the lower federal courts,²⁰ and the Supreme Court²¹ enunciating the same principle, though applied to facts less like those of the principal case. A practical argument against the result reached in New York was suggested in the dissenting opinion in the lower court,²² namely, that it may become necessary for the employer to prove his own negligence, when sued in the state courts, in order to come in under the federal act. The employer would hardly choose to adopt this unpalatable course, especially as the question of negligence, being necessarily in issue as a jurisdictional fact in the state court, would seem to be *res judicata* in the federal court. "The result would be in most cases to give the injured party an option to claim under the Compensation Act or under the federal liability law." The fundamental error of the New York and New Jersey decisions seems to be that they consider a mere difference in the theory of recovery upon which the two acts are based tantamount to a difference in subject matter.

SUITS AGAINST FOREIGN EXECUTORS. — Although an executor is sometimes conceived as continuing the person of the decedent for the purpose of the devolution of property,¹ and although he has title to the decedent's chattels,² each state in which property is found may set up a separate administration;³ and it is settled in most jurisdictions that at common law and in the absence of special circumstances⁴ he cannot

¹⁹ *Flanders v. Georgia & S. F. Ry. Co.*, 67 So. 68 (Fla.); *Wagner v. Chicago & Alton R. Co.*, 265 Ill. 245, 106 N. E. 809; *Corbett v. Boston & Maine R. Co.*, 219 Mass. 351, 107 N. E. 60; *Kamboris v. Oregon & Washington R. & Navigation Co.*, 146 Pac. 1097 (Ore.); *Eastern Ry. Co. v. Ellis*, 153 S. W. 701 (Tex.).

²⁰ *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660, 662; *Dewberry v. Southern Ry. Co.*, 175 Fed. 307; *Taylor v. Southern Ry. Co.*, 178 Fed. 380, 382; *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. 318, 319.

²¹ *Second Employers' Liability Cases*, 223 U. S. 1; *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 576; *Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59, 66; *St. Louis, I. M. & So. Ry. Co. v. Hesterly*, 228 U. S. 702, 704, overruling 98 Ark. 240; *Wabash R. v. Hayes*, 234 U. S. 86, 89.

²² *Winfield v. New York Central & H. R. R. Co.*, 153 N. Y. Supp. 499, 504.

¹ See 1 WOERNER, ADMINISTRATION, § 157.

² See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1384.

³ See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1360-1361; STORY, CONFLICT OF LAWS, 8 ed., § 513; 1 WOERNER, ADMINISTRATION, § 158.

⁴ Where the executor having assets in his possession has repudiated the authority of his own state and taken them out of its power he may be sued where found. *Williamson v. Branch Bank at Mobile*, 7 Ala. 906; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239; *Lake v. Hardee*, 57 Ga. 459. See *Lewis v. Parrish*, 115 Fed. 285, 287. But cf. *Black v. Woodman*, 5 Redf. (N. Y.) 363; *Hedenbergh v. Hedenbergh*, 46 Conn. 30. He may also be sued in any place where he meddles with assets. *Marcy v. Marcy*, 32 Conn. 308. *A fortiori* where he has committed both the above wrongs. *Campbell v. Tousey*, 7 Cow. (N. Y.) 64. However the doctrine of executor *de son tort* is generally obsolete. See *Hopper v. Hopper*, 125 N. Y. 400, 404, 26 N. E. 457, 458. An executor may be sued on a contract he has made as executor. *Johnson v. Wallace*, 112 N. Y. 230. And he may sue anywhere on a judgment he has recovered. *Biddle v. Wilkins*, 1 Pet. (U. S.) 686; *Talmage v. Chappel*, 16 Mass. 71; *Lawrence v. Lawrence*, 3 Barb. Ch. (N. Y.) 71. Such a judgment against him as plaintiff is also conclusive everywhere. *Coram v. Ingersoll*, 148 Fed. 169.

sue⁵ or be sued⁶ outside of the jurisdiction in which he qualifies. Consequently administration appears to be substantially an *in rem* proceeding.⁷ On this ground a New York statute providing in broad terms that a foreign executor might sue or be sued on the same basis as a non-resident⁸ has recently been construed by a federal court, in a case arising under the Sherman Act, to open the New York courts to litigation only in cases where the law of the decedent's domicile allows it. *Thorburn v. Gates*, 225 Fed. 614. The broad and most obvious construction of the statute, it was thought, would lead to its being in violation of the due process clause, on the ground that it authorized an attempt to dispose of decedent's goods over which another state had exclusive authority. A construction which limited the application of the statute to cases where property is in the jurisdiction was rejected as too artificial.⁹ It is not very clear why this construction is any more strained than the one adopted and it seems quite possible that the intention of the legislature, in so far as the question was adverted to, was only to affect the local assets.

But however that may be, it is submitted that another view of the constitutional question is tenable. A backhanded but still a forceful way of presenting the view of the court is this: All judgments founded on valid jurisdiction are entitled to full faith and credit. But, in view of the common understanding of the nature of administration, other states clearly might disregard any judgment which purported to bind the executor with respect to assets of the estate generally.¹⁰ Such a judgment must, therefore, be without jurisdiction, and consequently it would be a violation of due process to render it. The well-known decision of the Supreme Court¹¹ that the full faith and credit clause did

⁵ Executors and administrators rest on the same basis in this respect. *Johnson v. Powers*, 139 U. S. 156; *Noonan v. Bradley*, 9 Wall. (U. S.) 394; *Duchess D'Auxy v. Porter*, 41 Fed. 68; *Mansfield v. McFarland*, 202 Pa. St. 173, 51 Atl. 763. See STORY, *CONFLICT OF LAWS*, 8 ed., § 513; 2 WHARTON, *CONFLICT OF LAWS*, 3 ed., § 608.

⁶ Here also there is no distinction between executors and administrators. *Durie v. Blauvelt*, 49 N. J. L. 114, 6 Atl. 312; *Vaughn v. Northrup*, 15 Pet. (U. S.) 1; *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44; *Hedenbergh v. Hedenbergh*, 46 Conn. 30; *Davis v. Smith*, 5 Ga. 274; *Tyler v. Bell*, 2 Myl. & C. 89. See authorities in 27 L. R. A. 101 n.; STORY, *CONFLICT OF LAWS*, 8 ed., § 513; 2 WHARTON, *CONFLICT OF LAWS*, 3 ed., § 616. See also *Emery v. Batchelder*, 132 Mass. 452.

⁷ See *Burton v. Williams*, 63 Neb. 431, 88 N. W. 765; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38; *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44.

⁸ CODE CIV. PROC., § 1836 a.

⁹ The court conceded that such a statute would be constitutional. *Cady v. Bard*, 21 Kan. 667; *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550; *In re McCreight*, 9 Oh. Dec. 454.

¹⁰ *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. See *Cherry v. Speight*, 28 Tex. 503.

¹¹ *Haddock v. Haddock*, 201 U. S. 562. But see *Holmes, J.*, dissenting, at p. 632. See also *Goldrey v. Morning News*, 156 U. S. 518, 521; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 411. If the law were otherwise recognition of a decree not entitled to full faith and credit under the doctrine of *Haddock v. Haddock* would be a *fortiori* a violation of due process. Yet this is done without question of its constitutionality. *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684. Earlier *dicta* may, however, leave the Fourteenth Amendment out of consideration. See *Pennoyer v. Neff*, 95 U. S. 714, 729 (1877); *Hall v. Lanning*, 91 U. S. 160, 168, 169 (1875). And of course cases arising before that Amendment are inapplicable. *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Moulin v. Ins. Co.*, 24 N. J. L. 222. A recent decision of the

not embrace a divorce decree admittedly valid in the state where it issued,¹² while not perhaps a fortunate one as regards divorce, certainly establishes that the questions of full faith and credit and due process do not necessarily stand and fall together. The practical objection to that case, that it does not provide for a uniform operation of divorce decrees throughout the country, has no parallel in the present case, where those who attack the statute, and not its supporters, are insisting that each state be allowed to go its own way without molestation. Statutes similar to the present have been expressly upheld under the broad construction in two states¹³ and recognized by *dicta* in federal courts.¹⁴ In another state a foreign executor may be sued at common law in the absence of an affirmative showing that a judgment would trench unduly upon the jurisdiction of another court already attached.¹⁵ Besides various minor indications that such a statute is possible,¹⁶ the present law as laid down both by the federal¹⁷ and the New York

Supreme Court is distinguishable. *Riverside Mills v. Menefee*, 237 U. S. 189. It was there said at p. 197: "The two clauses [full faith, and due process clauses] are harmonious, and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered." These words, however, are plainly directed only against the argument that the due process clause does not affect the power to issue such a judgment, and that until there was an attempt to take property under it no objection could be made. *Cf. Butler v. Steckel*, 137 U. S. 21. Nor has the decision in *Riverside Mills v. Menefee*, *supra*, that a particular judgment was void any bearing on the question now under discussion.

¹² *Maynard v. Hill*, 125 U. S. 190. See *Haddock v. Haddock*, 201 U. S. 562, 569.

¹³ *Dewey v. Barnhouse*, 75 Kan. 214, 88 Pac. 877; *Craig v. Toledo, Ann Arbor & N. M. R. Co.*, 2 Oh. N. P. 64. See *In re McCreight*, 9 Oh. Dec. 454. See *Williams' Adm'r's v. Walton's Adm'r's*, 28 Oh. St. 451, 464. 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1373-1374.

¹⁴ See *Courtney v. Pradt*, 135 Fed. 818, 822, 825; *Courtney v. Pradt*, 160 Fed. 561, 563. The Supreme Court has refrained on a bill of review from upsetting a judgment against a representative because of a statute only permitting him to sue. See *Lawrence v. Lawrence*, 143 U. S. 215, 222. Such a statute does not in general permit him to be sued by implication. *Burton v. Williams*, 63 Neb. 431, 88 N. W. 765; *Gordon v. Estate of Simonton*, 10 Fla. 179.

¹⁵ *Laughlin v. Solomon*, 180 Pa. St. 177, 36 Atl. 704. The case came upon demurrer and it is clear both from the synopsis of pleadings reported and the argument for the defendant that there was no allegation that assets were in the jurisdiction. See 180 Pa. St. 177, 178.

¹⁶ A Wisconsin statute similar to the present statute, except that it contemplated that the initiative be taken by the executor, appears to have escaped adverse criticism. See *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499. *Robertson v. Chicago, St. P. M. & O. Ry. Co.*, 122 Wis. 66, 74, 99 N. W. 433, 436; *Voss v. Stoll*, 141 Wis. 267, 124 N. W. 89. A Kentucky court will recognize an Ohio decree against a Kentucky administrator if he submits himself to defend the action. *Davis v. Connelly's Ex'r*, 4 B. Mon. 136. It is doubtful whether the executor's consent should be material, for if such a judgment is to be disregarded it should probably be on the theory that he cannot bind the estate in another jurisdiction. See *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 42; *Judy v. Kelley*, 11 Ill. 211, 215; *Gordon v. Estate of Simonton*, 10 Fla. 179, 196; *Davis v. Smith*, 5 Ga. 274; 1 WOERNER, ADMINISTRATION, § 160.

¹⁷ Where the same person is domiciliary and ancillary executor a judgment against him at the domicile has been held conclusive against him in the ancillary jurisdiction. *Carpenter v. Strange*, 141 U. S. 87; *Owsley v. Central Trust Co.*, 196 Fed. 412. A judgment against an ancillary executor has been held admissible in evidence against a different executor at the domicile. *Hill v. Tucker*, 13 How. (U. S.) 458.

courts¹⁸ is not consistent with the tenet that courts in one jurisdiction cannot affect the disposition of assets in another.

The holding in the principal case means that the present views of the majority of the states as to the nature of the liability of a foreign executor must be imposed upon the minority simply because a question of jurisdiction is involved, and it prevents a New York court from giving a judgment which might be recognized by some states other than that of the domicile, in addition to being enforced against assets found in New York then or later. Were it not for the court's clever construction, which theoretically at least allows an opening for gradual change, the result of holding the broad construction unconstitutional would be to saddle the present majority rule upon all the states for all time, unless the federal constitution is to be cluttered up with amendments of a purely legislative character. If it is a principle imbedded in the constitution that administration is *in rem*, it does not seem desirable to allow other courts than that in which the *res* to be disposed of is situated to have jurisdiction over it, or the courts or legislature of that state to delegate their authority to foreigners. If, however, the explanation is that one state may give a judgment *in personam* where the state of domiciliary administration agrees to recognize it, it seems equally reasonable to allow any state to so consider it, and to allow the judgment to affect any assets that may be in that state at any time, or in any other state which may adopt the same theory.¹⁹ There is certainly nothing logically impossible in permitting the states to maintain a reasonable difference of opinion as to the nature of the liability of a foreign executor. As pointed out in the principal case, it is probably only for historical reasons that the title and obligation of the executor are not regarded as effecting a substitution of his personality for that of the dead man, recognized everywhere, just as is done in the case of the heirs. Descended from the *heres factus* of Rome it seems to be chiefly due to the evolution of administration through the hand of the ordinary that the executor now stands upon a different basis. The prevailing theory can hardly be considered so vital and fundamental a part of our institutions that any judgment not in accordance therewith must be invalid under the due process clause.

Furthermore, statutes permitting a foreign executor to sue are uniformly enforced without consulting the wishes of the court first appointing him. *Eells v. Holden*, 12 Fed. 668; *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499; *Moir v. Dodson*, 14 Wis. 279. See 2 WHARTON, CONFLICT OF LAWS, 1373. And judgment against him is conclusive everywhere and thus deprives the estate at the domicile of possible assets. *Coram v. Ingersoll*, 148 Fed. 169. Under such statutes he may be admitted as a formal defendant to assert an affirmative claim. *Brown v. Brown*, 35 Minn. 191; *Decker v. Patton*, 20 Ill. App. 210, affirmed, discussing other points, 120 Ill. 464, 11 N. E. 897. But not in general as a defendant. See n. 14, *supra*.

¹⁸ Judgment has been given against an ancillary executor appointed in New York when the law there forbids any local assets to be applied to the claims of creditors of the plaintiff's class. *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457.

¹⁹ Pennsylvania will recognize such a judgment. *Evans v. Tatem*, 9 S. & R. 252. See *Laughlin v. Solomon*, 180 Pa. St. 177, 183. It would seem that any state which allows suit against foreign executors should recognize such judgments as a matter of comity, but a recent Ohio inferior court case is suggestive of the contrary. *Albrecht v. Hoffman*, 16 Oh. N. P. n. s. 285.

COMPULSORY SALES AND PUBLIC POLICY. — If a farmer covets his neighbor's horse, and the neighbor declines to part with it, no sane system of jurisprudence would think of furnishing the farmer with any legal means of compelling the neighbor to sell against his will. The farmer's only interest in the horse is his desire for it, and this is not of sufficient social importance to warrant legal protection at the expense of the neighbor's equally significant desire to keep it. To such a case the language of the Circuit Court of Appeals, in the case of the *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, is appropriate. Undoubtedly the neighbor might "reject the offer . . . for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern."¹

Instead of a neighbor with a horse, one may suppose a country store, with a full line of all the necessities and luxuries of life, within convenient reach of the farmer's house. Clearly he has a very real and permanent interest in this store. If he were capriciously and arbitrarily denied access on equal terms with his neighbors, it would be a serious harm, subjecting him to expense and personal discomfort, perhaps even compelling him to seek a home elsewhere. This interest the law seems once to have protected.² To-day there is no legal compulsion by which it can be secured. Yet to a large extent social compulsion takes its place. It is not only the carrier, the innkeeper, the purveyor of light and heat, who "takes upon himself a public employment," and is "bound to serve the public as far as the employment extends,"³ Where the law is silent, the community, through custom and ethics, shows its expectation that every man who goes into the business of selling to the public for a livelihood shall pursue his calling fairly and without discrimination. Rudolph Jhering has put the matter tersely: "Has the innkeeper a right to refuse the stranger; the shopkeeper, baker, butcher, to refuse the customer; the apothecary, the physician, to refuse the client? Every true man of business feels that he has *not* the right; he is aware that he would suffer in public opinion. Why? . . . Because by the adoption of his particular vocation he has given society an assurance which he is not making good."⁴

One may go a step further. Instead of a village store, take a large manufacturing business, producing a commodity of general consumption, of which it has a substantial monopoly, and for which, by intrinsic merit or judicious advertising, it has created a wide demand. A business man, relying on his ability to purchase this commodity, invests money and enterprise in a retail store, and creates for himself, perhaps at some expense, the reputation of a reliable retailer of such commodities as those of our manufacturer. A capricious refusal on the manufacturer's part to deal with the retailer would subject him to a serious hardship. If other manufacturers of similar commodities followed suit, he might be

¹ 227 Fed. 46, 49. For a statement of the case see 29 HARV. L. REV. 341.

² See instances of common employment cited in Adler, "Business Jurisprudence," 28 HARV. L. REV. 135, 149 ff.

³ Chief Justice Holt, in *Lane v. Cotton*, 1 Ld. Raym. 646, 654.

⁴ LAW AS A MEANS TO AN END (Modern Legal Philosophy Series, V), p. 108.

ruined. Here there is not always the protection of public opinion, so potent in the case of the country storekeeper. There is the strongest social interest to be secured, and it can be secured without substantial burden on the manufacturer, for to compel him to sell without discrimination would be only to compel him to do what in the general understanding of the business community he has undertaken to do by entering the business. Yet here also the common law, with its stern individualism, has refused to lend its aid.

In a note in a previous issue,⁵ discussing the Cream of Wheat case, a method was suggested by which compulsory sales could be effected in such a case, without running counter to any constitutional difficulties. In the Michigan Law Review for January⁶ the conclusions reached in that note are vigorously criticized. The writer concedes that the method proposed would in all probability be constitutional, but the policy of the plan is attacked on the ground that it would enable such a company as the plaintiff in the Cream of Wheat case, by selling to the public below cost for the purpose of attracting customers, to "make it impossible for ordinary retailers to carry these goods, . . . thus perhaps demoralizing retail trade, crippling manufacturers, with ultimate approach to, instead of prevention of, monopoly."

The undesirability of such a result may be conceded; but is the result a necessary one? Because a retailer is to be given the power to compel a manufacturer to sell to him without discrimination, it does not follow that he must be allowed to use that power to wreck the retail trade. If price cutting is an evil, it can be prevented, as, for instance, by bringing it within the definition of "unfair methods of competition," prohibited by the Trade Commission Law.⁷ And even if statutory enforcement of a price-maintenance system is thought inadvisable, the court or commission charged with the enforcement of a compulsory sales law might well be empowered to refuse relief if the complainant threatens to use his power in an anti-social manner, just as a court of equity now refuses relief if the complainant's conduct is unconscionable.⁸ To lay down a flat rule, and enforce it though the heavens fall, smacks of a stage of our law when legal principles had not yet attained diversification, and the science of administration was as yet unborn. As Mr. Justice Holmes has said in another connection, "between the variations . . . that I suppose to exist, and the simple universality of the rules in the Twelve Tables or the *Leges Barbarorum*, there lies the culture of two thousand years."⁹

⁵ 29 HARV. L. REV. 77.

⁶ 14 MICH. L. REV. 228.

⁷ 38 STATS. AT LARGE, 717, 719. This seems only a phase of the infusion of business morality into law, for which Dean Wigmore has made so powerful a plea. See 10 ILL. L. REV. 178, especially at 186 ff.

⁸ Thus in *Worden v. California Fig Syrup Co.*, 187 U. S. 516, where the owner of a patent medicine asked the court to enjoin the defendant from appropriating his good will by fraudulent advertising, the court denied relief, on the ground that the plaintiff himself was guilty of deceptive advertising.

⁹ *Leroy Fibre Co. v. Chicago, M. & St. P., Ry.*, 232 U. S. 340, 354.

RECENT CASES

ADMIRALTY — PRACTICE — RIGHT TO WITHDRAW SUIT AFTER DEFENDANT HAS PETITIONED FOR LIMITATION OF LIABILITY. — The claimant brought suit for the loss of her baggage on the "Titanic." The defendant filed a petition for limitation of liability under a United States statute. The claimant now desires to withdraw her suit, presumably to sue in England where the damages would be higher. *Held*, that the suit may be withdrawn on payment of costs. *The Titanic*, 225 Fed. 747 (C. C. A., 2d Circ.).

At common law a plaintiff may voluntarily dismiss his suit at any time before judgment; and his reasons for discontinuing are immaterial. *Banks v. Uhl*, 6 Neb. 145; *Petition of Butler*, 101 N. Y. 307, 4 N. E. 518. And merely that the plaintiff's claim has been resisted does not deprive him of his right to dismiss the action. *Wilborn v. Elemendorf*, 40 S. W. 1059 (Tex.); *McCabe v. Southern Ry. Co.*, 107 Fed. 213. But a dismissal will not be permitted when the defendant asks affirmative relief such as a set-off or counterclaim. *Grignon v. Black*, 76 Wis. 674, 45 N. W. 122; *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346. *Contra*, *Huffstuller v. Louisville Packing Co.*, 154 Ala. 291, 45 So. 418. A petition in admiralty for the limitation of liability is like recoupment in that it makes no affirmative claim for damages, but seeks merely to reduce the amount for which the shipowner is liable. On the other hand, all other suits against the petitioner are temporarily enjoined and, if the petition is granted, the injunction is made perpetual. See BENEDICT, ADMIRALTY, §§ 525, 526. In this respect it resembles a cross bill in equity which is frequently held to prevent the plaintiff's dismissing the suit. *Tift v. Keaton*, 78 Ga. 235, 2 S. E. 690; *Pullman's Palace-Car Co. v. Central Transportation Co.*, 49 Fed. 261. *Contra*, *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81. Thus, if the petition is to be regarded as a mere defense to the claim for damages, with the perpetual injunction only an incident to this relief, the principal case can be supported; but if it is regarded as giving affirmative relief apart from resistance to the present action, the defendant was unjustly prejudiced by the permission given to the claimant to withdraw her suit.

APPEAL AND ERROR — INVITED ERROR — VERDICT WITHOUT EVIDENCE ON INSTRUCTIONS REQUESTED BY APPELLANT. — The defendant, on trial for murder, was convicted of manslaughter under an instruction requested by himself. The instruction was not justified by any evidence, though there was evidence capable of supporting a conviction of murder. *Held*, that he is entitled to a new trial. *Griggs v. State*, 86 S. E. 726 (Ga.).

Erroneous or inappropriate instructions cannot be objected to by the party that requested them. *Flowers v. Helm*, 29 Mo. 324; *Threlkeld v. State*, 128 Ga. 660, 58 S. E. 49. Instructions are meant to be acted on by juries: if that on which the jury ought to act is free from attack by the defendant, their action on it ought to be. Under the facts, the verdict of manslaughter can only have been an act of mercy by a jury who really believed defendant guilty of the higher crime; to allow an appeal on the ground that the jury was improperly kind to him at his request seems an unnecessary lenience. Their error was as much "invited error" as was the error of the court in instructing them. And it is a common holding that a verdict cannot be impeached in an appellate court as against evidence when the complaining party has failed to move to take the question from the jury. *McDonnell v. United States*, 133 Fed. 293; *Browning v. Dorton*, 143 Mo. App. 249, 128 S. W. 230; *Hopkins v. Clark*, 158 N. Y. 299, 53 N. E. 27. See *State v. Kiger*, 115 N. C. 746, 750, 20 S. E.

456, 457. In the outcome, defendant was sent back to his trial for murder, as could be done under prior Georgia holdings. *Brantley v. State*, 132 Ga. 573, 64 S. E. 676. In other jurisdictions he could be tried again only for manslaughter. *State v. Martin*, 30 Wis. 216; *State v. Dowling*, 84 N. Y. 478. See *Trono v. United States*, 199 U. S. 521; 19 HARV. L. REV. 300. In such a jurisdiction a ruling like that in the principal case would be very unfortunate indeed.

ASSIGNMENTS FOR CREDITORS — VALIDITY — ASSENT OF CREDITORS. — Pursuant to a resolution adopted by his creditors, the debtor executed and delivered a deed of assignment for the benefit of his creditors to the trustee selected by them. Before communication of the execution of the deed to any creditor, a judgment creditor who had not joined in the resolution levied on the property covered by the deed. *Held*, that as the deed passed no title to the trustee, the judgment creditor should succeed. *Ellis & Co. v. Cross*, 113 L. T. R. 503 (K. B.).

Under the view generally accepted in the United States, a deed of assignment for the benefit of creditors is enforceable upon execution and delivery, consent thereto on the part of creditors being either unnecessary or presumed. *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Hyde v. Olds*, 12 Oh. St. 591; *Tompkins v. Wheeler*, 16 Pet. (U. S.) 106. See 11 HARV. L. REV. 412; BURRILL, ASSIGNMENTS, 6 ed., § 257. In England and Massachusetts, however, the assent of creditors is required. In Massachusetts, the assignment is held a fraudulent conveyance until assented to, and is then validated to an amount equal to the aggregate claims of the creditors who assented. *Widgery v. Haskell*, 5 Mass. 144. In England, no title passes to the trustee unless one or more creditors subsequently assent to the deed. Until such assent the deed is treated as creating a revocable power given to the "trustee" to dispose of the property for the benefit of the debtor. *Garrard v. Lauderdale*, 3 Sim. 1. If the trustee is a creditor, however, it is said that he takes a power coupled with an interest which makes the agency irrevocable and the deed good. *Siggers v. Evans*, 5 El. & Bl. 367. In the principal case, it is submitted, that the assent given before the execution should be as good as assent after. An analogy is afforded in the law of sales of personal property where consent prior to an act of appropriation is just as good as assent after the act. WILLISTON, SALES, § 274. In Massachusetts this assent would have prevented the deed from being a fraudulent conveyance to the extent of the total claims of the assenting creditors. *Cf. Fall River Iron Works v. Croade*, 15 Pick. (Mass.) 11, 17. Even in England it has been held that a prior consent would at least have prevented any assenting creditor from treating the assignment as an act of bankruptcy. *Ex parte Stray*, L. R. 2 Ch. App. 374.

BILLS AND NOTES — DEFENSES — NEGLIGENCE OF MAKER — SIGNING IN BLANK. — The defendant handed his blank note to a friend to hold till further instructions were given. The next day he directed that it be destroyed or returned to him. The note was filled out and indorsed to the plaintiff, a holder in due course, who now sues. *Held*, that he may recover. *Hancock v. Empire Cotton Oil Co.*, 86 S. E. 434 (Ga.).

The maker of a complete instrument keeps it at his peril, and lack of delivery is no defense to a suit by a *bonâ fide* purchaser. *Shipley v. Carroll*, 45 Ill. 285. *Contra, Sheffer v. Fleischer*, 158 Mich. 270, 122 N. W. 543. But the maker of an incomplete instrument cannot be subjected to liability unless express or implied authority has been given for filling the blanks. *Baxendale v. Bennett*, 3 Q. B. D. 525; *Ledwich v. McKim*, 53 N. Y. 307; *Linick v. Nutting & Co.*, 140 App. Div. 265, 125 N. Y. Supp. 93. Though it is well settled that by delivering an incomplete instrument for negotiation the maker authorizes its completion and is liable to a holder in due course regardless of whether the au-

thority was abused, when, as in the principal case, all authority was expressly negated, the maker can only be held liable if he is precluded by his conduct from denying the validity of the instrument. It is submitted that the bare entrusting of incomplete instruments to a custodian is not such conduct as to subject the maker to liability. *Smith v. Prosser*, [1907] 2 K. B. 735; but see *Putnam v. Sullivan*, 4 Mass. 45. For with an incomplete instrument there is no duty of care to prevent its getting into circulation. *Baxendale v. Bennett*, *supra*. Even negligence in signing and delivering a blank form not intended as a negotiable instrument will not support recovery. *First Nat. Bank v. Zeims*, 93 Ia. 140, 61 N. W. 483. Cf. *Costello v. Barnard*, 190 Mass. 260, 76 N. E. 599. There is an exception, however, in the duty owed to the drawee bank not to sign checks in blank. *Trust Co. of American v. Conklin*, 65 Misc. 1, 119 N. Y. Supp. 367.

BILLS AND NOTES — INDORSEMENT — FORGED INDORSEMENT: WHETHER DRAWEE MAY RECOVER PAYMENT NEGLIGENTLY MADE TO HOLDER. — A drawee bank, negligently disregarding notice by the drawer to stop payment, paid a check, on which payee's indorsement was forged, to a *bonâ fide* holder for value. On discovering the forgery the drawee bank seeks to recover from the holder. *Held*, that the bank cannot recover. *National Bank of Commerce v. First National Bank of Coveta*, 152 Pac. 596 (Okl.).

Where an indorsement is forged, as the holder never receives title to the check, the true owner may recover from the holder any payment the latter has received. *Dana v. Underwood*, 19 Pick. (Mass.) 99; *Arnold v. Cheque Bank*, 1 C. P. Div. 578. If the owner brings no action the drawee is allowed to recover back from the holder. *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Onondaga County Savings Bank v. United States*, 64 Fed. 703. See *Roberts v. Tucker*, 16 Q. B. 560, 578. It is submitted that the correct theory on which such recovery may be permitted is that the drawee sues on the payee's right of action and holds the sum recovered in trust for him. See Ames, "Doctrine of *Price v. Neal*," 4 HARV. L. REV. 297, 307. But the drawee has been held to lose his right if after discovery of the forgery he delays giving notice to the holder. *National Exchange Bank of Providence v. United States*, 151 Fed. 402; *United States v. Clinton National Bank*, 28 Fed. 357. See 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1371. In England recovery is barred even though notice is given immediately on discovering the forgery. *London & River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7. But considerable authority holds that the drawee should recover unless the holder has been prejudiced by the delay. *Yatesville Banking Co. v. Fourth National Bank*, 10 Ga. App. 1, 72 S. E. 528; *Canal Bank v. Bank of Albany*, *supra*. Though on the grounds of business practice a delay in giving notice of a *known* forgery might in itself defeat recovery, it would be unfortunate to go further and let a negligent failure to discover the forgery bar relief when the holder has been in nowise damaged. In the principal case it is difficult to see how the holder would have benefited had the drawee regarded the drawer's notice.

BILLS AND NOTES — PRESENTMENT AND NOTICE OF DISHONOR — WAIVER: ASSENT BY INDORSER TO EXTENSION OF TIME. — The plaintiff brings an action against the defendant as indorser of a note on the face of which the latter had written an agreement to remain bound "notwithstanding any extension of time granted the principal, hereby waiving all notice of such extension of time." Three extensions were given to the maker, no notice of which was given to the defendant, nor was any notice of dishonor by non-payment given him when the last extension period had expired. *Held*, that the indorser's assent to extension constituted a waiver of demand and notice. *First National Bank of Henderson v. Johnson*, 86 S. E. 360 (Sup. Ct., N. C.).

At common law it is settled that an indorser's consent to an extension of time on a negotiable instrument constitutes a waiver not only of a defense to his liability, but also of demand, and notice at the original date of maturity. *Cady v. Bradshaw*, 116 N. Y. 188, 22 N. E. 371; *Glaze v. Ferguson*, 48 Kan. 157, 29 Pac. 396; *Norton v. Lewis*, 2 Conn. 478. *Contra*, *Michaud v. Lagarde*, 4 Minn. 43. If the extension be actually granted, this result presents no difficulty, for then there has been no default. But the same result is reached even where the extension is not actually granted, on the ground that the indorser has shown an unconditional willingness not to have the maker pay on the date of maturity. *Sheldon v. Horton*, 43 N. Y. 93; *National Hudson River Bank v. Reynolds*, 57 Hun 307, 10 N. Y. Supp. 669; *Jenkins v. White*, 147 Pa. St. 303, 23 Atl. 556. The principal case may be supported on this ground, for when the third extension period had matured, the continuing consent to further extensions would thus waive demand and notice at that time, even though a further extension was not granted. The court proceeded on another view which would also justify the result. The consent to an extension of time is held to waive demand and notice even at the extended date of maturity, on the ground that, by waiving demand and notice at the original date of maturity, the indorser has waived the condition which qualifies his promise to pay and has made his promise absolute, assuming thereby the position of a guarantor. *Amoskeag Bank v. Moore*, 37 N. H. 539; *Ridgway v. Day*, 13 Pa. St. 208; *Barclay v. Weaver*, 19 Pa. St. 396. See *Shelton v. Horton*, *supra*, 99. But *cf.* *Hudson v. Wolcott*, 39 Oh. St. 618, 623; *Walker v. Graham*, 21 La. Ann. 209. The result on either of these grounds seems an arbitrary exception to the equally arbitrary rule which discharges the indorser from all liability if no notice of dishonor be given him, even though he suffer no injury through such neglect. Nor does the Negotiable Instruments Law appear to alter the result. Sections 120, 89, 109 and 110 which are applicable to the case merely enact the general principles of the common law as to waiver of demand and notice without attempting to enumerate the many means by which demand and notice may be impliedly waived. See *First National Bank v. Gridley*, 112 App. Div. 398, 405, 98 N. Y. Supp. 445, 450. Thus if there would be a waiver at common law there should be under the act.

CONFLICT OF LAWS — REMEDIES — LIMITATION OF ACTIONS — LIMITATION IN FEDERAL EMPLOYERS' LIABILITY ACT AS EXTINGUISHING THE CAUSE OF ACTION. — Suit had been brought in a state court in North Carolina on a cause of action arising under the Federal Employers' Liability Act. The act provides "that no action shall be maintained . . . unless commenced within two years. . . ." The state Statute of Limitations allows three years' time. More than two but less than three years had elapsed between the accrual of the cause of action and the commencement of the suit. A judgment entered for the plaintiff was reversed in the United States Supreme Court. *Atlantic Coast Line R. Co. v. General Burnette*, 239 U. S. 199.

Statutes of Limitation are generally remedial, and hence without extra-territorial effect. *Le Roy v. Crowninshield*, 2 Mason 151; *O'Shields v. Ga. Pac. Ry. Co.*, 83 Ga. 621, 10 S. E. 268. But where a statute creating a new right limits the time in which action thereon may be brought, the limitation is construed as curtailing the right itself, and therefore governs any action based on that right, although brought in another jurisdiction. *Pittsburg, etc. Ry. Co. v. Hine*, 25 Oh. St. 629; *The Harrisburg*, 119 U. S. 199. The North Carolina court, when the case was before it, refused to construe the limitation in the Liability Act in this manner, both on the ground that Congress, by the act, had intended to facilitate the recovery of damages by employees, not to limit their rights, and that the act conferred no right but merely withdrew a defense. See principal case, 163 N. C. 186, 192, 79 S. E. 414, 416. But the abrogation of a defense

gives a right to a recovery where none existed before. Furthermore, no distinction should be made between the effect of a limitation to a re-defined and to a newly created right. *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, 665. *Contra*, *Finnell v. So. Kan. Ry. Co.*, 33 Fed. 427; and see *Williams v. St. Louis, etc. Ry. Co.*, 123 Mo. 573, 581, 27 S. W. 387, 389. The substantive rights are determined by the law of the locus of the transaction, which can as well cut down an existing right as limit a new one. So the problem is merely one of construing whether the limitation is remedial or substantive. In the Employers' Liability Act there is nothing to rebut the presumption of the usual import of the juxtaposition of right and limitation.

CONSTITUTIONAL LAW — PERSONAL RIGHT — LIBERTY TO CONTRACT — STATUTE RESTRICTING EMPLOYMENT OF ALIENS. — A New York statute provided that only citizens of the United States should be employed in the construction of public works. The Public Service Commission made several contracts with the plaintiffs for the construction of the new subway system of New York City, with a provision that they should be void if the statutory restriction was not complied with. The plaintiffs now bring a bill in equity to restrain the commission from declaring the contracts void in accordance with this provision, on the ground that the statute is unconstitutional. *Held*, that the bill should be dismissed. *Heim v. McCall*, 239 U. S. 175.

For a discussion of the questions involved, and a criticism of the opposite result reached by the New York Appellate Division, see 28 HARV. L. REV. 496, 628.

CONTRACTS — DEFENSES: INFANCY — RATIFICATION WITHOUT KNOWLEDGE THAT CONTRACT IS VOIDABLE. — The plaintiff, while an infant, bought and paid for the defendant's moving-picture theatre. Soon after becoming of age he tried to sell the theatre, not knowing of his power to avoid the contract. Later he tried to rescind the contract and now sues to recover the purchase price. *Held*, that he may recover. *Manning v. Gannon*, 43 Wash. L. Rep. (D. C.) 759.

By a marriage settlement made while an infant, the plaintiff settled in trust certain reversions expectant on her mother's death. For six years after becoming of age, she neither affirmed nor repudiated the contract expressly. *Held*, that she may not now repudiate, though she did not know hitherto that her contract was voidable. *Carnell v. Harrison*, 50 L. J., 569.

There is some rather ill-considered authority holding that ratification depends on knowledge that the contract is voidable. *Hinely v. Margaritz*, 3 Pa. St. 428. See *Baker v. Kennett*, 54 Mo. 82, 92; *Hatch v. Hatch*, 60 Vt. 160, 171, 13 Atl. 791, 797; *Harmer v. Killing*, 5 Esp. 102, 103. The weight of authority, however, is in accord with the present English decision on the ground that one is presumed to know the law. *Morse v. Wheeler*, 4 Allen (Mass.) 570; *Anderson v. Soward*, 40 Oh. St. 325; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555. See WHARTON, CONTRACTS, § 57. It is submitted that this result is also more in accord with legal principles. The statement in these authorities merely expresses the rule pervading the entire law of contracts that, given an intention to do the acts in question, a knowledge of the legal effects of those acts is immaterial. See WILLISTON'S WALD'S POLLOCK, CONTRACTS, 3 ed., 450. And the exception to this rule asserted by the American case can hardly be supported on grounds of public policy, for the act which created the right to enforce the contract against the former infant was done by an adult who no longer can claim special privileges. See *Bestor v. Hickey*, 71 Conn. 181, 186, 41 Atl. 555, 556. This reasoning is supported by analogy. The so-called waiver of the defense of the Statute of Limitations requires no knowledge of its existence. *Langston v. Aderhold*, 60 Ga. 376. And an indorser of a note, though not

liable for want of notice of non-payment, will become liable on a new promise to pay, whether or not he knew of his defense. *Third Nat. Bank v. Ashworth*, 105 Mass. 503.

CONTRACTS — DEFENSES — STATUTORY INFORMALITY AS DEFENSE AGAINST SUIT BY GOVERNMENT. — The defendant, whose bid for transportation of coal had been accepted by the United States Navy Department, was tendered a written contract in the form required by statute. U. S. REV. STAT., § 3744. This he refused to sign on the ground of variance. The government now sues for breach of contract. *Held*, that the plaintiff may recover. *United States v. New York, etc. Steamship Co.*, 239 U. S. 88.

Although the statute in the principal case does not in terms invalidate unwritten contracts, the Supreme Court has held them unenforceable against the United States. *Clark v. United States*, 95 U. S. 539; *Henderson's Case*, 4 Ct. Cl. 75. This construction carries out the purpose of the statute, which is, in the words of its preamble, "to prevent and punish Fraud on the Part of Officers intrusted with making Contracts for the Government," for it assures to the government that all fraudulent contracts will be either written and on file or nugatory. But it would be going beyond both the terms and the purpose of the statute to extend this construction to make informal contracts unenforceable against the contractor, for it is inconceivable that Congress intended to protect him against frauds of the government. The objection that the government's promise thus becomes illusory, and hence no consideration for the contractor's promise, has no greater force than in contracts of infants or in contracts under the Statute of Frauds where only the defendant has signed the memorandum. *Holt v. Ward Clarendieux*, 2 Strange 937; *Clason v. Bailey*, 14 Johns. (N. Y.) 484. Nevertheless, as the contractor may well be led into expensive preparations which in no wise enrich the government, the lack of mutuality throws a burden on the contractor not wholly relieved by his right to recover in *quantum meruit*. *Clark v. United States*, *supra*. A possibility in the principal case not mentioned by the court is that both parties looked forward to the required formalities as a necessary preliminary to a binding contract. *Mississippi, etc. Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063. See *Capital Printing Co. v. Hoey*, 124 N. C. 767, 793, 33 S. E. 160, 168.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO OWNERSHIP — RIGHT TO VOTE: VOTING TRUSTS. — The holders of the majority stock of a corporation transferred their stock to the president as trustee, taking in return trust certificates. The trust was to last for ten years, the absolute power to vote being in the trustee. The plaintiff purchased certain trust certificates, and upon demand being made the defendant refused to issue stock certificates in exchange for the trust certificates. The plaintiff brings a bill in equity praying a cancellation of the agreement and a decree ordering the stock to be issued. *Held*, that the relief should be granted, the agreement being void. *Lukhy v. Ream*, 110 N. E. 373.

For a discussion of this case, see NOTES, p. 433.

CRIMINAL LAW — LIABILITY FOR OTHERWISE LAWFUL ACT RESULTING IN UNLAWFUL ACT OF OTHERS — SALE OF LIQUOR WITH KNOWLEDGE THAT IT IS TO BE RESOLD ILLEGALLY. — The defendant sold liquor knowing that the buyer intended to resell it in violation of the law. *Held*, that he was guilty of aiding and abetting in the subsequent resale. *Cook v. Stockwell*, 113 L. T. R. 246 (K. B.).

It is a general rule that the intervening, independent acts of a third person, if foreseeable, will not make a preceding cause remote. *Carter v. Towne*, 98 Mass. 567; *Jennings v. Davis*, 187 Fed. 703, 709; *Dixon v. Bell*, 5 Maule & S.

198; *Rex v. Oliphant*, [1905] 2 K. B. 67; *Reg. v. Butt*, 15 Cox C. C. 564. And if, as in the principal case, the defendant's act clearly participated in producing the wrongful result, it is not material that it was not a *causa sine qua non*. *Anderson v. Settergren*, 100 Minn. 294, 111 N. W. 279; *Binford v. Johnston*, 82 Ind. 426; *Reg. v. De Marny*, [1907] 1 K. B. 388. However, it was once currently asserted and is still heard to-day, that this rule of foreseeability does not apply when the intervening independent acts were done wilfully and unsolicited. *Andrews & Co. v. Kinsel*, 114 Ga. 390, 40 S. E. 300. See *Alexander v. Town of New Castle*, 115 Ind. 51, 53. See 1 WHARTON, CRIMINAL LAW, 9 ed., § 160. But this limitation, which is inconsistent with the general principles of causation since intentional acts may be equally as foreseeable as negligent ones, has been much criticized and is less widely asserted to-day. See J. Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 121; SALMOND, TORTS, 2 ed., 114. See *Lynch v. Knight*, 9 H. L. Cas. 577, 600; *Meade v. Chicago, etc. Ry. Co.*, 68 Mo. App. 92, 100. Cf. *Wise v. Dunning*, [1902] 1 K. B. 167. Nor is proximate causation in the principal case negatived by the series of cases holding that a seller who did no acts tending directly to further the illegality, may enforce a contract of sale though he knew the goods were to be illegally resold in another jurisdiction. *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383; *Hill v. Spear*, 50 N. H. 253; *Pellecat v. Augell*, 2 Crompt. Meas. & Ros. 311. For these cases turn on questions of public policy and comity rather than of proximate causation. See *Hill v. Spear*, *supra*, at 273. Granting causation it is submitted that the fact that the defendant in the present case is not technically either a *principal* or an *accessory* does not prevent his conviction, for if causation and the necessary elements of an offense are made out, an arbitrary technicality of crimes at common law should not be carried over to support acquittal for violation of a police regulation. *Reg. v. De Marny*, *supra*. However, in enforcing liquor regulations it has been generally held that a person, whether buying for himself or as agent, cannot be held liable because the sale was illegal. *State v. Rand*, 51 N. H. 361; *Commonwealth v. Willard*, 22 Pick. (Mass.) 476; *Evans v. State*, 55 Tex. Cr. 450, 117 S. W. 167; *Anderson v. State*, 32 Fla. 242, 13 So. 435. But those cases are supportable on reasons applicable to buyers only. See 26 HARV. L. REV. 550. Hence they are not in conflict with the decision in the principal case.

DAMAGES — PENALTIES — EFFECT OF POSTING PENAL SUMS TO SECURE PERFORMANCE OF CONTRACT. — The plaintiff and R., having formed a contract, placed the written agreement and \$2,000 apiece with the defendant bank, which, in the event of a breach of this contract, was to pay the delinquent's deposit to the injured party. After the date set for performance of the contract, the plaintiff, contending that the arrangement for the payment of penalties was void, demanded the return of his deposit. On the bank's refusal to comply, he sues. Held, that he cannot recover without showing that R. has no claim on his deposit for damages. *Kuter v. State Bank of Holton*, 152 Pac. 662 (Kan.).

In lieu of the above arrangement, suppose that the plaintiff and R. had exchanged penal bonds of \$2,000, to be void on performance by the obligors of their respective contractual duties. Equity, and subsequently the common law, early recognized that the condition was the essence of a penal bond and indicated the true limit of the obligation. *Parks v. Wilson*, 10 Mod. 515. See *Collins v. Collins*, 2 Burr. 820, 824; 2 SEDGWICK, DAMAGES, 9 ed., § 675 b; 2 BL. COM. 341. Consequently, it came to be held that in a suit at law on a penal bond the obligee could not obtain the sum named therein, which was a penalty, and recovery was limited to the loss actually ensuing from the non-performance of the condition. *Kelley v. Seay*, 3 Okla. 527, 41 Pac. 615; *McIntosh v. Johnson*, 8 Utah 359, 31 Pac. 450. Thus, though the obligation in the supposed case is

to pay \$2,000, neither more nor less, and is unenforceable as such, the bond is not void, but remains a valid instrument which is regarded as security for the payment of damages. The interpolation of a third party to hold and pay penal deposits differs in no essential way from the exchange of penal bonds, for, although the third party is a stranger to the original contract, in both instances this latter agreement remains the substance of the transaction. It follows, therefore, notwithstanding the fact that the agreement in the principal case to pay over the penal sum was unenforceable as such, that the deposit remained a source of payment of possible damages.

DESCENT AND DISTRIBUTION — NATURE OF ESCHEAT — WHETHER SUBJECT TO INHERITANCE TAX. — Real and personal property of an intestate without heirs escheated under a statute to the county wherein it was situated. The state sued to collect an inheritance tax under a statute imposing a tax on the transfer of any property "by will or by the intestate laws of this state." *Held*, that the transfer by escheat is subject to the tax. *People v. Richardson*, 109 N. E. 1033 (Ill.).

Under a similar statute providing for escheat the Probate Court with statutory powers to distribute intestate estates, decreed that the property of an intestate without known heirs escheated to the defendant county. The plaintiff, claiming as heir, now sues the county to recover the land, alleging that as an escheat was not a form of inheritance, the Probate Court had no jurisdiction. *Held*, that escheat was part of the scheme of distribution, and the Probate court had jurisdiction. *Christianson v. County of King*, Sup. Ct. Off., No. 67.

Under the English common law escheat was an incident of feudal tenure. On the failure of heirs or of inheritable blood to the tenant, the tenure was determined, and the land reverted back to the lord, the original grantor. See CO. LITT. 13 a; 2 BL. COM. 72, 244; 4 KENT COM. 423. Escheat in its feudal sense still persists in England. See WILLIAMS, REAL PROPERTY, 55. That this feudal escheat should not be subject to an inheritance tax is shown by the analogy that the coming into possession of a vested remainder upon the death of a life tenant is not so taxable. *In re Pell's Estate*, 171 N. Y. 48, 63 N. E. 789. But in the United States escheat in the feudal sense seems not to exist. See 3 WASHBURN, REAL PROPERTY, 6 ed., 61. It is doubtful whether there has been any feudal tenure in this country since the Revolution. See 2 BL. COM., Cooley's ed., 102 n.; 4 KENT COM. 424; 1 WASHBURN, REAL PROPERTY, 5 ed., 39-42. See *contra*, GRAY, RULE AGAINST PERPETUITIES, § 22. In a number of states it has been expressly declared non-existent. See GRAY, RULE AGAINST PERPETUITIES, § 23. The state now succeeds to the estate of the deceased as *ultimus haeres*, by virtue of its sovereignty. See *Matthews v. Ward's Lessee*, 10 Gill & J. (Md.) 443, 451. See TIFFANY, REAL PROPERTY, § 458. Under the English common law escheat did not apply to personalty, nor to equitable interests in land; but in the United States it is now almost entirely regulated by statute, and includes the transfer to the state of property rights of every nature. Compare *Burgess v. Wheate*, 1 Eden 177, with *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753; *Matthews v. Ward's Lessee*, *supra*; *Commonwealth v. Blanton's Executors*, 2 B. Mon. (Ky.) 393. See STIMSON, AM. ST. LAW, §§ 1151, 1157. It is submitted that escheat in this country is properly included within "the intestate laws," and is therefore subject to the usual form of inheritance tax.

DIVORCE — DEFENSES — VOIDABILITY OF THE MARRIAGE. — The plaintiff brought an action for separation from her husband. The husband, in defense, pleaded facts that showed the marriage to be voidable at his election. *Held*, that this is not a good defense. *Ostro v. Ostro*, 155 N. Y. Supp. 681 (App. Div.).

It is axiomatic that a divorce proceeding must be predicated upon the exist-

ence of a valid marital status, for it is that which it proposes to dissolve or modify. *Mangue v. Mangue*, 1 Mass. 240; *Holtman v. Holtman*, 114 S. W. 1198 (Ky.). See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 732, 736. The principal case presents a voidable marriage, which, as distinguished from a void marriage, does bring into existence a valid marital status which continues and is good for all purposes until avoided. *State v. Cone*, 86 Wis. 498, 57 N. W. 50; *Elliott v. Gurr*, 2 Phill. Ecc. 16. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 259; 2 NELSON, DIVORCE AND SEPARATION, § 569. It may be avoided only by judicial decree on motion of the proper party. N. Y. CONSOL. LAWS, 1909, ch. 19, § 7. Now if the defense offered in this case is in effect a cross bill for nullification, as it was in the English Ecclesiastical Courts, it might well be entertained, for nullification would necessarily render a divorce vain. See *Guest v. Shipley*, 2 Hag. Con. 321; *Anon.*, 1 Deane Ecc. Rep. 295. And see ROGERS, ECC. LAW, 2 ed., 361; 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 273. But it is not such a cross bill, for the husband does not seek to avoid the marriage, nor is it clear that he ever will do so. To allow the contingency of future nullification as a defense to a suit for divorce would plainly violate the spirit of all the divorce laws. One spouse would be left entirely unprotected in a relationship in which the other is fully protected and in which he might see fit to continue indefinitely. *Smith v. Cook*, 24 Que. S. C. 469; *Taylor v. Taylor*, 173 N. Y. 266, 65 N. E. 1098. See *Gould v. Gould*, 125 App. Div. 375, 109 N. Y. Supp. 910; *Von Prochazka v. Von Prochazka*, 21 N. Y. 309, 3 N. Y. Supp. 301. But see *Durham v. Durham*, 99 App. Div. 450, 452, 91 N. Y. Supp. 295, 297.

EQUITY — FORECLOSURE OF A MORTGAGE ON PROPERTY PARTLY IN A FOREIGN JURISDICTION — INDIRECT ORDER. — A corporation formed to irrigate California land found it necessary to build a canal through Mexican territory. By the law of Mexico a foreign corporation could not hold land there, so a subsidiary Mexican corporation was formed to hold the title. A large judgment was obtained against the California corporation for damages from failure to control the water. (*The Salton Sea Cases*, 172 Fed. 792). In pursuance of a plan to defeat the collection of this judgment and the foreclosure by bondholders of their deed of trust, by dividing the property so as to make each part valueless by itself, a creditor, who also owned the controlling interest in the California corporation, obtained a collusive judgment in Mexico against the Mexican corporation, sold the Mexican property on execution to its creature, a second Mexican corporation, and had a receiver put in charge of the property. The bondholders now bring a bill in equity to foreclose their deed of trust, and the judgment creditors intervene. *Held*, that the collusive creditor be enjoined from making use of the Mexican judgment or interfering with the property in Mexico, and that the property in California and the stock of the two Mexican corporations be sold as a whole. *Tille Insurance and Trust Co. v. California Development Co.*, 152 Pac. 542 (Cal.).

Equity, by its power over the defendant personally, will enjoin the prosecution of foreign suits and judgments in order to prevent fraud and collusion. *Wonderly v. Lafayette County*, 150 Mo. 635, 51 S. W. 745; *Cole v. Cunningham*, 133 U. S. 107. And this is true though the subject matter lies in a foreign jurisdiction. *Bunbury v. Bunbury*, 8 L. J. Ch. 297. But in the principal case equity had no power over the Mexican land and so the transfer thereof could not be declared void. *Carpenter v. Strange*, 141 U. S. 87; *State v. Grimm*, 243 Mo. 667, 148 S. W. 868. But in the ordinary case a reconveyance could have been ordered. *Gardner v. Ogden*, 22 N. Y. 327. And had the entire system been situated in States of the Union, the whole could have been subjected to foreclosure by a decree of one of those States. *Muller v. Dows*, 94 U. S. 444; *Meade v. New York, etc. R. Co.*, 45 Conn. 199; *Union Trust Co. v. Olmstead*,

102 N. Y. 729, 7 N. E. 822. But what the foreign jurisdiction will recognize as a valid conveyance limits the power of the court of equity. See *Waterhouse v. Stansfield*, 10 Hare 254, 255. And since in the case of Mexican land the conveyance must be completed by certain registration in Mexico, for a United States court to decree the passing of title, there would involve ordering acts abroad. But even if there were no jurisdictional difficulties in the principal case, the title has been in litigation in Mexico and a receiver put in charge under a law so different from that of California that the practical difficulties would prevent the rendition of a decree affecting the land. Yet the litigation should be entertained where complete justice can best be secured. *Harris v. Pullman*, 84 Ill. 20. And the court achieved complete justice in the most practical way by ordering the transfer of the stock and avoiding any possible complications involving the rights of Mexico.

ESTOPPEL — ESTOPPEL BY DEED — LAND MORTGAGED BEFORE ACQUIRED — PRIORITY OF MORTGAGE TO JUDGMENT LIEN. — A tenant in common, after mortgaging the property as sole owner, acquired the interest of his cotenant. Later, a creditor obtained a judgment against him. *Held*, that as to the subsequently acquired interest the judgment lien takes priority over the mortgage. *Gallagher v. Stern*, 95 Atl. 518 (Pa.).

In the United States it is generally held that a warranty deed or mortgage passes, by way of estoppel, any title which the grantor may thereafter acquire. *Philly v. Sanders*, 11 Oh. St. 490; *Jarvis v. Aikens*, 25 Vt. 635. Accordingly the grantee prevails against a later purchaser or creditor of the grantor. *Jarvis v. Aikens*, *supra*; *White v. Patten*, 24 Pick. (Mass.) 324; *Tefft v. Munson*, 57 N. Y. 97. But Pennsylvania and a few other states follow the English view that, although the grantor is estopped by his conveyance, the after-acquired title does not pass. *Calder v. Chapman*, 52 Pa. St. 359; *Burners v. Keran*, 24 Gratt. (Va.) 42, 66. The estoppel is therefore held not to affect the subsequent purchaser or creditor if he had no notice. And the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the encumbrance, since it is outside the chain of title. *Dodd v. Williams*, 3 Mo. App. 278; *Calder v. Chapman*, *supra*. Cf. *Bingham v. Kirkland*, 34 N. J. Eq. 229. But in the principal case the mortgage was not outside the chain of title, since it was the duty of the title examiner, in his search for liens against the mortgagor, to go back beyond the time when the latter acquired the interest of his co-tenant to the time when he acquired his original interest as tenant in common. Had he done so he would have found the mortgage. Accordingly, he should be charged with constructive notice. Even under the minority view, therefore, the case is unsound.

GOOD WILL — RIGHT TO USE FIRM NAME — AGREEMENT BETWEEN TENANTS IN COMMON. — A copartnership known as B. & Co. used its name, good will, and trade marks under a rental agreement with B., who owned them but was not a member of the firm. B. bequeathed them in equal shares to his sons C. and D., who entered the firm but retained the name, good will, and trade marks as their separate property. C. and D. then entered into an agreement providing that upon the death of either, the survivor should have the right to continue the business of B. & Co. and the exclusive right to use the half interest of the other in the firm name, good will, and trade marks, upon payment of one-third of the net profits to the legal representatives of the deceased. C. died, and D. continued the business under the agreement. Later he notified the plaintiff, who was D.'s legal representative, that he would no longer pay her any of the profits, as he was no longer using her half interest. She thereupon brought an action against him. *Held*, that she is entitled either to one-third of the net profits or to a decree restraining D. from using the name, good

will, and trade marks, and providing for a sale of the same by a receiver for the joint benefit of D. and the plaintiff. *Barclay v. Barclay*, 155 N. Y. Supp. 221.

Ordinarily the name, good will, and trade marks of a partnership are firm assets, which each partner, upon dissolution, is entitled to have converted into cash and included in the firm accounts. *Slater v. Slater*, 175 N. Y. 143, 67 N. E. 224; *Moore v. Rawson*, 185 Mass. 264, 70 N. E. 64; *Hill v. Fearis*, [1905] 1 Ch. 466. Of course this rule may be changed by agreement of the parties. And in many jurisdictions it is held that in the absence of an express agreement to the contrary, each partner, upon dissolution, has an equal right to use the firm name, if he does not thereby expose his former partners to risk of liability. *Burchell v. Wilde*, [1900] 1 Ch. 551; *Young v. Jones*, 30 Fed. Cas., No. 18,159. It is recognized, therefore, that such property is, in its nature, susceptible of separate and independent use by each of two coöwners. *Merry v. Hoopes*, 111 N. Y. 415, 18 N. E. 714. But where the retiring partner retains his interest in the name, giving the other partner merely the right to use it in return for a share of the profits, it is submitted that there is an implied agreement that, so long as the business continues, the retiring partner's interest will be used for his benefit. Such an agreement is specifically enforceable, for the subject-matter is unique and a fiduciary relation is involved. Moreover, since the value of a firm name or a trade mark lies in its connection with the business with which it has been used, it cannot be assigned apart from that business. *Thorneloe v. Hill*, [1894] 1 Ch. 569. Therefore, as long as D. continued the business of B. & Co., the plaintiff's interest was not restored to her, and she was entitled to compensation.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — EXEMPTION OF RAILROADS FROM LIABILITY FOR NEGLIGENT INJURIES TO PULLMAN EMPLOYEES. — A waiter in a Pullman car was killed by the negligence of a railroad. His contract with the Pullman Company contained a provision releasing the railroads from liability for negligent injuries. Suit is brought by his widow under the Colorado Death Statute. Held, that his widow may not recover. *Lindsay v. Chicago, B. & Q. R. Co.*, 226 Fed. 23 (C. C. A., 7th Circ.).

For a discussion of this case, see NOTES, p. 435.

INSURANCE — ELECTION AND WAIVER OF CONDITIONS — EFFECT OF FAILURE OF INSURER TO RETURN PREMIUMS ON BREACH OF CONDITION. — The plaintiff, supposing that a house belonged to him, insured it with the defendant company. The policy provided that it should be void if the insured did not own the property in fee, and also provided that if the policy should become void, the premiums should be returned. After a loss, the defendant learned of a defect in the plaintiff's title, but did not return the premium. Held, that the neglect to return the premium was a waiver of the breach of condition, and the defendant was therefore liable. *Scott v. Liverpool & London & Globe Ins.* 86 S. E. 484 (S. C.).

It is generally recognized that a provision in an insurance policy that under a certain condition it shall be void means only that the insurer will then have the privilege of avoiding the policy. See 2 MAY, INSURANCE, § 497. Nevertheless it has been uniformly held that the insured cannot recover without proving that the insurer by some affirmative action has waived the breach of condition. *Ins. Co. v. Wolff*, 95 U. S. 326. See *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 419. Recent authorities have, however, been very liberal in finding such a waiver. *Titus v. Glens Falls Ins. Co.*, *supra*; *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947. See *Ins. Co. v. Eggleston*, 96 U. S. 572, 577. The principal case can only be supported on the theory that the insurer has merely an election to avoid the policy, which can only be taken advantage of by promptly displaying an intent to do so. See *Provincial Ins. Co. v. Leduc*,

6 P. C. 224, 243. This theory, which removes from the insured the burden of proving a waiver, has been ably supported. See J. S. Ewart, "Waiver in Insurance Cases," 18 HARV. L. REV. 364. Its application to a case where the breach of condition occurred, or was first known to the insurer, after the loss, and where there was no possible prejudice to the plaintiff in the defendant's failure to act, is not only novel but against authority. *Aetna Ins. Co. v. Mount*, 90 Miss. 642, 44 So. 162; *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 89 Pac. 130.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACTS — WHETHER STATE COMPENSATION STATUTES ARE SUPERSEDED BY ACT OF 1908. — The plaintiff, a railroad employee, was injured while tamping ties on a roadbed used in interstate commerce. It was agreed that no one was negligent. He sued for recovery under the Workmen's Compensation Law of New York. *Held*, that he may recover. *Winfield v. New York Central & Hudson R. R. Co.*, 54 N. Y. L. J. 52, 110 N. E. 614 (N. Y. Ct. of Appeal).

For a discussion of the question whether the federal Employers' Liability Act has superseded the state compensation laws as to interstate commerce, see NOTES, p. 439.

JUDGES — GROUNDS OF DISQUALIFICATION — PREJUDICE. — Burke, one of the miners who took part in the recent Colorado coal strike, was indicted for a murder alleged to have been committed in the course of the riots resulting from the strike. He filed affidavits alleging that the trial judge had been employed as counsel by the mine owners in similar prosecutions against other strikers, and that he was a vigorous partisan of the owners and had openly declared himself hostile to the strikers and their cause, and demanding that another judge be called in to take his place at the trial. The judge held that the facts stated were not sufficient to satisfy the statutory requirement for disqualification. The affiant then applied to the Supreme Court for a writ of prohibition. *Held*, that the writ will issue. *People v. Hillyer*, 152 Pac. 149 (Colo. Sup. Ct.).

For a discussion of the questions involved, see NOTES, p. 430.

LANDLORD AND TENANT — ASSIGNMENT OF LEASE — ASSIGNEE'S LIABILITY FOR RENT. — The plaintiff leased premises to a tenant who covenanted not to assign without his permission. The tenant became bankrupt and the lease was assigned to the defendant who later promised the plaintiff to pay the rent in return for the latter's assent to the assignment. The defendant assigned to a third party. The plaintiff sued the defendant for rent accruing after this second assignment. *Held*, that the defendant is not liable. *78th Street & Broadway Co. v. Pursell Mfg. Co.*, 155 N. Y. Supp. 259 (Sup. Ct.).

The assignee of a lease ordinarily terminates his liability to the lessor for rent when he makes an assignment over, since this puts an end to the privity of estate between the two. *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105; *Johnson v. Sherman*, 15 Cal. 287; *Fagg v. Dobie*, 3 Y. & C. 96. See 2 TAYLOR, LANDLORD AND TENANT, 9 ed., § 452; WOODFALLS, LANDLORD AND TENANT, 19 ed., 302. However, the liability of the assignee will continue in case the lessor can base his claim against him for rent upon privity of contract. *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542; *Lindsley v. Schnaider Brewing Co.*, 59 Mo. App. 271. See JONES, LANDLORD AND TENANT, § 462. But, of course, the lessor must show that the alleged contract was supported by proper consideration. *Dougherty v. Matthews*, 35 Mo. 520. In the principal case the only consideration which can be found to support the promise of the assignee to pay the rent is the lessor's assent to the assignment. And it is now well settled that an assignment of a lease made by the trustee of a bankrupt lessee

is one by operation of law which does not require the assent by the lessor. *Gazlay v. Williams*, 210 U. S. 41, discussed in 22 HARV. L. REV. 146; *In re Gulman*, 197 Fed. 472; *Doe v. Bevan*, 3 M. & S. 353. See JONES, LANDLORD AND TENANT, § 466; WOODFALLS, LANDLORD AND TENANT, 19 ed., 319. Hence such assent cannot be treated as consideration.

LIBEL AND SLANDER — DAMAGES — EVIDENCE: MAY PLAINTIFF GIVE EVIDENCE OF GOOD CHARACTER IN AGGRAVATION OF DAMAGES? — In an action for slander the plaintiff was permitted to introduce evidence of his honesty. It had not been challenged by the defendant either by evidence or plea of justification. *Held*, that the evidence was properly admitted. *Deitchman v. Bowles*, 179 S. W. 249 (Ky.).

In actions of defamation, the reputation of the plaintiff is presumed to be good until proof to the contrary. Many courts and writers have based thereon a rule that, unless his character has been attacked, the plaintiff cannot offer evidence of his good character in aggravation of damages. *Guy v. Gregory*, 9 C. & P. 584, 587; *Blakeslee v. Hughes*, 50 Oh. St. 490, 34 N. E. 793. See ODGERS, LIBEL AND SLANDER, 4 ed., 366; 1 WIGMORE, EVIDENCE, § 76. *Contra*, *Adams v. Lawson*, 17 Gratt. (Va.) 250; *Hitchcock v. Moore*, 70 Mich. 112, 113, 37 N. W. 914, 916. *Cf.* *Stafford v. Morning Journal Ass'n*, 142 N. Y. 598, 37 N. E. 625. See 4 SUTHERLAND, DAMAGES, 3 ed., § 1211. But the previous reputation of the plaintiff is certainly probative of the extent of his injury, and it seems illogical to exclude relevant evidence merely because there is a *prima facie* presumption which makes the rendering of such evidence no longer a prerequisite to recovery. See *Adams v. Lawson*, 17 Gratt. (Va.) 250, 260. Especially is this so when the presumption, as here, covers a conclusion incapable of accurate definition; for the plaintiff's character may be appreciably better than the impression that an instruction that "the plaintiff's character is presumed to be good" would convey to the jury, and he should have an opportunity to prove it so. See *Shroyer v. Miller*, 3 W. Va. 158, 161. Again, the very nature of the action tends to lower the plaintiff's reputation below par in the minds of the jury, for in all cases of defamation, at least that attack on the plaintiff's character on which the suit is based is before the jury, and such accusations, though not believed, still tend to poison the minds of the hearers against the reputation of the person defamed. Finally, as the principal redress sought in most cases of libel or slander is the vindication of the plaintiff before the eyes of the community, to deny him the right to prove his good character is to deprive him of the most effective means of obtaining that relief which he seeks and to which he is entitled. *Bennett v. Hyde*, 6 Conn. 24.

SURETYSHIP — SURETY'S DEFENSES: GENERAL PRINCIPLES OF CONTRACT — PARTNERSHIP AS PRINCIPAL: EFFECT OF DISSOLUTION ON CONTINUING GUARANTY. — The plaintiff became surety to the defendant county for any deposits it might make in "the Hallock Bank." No outsider knew which particular members of a certain family owned the bank, nor whether it was a corporation, a partnership, or an individual enterprise. On the failure of the bank the plaintiff paid its debt to the defendant. The plaintiff later learned that the bank had been a partnership, and that one who was a partner at the time the plaintiff became surety had died before the debt to the defendant was incurred. The plaintiff now sues the defendant county to recover back the amount he paid. *Held*, that he may recover. *Richards v. Steuben County*, 155 N. Y. Supp. 571 (Sup. Ct.).

The contract of an accommodation surety is strictly construed in his favor, and cannot be extended by implication beyond its exact terms. *City of Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218; *State v. Dayton*, 101 Md. 598, 61 Atl. 624. An instance of this is the established rule that the surety for a partnership is

entirely released from liability for subsequent partnership obligations by any change in the membership of the firm, because he contracted to be liable for the debts of the original firm only. *University of Cambridge v. Baldwin*, 5 M. & W. 580; *Byers v. Hickman Grain Co.*, 112 Ia. 451, 84 N. W. 500; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867. See 14 HARV. L. REV. 627. However, if the guaranty shows the intention of the parties that it should survive changes in the partnership, the surety will continue liable for the obligations of the new firm. See *Backhouse v. Hall*, 6 B. & S. 507, 520; *Burch v. De Rivera*, 53 Hun 367, 369, 6 N. Y. Supp. 206, 207. Likewise, since a special guaranty is held unassignable, a change in the membership of a partnership which is the creditor of the principal, discharges the surety, unless the contrary intention of the parties appears. *Pemberton v. Oakes*, 4 Russ. 154; *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Bennett v. Draper*, 139 N. Y. 266, 34 N. E. 791. In one case such contrary intention was found from the fluctuating nature of the firm. *Metcalf v. Bruin*, 12 East 400. In the present case the fact that the sureties were ignorant of the nature of the bank's ownership seems clearly to indicate their intention that it was a guaranty of the bank as an institution not as a partnership, and thus that the guaranty should survive any change in the firm. Cf. *Barclay v. Lucas*, 1 T. R. 291, note. See BRANDT, SURETYSHIP, 3 ed., § 138.

TRUSTS — FOLLOWING TRUST PROPERTY — CONFUSION OF TRUST FUNDS WITH TRUSTEE'S OWN PROPERTY. — A trust company mingled trust funds in its possession with its general assets. It thereupon became insolvent. The injured *cestuis* claim priority to the extent of the trust funds. Held, that no right to priority exists. *Commonwealth v. Tradesmen's Trust Co.* (Nos. 1, 2, 3), 95 Atl. 574, 577, 578 (Pa.).

"An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." *Taylor v. Plumer*, 3 M. & Sel. 562, 574. Nor does equity any longer find a difficulty in following money into a larger sum in which it has been mingled. *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54. See A. W. Scott, "Right to Follow Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125. It should make no difference that the sum in which the funds are mingled is the trustee's whole estate. Of course if the funds themselves have been expended the *res* is gone and the *cestui* can have no priority. *Bircher v. Walther*, 163 Mo. 461, 63 S. W. 691; *Metropolitan National Bank v. Campbell Commission Co.*, 77 Fed. 705. But after an improper mixture the trustee must show that the funds he has expended from the mass are the *cestui's* part of it. *Knatchbull v. Hallett*, *supra*; *Widman v. Kellogg*, 22 N. Dak. 396, 133 N. W. 1020. And if the funds have been paid into the estate and not paid out again, the *res* is there, and equity should follow it. *Harrison v. Smith*, 83 Mo. 210; *People v. City Bank of Rochester*, 96 N. Y. 32; *McLeod v. Evans*, 66 Wis. 401. See S. Williston, "Right to Follow Trust Property," 2 HARV. L. REV. 28, 36. See *contra*, *Empire State Surety Co. v. Carroll County*, 194 Fed. 593. Priority is here denied on the old ground that money has no earmarks. The necessary corollary is fearlessly applied: the *cestuis* are postponed to the insolvent's general depositors under a statute preferring depositors before ordinary creditors.

WILLS — PRESUMPTION OF SURVIVORSHIP — DISPOSITION WHERE TESTATOR AND PRINCIPAL BENEFICIARY DIE IN SAME DISASTER. — A husband and wife each named the other as principal beneficiary in their wills, each providing that if the other died first, their foster son should become the sole beneficiary. Both were frozen to death in a snowstorm, there being no evidence tending to show which died first. The next of kin now contest the foster son's

right to take under the wills. *Held*, that the foster son take. *Fitzgerald v. Ayers*, 179 S. W. 289 (Tex.).

It is well established in the common law that there is no presumption of survivorship or of simultaneous death where persons meet death in a common disaster. *Underwood v. Wing*, 19 Beav. 459; *Newell v. Nichols*, 12 Hun (N. Y.) 604. It is a fact to be proved by the claimant. *Wing v. Angrave*, 8 H. L. Cas. 182; *Newell v. Nichols*, *supra*. When the claimant cannot establish the survivorship, under the English view, the gift over fails and the property passes into the residuum, or by intestacy. *Elliott v. Smith*, 22 Ch. Div. 236; *Re Alston*, [1892] P. 142; *Wing v. Angrave*, *supra*. Precisely the same result is reached in this country, where the property is distributed as if the deaths were simultaneous. *Johnson v. Merithew*, 80 Me. 111; *Re Willbor*, 20 R. I. 126. In the United States, however, effect has been given, in construing a will providing for a gift over if the principal legatee "dies before I do," to the obvious intention of the testator that if, for any reason, the primary beneficiary cannot take the property with an effective power to dispose thereof, the gift over is to prevail. *Y. W. C. Home v. French*, 187 U. S. 401; *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981. This construction, even in cases where the claimant would take under one of two "twin" wills if either testator survived the other, has been refused in England, although forcefully urged by Lord Campbell. See dissenting opinion, *Wing v. Angrave*, *supra*, at 196. Under the American construction the defendant in the principal case takes without the necessity of establishing a survivorship. This seems obviously the only just result.

WITNESSES — PRIVILEGED COMMUNICATIONS: PHYSICIANS — WAIVER IN INSURANCE POLICY. — The plaintiff sued on a life insurance policy which was to become void if the insured died in the violation of law and in which the insured waived her statutory privilege as to communications with her physicians. The testimony of two attendant physicians that she died of an abortion was admitted. A statute provided that no physician should be allowed to disclose any information acquired in his professional attendance on patients. 3 MICHIGAN COMP. LAWS, § 10181. *Held*, that the waiver will not be given effect. *Gilchrist v. Mystic Workers of the World*, 154 N. W. 575 (Mich.).

The purpose of the statute in the principal case, which is to encourage recourse to physicians and free communication of symptoms, a subsequent waiver would not defeat. See 3 NEW YORK REVISED STATUTES (1836), 2 ed., p. 737; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194. See 4 WIGMORE, EVIDENCE, § 2380. Similar statutes in other states, also expressed as an absolute disqualification of the physician, have been construed as privileges of the patient which he may waive without restriction. *Adreveno v. Mutual, etc. Life Ass'n*, 34 Fed. 870 (C. C. Mo.). See *Penn. Mutual, etc. Co. v. Wiler*, 100 Ind. 92. For the general rule is that a privilege solely for the benefit of individuals may be waived by such individuals. See *State Trust Co. v. Sheldon*, 68 Vt. 259, 260, 35 Atl. 177, 178. And when the purpose of a statute can only be achieved by the suppression of probative evidence and hence of the truth, the operation of such statute should be strictly limited to the necessities of that purpose. Although no court has made the distinction, it, nevertheless, seems arguable that the waiver in the principal case, being prior to the consultation with the physician, would check the confidence that the statute was intended to foster. However, it is more than doubtful that the advantage of securing confidence in the few cases where disclosure would be so distasteful to the patient as to be deterrent, outweighs the disadvantage of suppression of evidence that the privilege unnecessarily entails. See *Renihan v. Dennin*, 103 N. Y. 573, 580, 9 N. E. 320, 322; *Connecticut Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 254. See 4 WIGMORE, EVIDENCE, § 2380.

WORKMEN'S COMPENSATION ACTS — PROVISIONS FOR DEATH BENEFITS: AT WHAT TIME DOES RIGHT OF ACTION ACCRUE? — The plaintiff's husband was hurt while in the defendant's employ and died on the following day. Between the time of the injury and the time of death a higher scale of death benefits under the Workmen's Compensation Act went into effect. The trial court allowed the plaintiff to recover under the new scale. *Held*, that the award was correct. *State ex rel. Carlson v. District Court*, 154 N. W. 661 (Minn.).

To support the defendant's contention that the plaintiff's right of action accrued at the time of the injury it may be argued that one violates duties towards others by acts, not by subsequent results, though certain consequences must ensue before the person affected can maintain his action, and therefore that the situation at the time of acting should govern. Here, however, what the defendant did or did not do is quite immaterial, for the Compensation Act provided for recovery even in case of accident. Furthermore, it is a fundamental principle of the law that one violates one's duties, thereby creating causes of action, not solely by doing an act, but by producing consequences that may happen long after the cause. See H. T. Terry, "Proximate Consequences in the Law of Torts," 28 HARV. L. REV. 10, 11. For example, one owes a duty to a father not to deprive him of the services of a daughter, and this duty is not broken until the loss of services, though that be months after the commission of the original tort. That the Compensation Act provided for the survival of the deceased's right of action is therefore the only basis on which can be supported the defendant's contention that the plaintiff's claim was founded on her husband's injury and not his death. This supposition is overcome by pointing out that the action accrued, not to the estate, but to the deceased's personal representative for the benefit of designated dependents, and also that the damages recoverable are such as result to the beneficiaries from the death. GEN. STATUTES OF MINN., 1913, ch. 84 A. See TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 23. Moreover, the act of the principal case provides for an election between its provisions for death benefits and recovery under an older statute for wrongful death. GEN. STATUTES, *supra*, § 8204. And the latter has been construed to give an original right of action. *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 359. It follows from these considerations that the plaintiff's right to recover was original and accrued on her husband's death when the higher compensation was in effect. This conclusion entails the enforcement in this case of retrospective legislation. See *Society for Propagation of the Gospel v. Wheeler*, 22 Fed. Cas. 756, 767. But since the constitution of Minnesota does not prohibit such statutes, the decision of the principal case remains correct. GEN. STATUTES, *supra*, pp. 2071-2099.

BOOK REVIEWS

EQUITY PRACTICE, STATE AND FEDERAL. Volumes I, II, and III. By Robert Treat Whitehouse. Chicago: Callaghan and Company. 1915. pp. cxiv, lxvi, xxiv, 3296.

This work is confined entirely to those states where equity is administered as a separate system. It does not cover states where law and equity have been blended into a single system of procedure by a code. The first volume alone contains an exposition of principles with authorities. The second volume contains the principal statutory and code provisions on equity procedure now in force in the various jurisdictions where the English Chancery system is still essentially followed, and also the equity rules in force in these jurisdictions — compared and compiled down to January 1, 1915. These are arranged by

states in alphabetical order, except that the United States comes last in the list. The third volume contains equity forms arranged by subjects. All three volumes contain careful tables of contents, arranged by chapters, and the last volume contains a full index. There is, however, no table of cases, and references to the National Reporter System are omitted.

As the first volume is the only one devoted to the exposition of principles, with citation of authorities, it is evident that that volume contains the principal matter to be considered by the reviewer. In style it is clear and terse, the paragraphs being successively numbered, and each being preceded by a few descriptive words in bold-faced type to indicate the scope of the matter treated in that paragraph. Since the work is evidently intended for both the skilled practitioner and for the novice, there is of necessity much that is elementary. So also each subject is approached from the standpoint of general principle, with some qualifications, it is true, but without exhaustive treatment of details. This was perhaps necessary if the work of exposition was to be confined to a single volume; but it may, perhaps, be doubted whether the work would not have been of greater assistance if the volume devoted to statutes and rules had been used for exposition also, which would have allowed more exhaustive consideration of the qualifications and details of the general principles so ably presented.

Two examples will suffice. The vexed subject of the availability of equitable defenses in suits at law is treated in Chapter XV, which covers but twelve pages. This is a matter which has been much considered in the federal courts — to say nothing of the states mentioned in that chapter. Thus the availability of fraud as a defense to an action at law has been treated in various aspects in the Supreme Court of the United States and has been the subject of numerous conflicting decisions in the inferior federal courts. (See "Fraud as a Defense at Law in the Federal Courts," 15 COL. L. REV. 489.) Yet this subject is only incidentally treated in a single footnote (p. 506) which ignores entirely *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, and *Cable v. United States Life Ins. Co.*, 191 U. S. 288, on the one hand, and *George v. Tate*, 102 U. S. 564, and *Hartshorn v. Day*, 19 How. (U. S.) 211, on the other. It is true that *Insurance Co. v. Bailey*, *supra*, and certain other cases are cited in connection with the general equity jurisdiction of the federal courts at page 29. But as there is no cross reference (or table of cases) this would be of little assistance to one examining the question of equitable defenses only.

A similar difficulty attends the exposition of the principles which govern reformation and rescission of contracts in something less than three pages (pp. 706-709). Such cursory treatment necessarily confines the author to bare statement of general principles. Perhaps for this reason he does not clearly distinguish between the requisites for reformation as compared with those for rescission, or point out that these two remedies are in truth the antithesis of each other. Rescission is a disaffirmance and destruction of the bargain for fraud or mutual mistake which enters into the bargain itself. Reformation is an affirmance of the bargain by remolding a writing which by fraud or mutual mistake does not correctly express that bargain, so that the writing conforms to what the parties actually agreed. (See "Mistake of Fact as a Ground for Affirmative Equitable Relief," 23 HARV. L. REV. 608.) As there can be no reformation unless there is a valid and enforceable bargain to which the writing may be made to correspond, the statement occurring on page 706, that in case of fraud by one party and mistake by the other the writing may be reformed so as to correspond to the real intention of the innocent party, is at least doubtful.

The work, however, has great merits and will be a distinct aid to the profession. It is clear and logically arranged. The practitioner who desires to obtain a broad survey of the field of equity practice may read it from cover to

cover (as the reviewer did) with both pleasure and profit. Because it gives due attention to details of practice, the busy practitioner who desires immediate assistance in drawing equity papers will find it of great assistance. In the opinion of the reviewer the thanks of the profession are due to Mr. Whitehouse.

EDWIN H. ABBOT, JR.

LAW AND ITS ADMINISTRATION. By Harlan F. Stone. New York: Columbia University Press. 1915. pp. vii, 232.

In a course of eight lectures Dean Stone has undertaken the somewhat difficult task of presenting to laymen "some of the more fundamental notions which underlie our legal system." The character of his audience should be borne in mind in considering the attitude of the writer toward his subject. It accounts, perhaps, for the vigor of his defense of the law, its administration and its administrators, particularly in the lectures on "Law and Justice" and "Constitutional Limitations," in which he has in mind the general and sweeping, uncritical and even intemperate attacks which have been made at times by the laity upon our legal system. He shows very clearly how unsound is the popular assumption that the administration of law under the conditions presented by the complex civilization of to-day is an easy task; he makes it clear, on the contrary, how difficult a task it is, a task which absolutely requires the best efforts of the most thoroughly trained to cope with its difficulties. In his discussions of the subjects of "Bench and Bar," "Procedure," and "Law Reform," Dean Stone frankly admits a justification for the dissatisfaction of the public where real defects do undoubtedly exist, and he presents a constructive and progressive program of reform. It is to be regretted by all who have at heart the administration of justice in the state of New York, that the hope expressed by the writer that needed reforms would be accomplished by the adoption of a new constitution was destined to be disappointed. The lectures on "Nature and Functions of Law" and "Fundamental Legal Conceptions" show that quality of simplicity which comes from clear thinking and a knowledge of the subject.

It is somewhat strange, however, that Dean Stone should, at this late day, so vigorously support the decision of the New York Court of Appeals in the famous Ives case, which he says "was the occasion of an outburst of criticism of the Court of Appeals, so loud, so ill-tempered, and so misguided, as to startle those who have respect for and faith in our institutions. . . . The spirit which under such circumstances dictated virulent attacks upon the court by the unsuccessful litigants is a spirit essentially lawless and subversive of all orderly judicial procedure" (p. 152). He further says that the fact that the constitution of the state of New York has been amended so as to authorize the passage of a workmen's compensation act shows that "by the orderly process of the law the supreme law of the state has been brought into harmony with the popular will, and a complete scheme of workmen's compensation is now in operation in this state. Whether this law will be upheld by the Supreme Court remains to be seen, but the history of the subject in New York emphasizes the fact that there is a direct and orderly method of correcting the erroneous determination of courts if such are made, and of bringing the provisions of our constitution into harmony with the popular will without resorting to ill-tempered abuse of the courts" (p. 155). But if a statute like that which was held in the Ives case to violate the state constitution does also violate the federal constitution, the direct and orderly method does not prove efficacious. If, on the other hand, such a statute does not violate the federal constitution it is because it does not involve a deprivation of life, liberty, or property without due process of law under the federal constitution; but if so it should not be held to be such

a deprivation under the state constitution. It really cannot be justifiable to hold that due process means one thing in the state constitution and another in the federal constitution, in spite of what Judge Werner seems to say. Fortunately the Supreme Court of the United States has taken a more liberal view of constitutional questions than that taken by the New York Court of Appeals. The Court of Appeals, however, has had a change of viewpoint since the decision in the Ives case was rendered. The new attitude of the court may be seen in such cases as *People v. Klinck Packing Co.*, 214 N. Y. 121 (upholding the "one day of rest in seven" law); *People v. Crane*, 214 N. Y. 154 (upholding a law providing that only citizens shall be employed upon public works); *People v. Charles Schweinler Press*, 214 N. Y. 395 (upholding a law providing that no woman shall work in any factory before six o'clock in the morning or after ten o'clock in the evening); which, although not directly opposed to the decision in the Ives case, show a readiness to consider actual conditions as well as "purely legal phases." The same thing may be said of *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, in which the present workmen's compensation law of New York is upheld.

AUSTIN W. SCOTT.

THE PRINCIPLES OF LEGAL LIABILITY FOR TRESPASSES AND INJURIES BY ANIMALS. By William Newby Robson. Cambridge, England: Cambridge University Press. 1915. pp. xvi, 180.

This exhaustive discussion of the English cases on liability for animals is another example of the convenient English practice of treating small sections of the law in small compass. It can scarcely be said to add anything of import to the store of learning upon this anomalous and unsymmetrical branch of the law, but as a handy digest of English case law on the subject it fulfills a purpose.

It is divided into three parts. The first, on the classification of animals, points out differences in this classification for the purposes of property law and of tort liability, which have generally been obscured by the use of similar terminology. The second deals with liability for the wrongful entry of animals upon land. The third and major part of the book examines at some length the law as to the liability of the keeper of animals for injuries inflicted by them upon the person or property of others.

At the very beginning the author attempts to demonstrate that the keeping of a known dangerous animal is the wrong which constitutes the basis of the liability. This is a view which finds considerable support in the authorities both in England and the United States. Thus, contribution has been denied between the joint owners of a vicious ram which had inflicted an injury for which one had been compelled to pay. (*Spaulding v. Adm'r of Oakes*, 42 Vt. 343). It is submitted, however, that it is an error springing from the practice of our law to disguise by fictions of fault liabilities not based on fault at all. One who keeps a known dangerous animal is not *per se* guilty of any legal wrong, but is made responsible for the injurious acts of the animal for reasons of policy similar to those which underlie his responsibility for the torts of his servant. The wrong is the act of the animal, for which the owner or keeper is made vicariously responsible. Otherwise nothing but the act of the injured person in bringing the injury upon himself should excuse the owner, unless, indeed, it be contended that an intervening act of a third person or a *vis major* renders the wrongful keeping remote as a cause of the injury. If this be so, however, the escape of the animal without fault on the part of the owner should have the same effect. As a matter of

fact, the keeping the animal is not the proximate cause of the injury, and it is not for that that the owner is held liable.

With more show of success the author takes occasion to oppose Mr. Salmond's attempt to include the owner's liability for the wrongful entry of his cattle upon land under the general principles governing the liability for damage caused by domestic animals. He points out that the owner is not liable for injurious acts of domestic animals flowing from their natural propensities, although such acts may have a tendency to cause damage. Thus the owner of a cat is not liable for its attack upon a dog, in spite of the well-known hostility between the two animals. (*Clinton v. Lyons & Co.*, [1912] 3 K. B. 198). It is only for the injurious acts of domestic animals flowing from an unnatural propensity of which he has *scienter* that the owner is liable. Hence the liability for trespass by cattle must rest upon the peculiar principles of the law of trespass, rather than any general principle of liability for the acts of domestic animals.

The book also contains an interesting, though not very clarifying, discussion of the confusion in the cases with regard to the evidence necessary to prove *scienter*.

The book suffers most from unnecessary repetition and verbosity, a defect which is only partly remedied by the use of different forms of type to set off the general principles of the law from the detailed discussion of the authorities.

CHESTER A. MCLAIN.

THE PREVENTION AND CONTROL OF MONOPOLIES. By W. Jethro Brown. New York: E. P. Dutton and Company. 1915. pp. xix, 198.

Published just as our Federal Trade Commission is beginning its task of supervising the business practices of industry in the United States, this book has unusual interest for Americans. It is an examination, by a jurist who combines theoretical insight and originality with practical experience, of the workings of Australian legislative and administrative regulation of industry.

Competition Dr. Brown conceives to be both a desirable and an enduring element in modern industry. The problem is by regulation and administration to moralize competition. The Preservation of Australian Industries Act, designed to accomplish this end, is based in part on our Sherman Law. But it shows a more practical realization of the concrete ends aimed at. It prohibits any contract or combination in restraint of trade, or injurious to Australian industry, by means of unfair competition; and it is specifically made a defense that there was no detriment to the public, or that the restraint was reasonable. Unfair competition is not left undefined, as in our Clayton Act; competition is unfair if the participant is a commercial trust, if the competition results in inadequate wages, disorganizes industry, or creates unemployment, or is conducted by means of rebates. Refusal to supply services or sell goods to a person on the ground that he deals with a third person, or refuses to join a combine, is made illegal.

Administration of the law, the author believes, is seriously hampered by the conflict of state and federal control, and a more accurate delimitation of the legal boundaries is called for. The prohibitions of the act, also, he believes, could with advantage be made more specific. Above all he emphasizes the need of taking the enforcement of the act out of the hands of the Attorney General, and placing it in the hands of an administrative commission beyond the suspicion of partisanship. The creation of the Inter-State Commission in 1912 has only in part filled this need, for it has been so heavily burdened with duties unconnected with the control of monopolies and the regulation of

competition, that it has not been able to devote to the enforcement of the act the attention which it deserves.

Where competition cannot be procured, or where it is not socially desirable, Dr. Brown's program is twofold: nationalization and regulation. In certain industries he believes nationalization to be *primâ facie* desirable: as in transportation, in industries immediately affecting health, such as the milk supply, in industries threatening the depletion of natural resources, and in other industries which for various reasons cannot be successfully regulated. For other "natural monopolies" price regulation is advocated. The discussion of the difficulties of such a program is critical and impartial. Drawing from both American and Australian experience, and using as illustrative material the findings of the Royal Commission on the Australian Sugar Industry in 1911, of which he was chairman, the author concludes that price regulation is practically feasible, and that proper administrative machinery can obviate most of its difficulties and disadvantages. He suggests that the Inter-State Commission be given power to declare the scale of prices of any trust or combine unreasonable, to compel a revision of prices, and if necessary itself to fix maximum and minimum prices.

The discussion of American experience is based entirely on secondary authority, much of it of not very recent date. The American reader will regret that the original sources of information on this subject were not available to the author. There is, for instance, no reference to the important congressional investigations of the steel trust, the "money trust," and the shipping combinations. American experience with the regulation of railroad rates is summed up in a brief quotation from Van Hise, "Concentration and Control," which deals with the subject only incidentally, while the standard book in this field, Ripley's "Railroads: Rates and Regulations," is not referred to. These are slight blemishes, however, in a book which is otherwise thorough, scholarly, and readable.

G. C. HENDERSON.

PROBLEMS IN THE LAW OF CONTRACTS. By Henry Winthrop Ballantine. Rochester: The Lawyers' Co-operative Publishing Company. 1915. pp. i, 363.

THE MONROE DOCTRINE. By Albert Bushnell Hart. Boston: Little, Brown, and Company. 1916. pp. xiv, 445.

AN INTRODUCTION TO ROMAN-DUTCH LAW. By R. W. Lee. Oxford, England: Clarendon Press. 1915. pp. xxxv, 360.

THE LAW OF UNINCORPORATED ASSOCIATIONS. By Sydney R. Wrightington. Boston: Little, Brown, and Company. 1916. pp. xxvi, 486.

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UNITED STATES *v.* HVOSLEF: A CONSTITUTIONAL SOURCE OF NATIONAL REVENUE IMPAIRED.

ALTHOUGH the case of *United States v. Hvoslef*,¹ decided in March, 1915, seems to have attracted but little attention, it adds, it is believed, a serious curtailment to the power of Congress to raise revenue, and at a time when every financial resource of the government is needed for purposes of national defense. It seems desirable, therefore, to examine the grounds of this decision in the light of former opinions of the Supreme Court for the purpose of considering whether the conclusions of the Court must be accepted as a final determination of the constitutional questions involved.

I

In discussing any question involving the construction of a clause of the Constitution of the United States, it is helpful to have definitely stated the writer's view concerning the nature and character of the Constitution itself, and the extent to which the decisions of the United States Supreme Court must be considered as finally determining the meaning of that instrument; not final merely so far as coördinate branches of the government are concerned, but as to how far they are to be considered as binding the future action of the Court itself.

¹ 237 U. S. 1.

It seems obvious to the writer that the one view of the Constitution giving security and permanency, and sustained by reason and authority, is that it is an unchanging instrument of government, amendable only in the manner provided by its terms, and that except as so amended it remains precisely the same in meaning as when first ratified.² If the view were accepted that the meaning may be modified by decisions of the courts, then there would be no constitutional guarantee of personal liberty or of the security of property, and few means of national defense which might not be glossed out of existence or greatly weakened by judicial interpretation. There seems to be no sure anchorage except in a firm adherence to the principle that while judicial, governmental, and public opinion in regard to its meaning may change, the Constitution itself does not change, and that in case of erroneous interpretation the way is always open to a return to the true construction whenever further consideration and additional light make such error clear. The Supreme Court itself, by adhering in practice to its right at all times to reexamine the terms of the instrument for the purpose of determining its meaning, and to subject every decision upon a constitutional question to the acid test of reason, has fixed the enduring character of the Constitution, and added immensely to its own strength and dignity by making itself the living voice through which that document speaks. The wisdom of the position taken by the Court is apparent when it is remembered that even in passing upon constitutional questions, the court must depend to some extent upon the industry and research of counsel before it, that points of controlling importance may, at times, escape the attention of the most diligent, and that while a question of constitutional construction may appear of relatively

² The impression, so generally current, that the Constitution does change, at least by growth, results, it is believed, from the fact that with the development of new conditions, new and often theretofore unthought of means are discovered which are "necessary and proper for carrying into execution" the powers of the National Government, but which, had they been enacted into law at a former time, might either have then had no such relation to any delegated power of the Government as to make them necessary and proper means for executing it, or a relation which would not, at that time, have been apparent. In other words, it is plain that it is we, our knowledge, and our circumstances, that change, and not the Constitution. Here it may be suggested that it may well be, as the writer believes, that the scope of the powers specifically granted by the Constitution has never been more than partially canvassed or explored.

slight importance at the time it is originally presented, it may thereafter become of the greatest moment.

It is with these considerations in mind that the writer desires to analyze the case of *United States v. Hvoslef*, and discuss it in the light of previous decisions of the Court.

II

In this case, the Court of Claims had allowed defendant in error judgment upon a claim for amounts paid as stamp taxes upon certain charter parties under section 25 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460. These charter parties were exclusively for the carriage of cargoes from ports in States of the United States to foreign ports, and the imposition of the taxes was held by the Court of Claims to be in violation of section 9, article 1, of the Constitution of the United States, which provides that, "No tax or duty shall be laid on Articles exported from any State." Mr. Justice Hughes, in delivering the opinion of the Court which sustained the action of the Court of Claims, said, in substance, that the constitutional freedom of exportation involved more than a mere exemption from taxes or duties laid specifically upon the goods themselves, that a tax on these charter parties was, in substance, a tax on exportation, and a tax on the exportation was a tax on the exports. Mr. Solicitor General Davis and Mr. Megaarden, for the United States, had contended that as the tax extended to all charter parties irrespective of whether the vessels were to be used in the export trade or not, it affected exportation only incidentally, and therefore the case was to be distinguished from one where burdens were specifically laid on any of the processes or incidents of exportation as such. The Court held this to be immaterial, saying that "the tax as applied to the charter parties here in question was nothing else than a tax on exportation and to this extent was, in any event, invalid,"³ (quoting from *Robbins v.*

³ *Id.*, p. 18. It may be remarked here that the position of counsel for the Government seems obviously sound. There is, in any view of the matter, a very clear distinction between a tax upon instruments of a given class, predicated upon the fact that they are to be used in connection with exportation, and a tax levied upon a given instrument, irrespective of whether it is used in connection with exportation or not. The distinction is referred to in the *Fairbank* case, *infra*, where the majority of the court, speaking through Mr. Justice Brewer, said, p. 290: "It must be noticed that by this act of

Shelby Co.,⁴ and citing the State Freight Tax Case⁵). The Court's main reliance, however, was upon the opinion of Chief Justice Marshall in *Brown v. Maryland*,⁶ and the opinion of the majority of the Court in *Fairbank v. United States*.⁷

III

At the outset it may be said that the case of *Brown v. Maryland* is of peculiar interest and importance historically and judicially. It is no reflection upon that great commonwealth to say that from the beginning Maryland had been a somewhat obstreperous member of the new union, for this was the second time that it had been brought before the bar of the United States Supreme Court to defend enactments directly impairing powers of the Federal Government. The first had been, of course, in the case of *M'Culloch v. Maryland*,⁸ which drew in question an attempt on the part of that State to tax the United States National Bank.

In *Brown v. Maryland*, the Maryland Legislature had enacted "that all importers of foreign articles, etc., shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars." This, of course, struck a vital blow at the exclusive dominion of the Federal Gov-

1898 while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of exports. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax."

It will be seen, however, that the Court in the *Hvoslef* case took the position that it was immaterial whether an instrument used in connection with exportation was singled out on account of that use, or was subjected to an indiscriminating tax as an instrument of a general class, used indifferently in domestic and export trade; but, on the other hand, held that every tax which affected exportation even in the slightest degree, whether incidentally or designedly, was prohibited by the terms of section 9 of article 1. The logic of the Court's position, of course, exempts from all governmental burden every contract, bill of exchange, check, note, lease or agreement made in connection with the processes of exportation. It is not the writer's main purpose, however, to discuss the distinction between taxes laid on instruments used in exportation, as such, and taxes on commercial instruments generally, but rather to discuss the general question of whether such taxes, however laid, come within the scope of the constitutional restriction.

⁴ 120 U. S. 489 (1887).

⁵ 15 Wall (U. S.) 232 (1872).

⁶ 12 Wheat. (U. S.) 419 (1827).

⁷ 181 U. S. 283 (1901).

⁸ 4 Wheat (U. S.) 316 (1819).

ernment over the most efficient source of revenue sought to be secured to it by the Constitution, and attempted to open the door again to those harassing regulations of foreign trade by the States which had been in a large measure the immediate cause of the Federal Convention. The Federal Government met this challenge just as it had done in the former case, by entering the appearance of its Attorney General, Mr. Wirt, as counsel for the appellants, and making their cause its own. The Government, of course, took the very firm ground that the Maryland statute was repugnant to the constitutional provision that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The first question, then, was, what was the meaning of the words "imposts or duties on imports or exports?"

Mr. Chief Justice Marshall after pointing out the broad meaning of the word "imports," and that the scope of the language was broadened, if possible, by the statement of that single exception in favor of inspection laws, which, if unstated, would presumably have been within the scope of the inhibition, and by the character of the evil sought to be avoided, which could not have been cured without giving the broadest possible interpretation to the language used, concluded that a tax upon importers was included within the term "any imposts or duties on imports." The Maryland statute was, of course, a palpable attempt on the part of a State to invade the field of taxation from which it had been expressly inhibited.

The answer to the second question as to whether the tax was also repugnant to the clause empowering "Congress to regulate commerce with foreign nations," etc., the Court found to be even more obvious than the answer to the first. For the State to say that no one shall engage in the business of an importer without first securing a license from the State, is a direct regulation of commerce with foreign nations, and an invasion of the power granted exclusively to Congress. The Chief Justice well says,

"The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject.

It is too obvious for controversy that they interfere equally with the power to regulate commerce."⁹

Unfortunately, however, the learned jurist, in discussing the limitation on the powers of the States imposed by the provision in question, referred by way of argument to the limitation upon the powers of Congress contained in the section now under consideration. He said:

"The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"¹⁰

Now, of course, the question of the powers of Congress, as affected by section 9, was not before the Court for adjudication. The sole question was as to the power of the States, and no one would have been more surprised than the great Chief Justice himself, if it had been suggested that what he might say by way of argument would, in such circumstances, be taken as finally fixing a definite limitation of the powers of the Federal Government.¹¹ It is submitted with great deference that when he said, with respect to the provisions forbidding the States to lay any imposts or duties on imports or exports, and the provision with respect to Congress

⁹ 12 Wheat. (U. S.) 419, 448.

¹⁰ *Id.*, 445.

¹¹ He had already said, in *Cohens v. Virginia*, 6 Wheat (U. S.) 264, 399 (1821): "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury v. Madison*.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered to its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

that no tax or duty shall be laid "on Articles exported from any State," that "there is some diversity in language, but none is perceivable in the act which is prohibited," he spoke without having that point before him for adjudication, and was in error, for there is not only diversity in language, but a wide difference perceivable in the meaning of the language used. At the very outset, in discussing the meaning of the word "imports," he had said; "What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country." When, however, he follows this up by saying; "'A duty on imports,' then, is *not merely a duty on the act of importation*, but is a duty on the thing imported,"¹² he shows not only that he understands the word in its true sense, and as comprehending both the articles imported and the acts of importation, but that he realizes that a duty on importation is the first meaning that strikes the mind when the phrase "a tax on imports" is used. The primary meaning of the word "import" given in the lexicons is "importation," and whether this is accepted as the primary or secondary meaning of the word, the word "imports" has, and by the very statement of the learned Chief Justice at that time had, a broad and general significance including both the articles themselves, and the acts of importation. The same is true with respect to the word "exports."

There is, then, a very marked difference perceivable in the language used with respect to the States and the language used with respect to the United States. In the one case, very broad and inclusive language is used, and it is followed by an exception which strengthens the general and inclusive scope of the prohibition. In the case of the United States government the prohibition is narrowed and specifically confined to taxes and duties on "Articles exported," and the limited scope of the prohibition is emphasized by adding the very significant words, "from any State." This difference in meaning is brought out even more clearly when we compare what Chief Justice Marshall says with reference to the circumstances which called forth the inhibition laid upon the action of the States with reference to imports and exports, with the reason which impelled the Convention to prohibit Congress

¹² 12 Wheat. (U. S.) 419, 437; the italics are the writer's.

from laying a tax or duty upon "Articles exported from any State." After he had called attention to the broad meaning which must be attached to the general words of the prohibition upon the States in regard to duties and imposts on imports and exports, made necessary by the statement of a single exception in favor of duties for the support of inspection laws, he said:

"If we quit this narrow view of the object, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

"From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed."¹³

Writings contemporaneous with and immediately preceding the Constitutional Convention amply corroborate this statement. The mischief, then, sought to be prevented was any intermeddling by the States with the subject matter of importation or exportation, a result which could only be accomplished by giving to the language used a broad and inclusive meaning. Indeed, the prohibition itself must be read in conjunction with the power of Congress "to regulate commerce with foreign nations," which by its very terms includes every sort of action bearing upon the subject matter of imports and exports, and when so considered, must of necessity exclude the idea of any intermeddling with either by the States.

But when we come to the provision that "no tax or duty shall be laid upon Articles exported from any State," we find that not only is the language itself narrow and specific, but the object sought to be accomplished is of a very different character.

Turning to the debates in the Constitutional Convention, it will be seen that there was no general objection to the power of Congress to tax exports. Mr. Madison, Mr. Wilson, and Mr. Gouverneur

¹³ 12 Wheat. (U. S.) 438.

Morris were strenuous in opposing any limitation on that power, and in this they had the support of General Washington.¹⁴ There had, of course, been no similar power in the general government, and we can only learn the mischief sought to be prevented by examining the text of the prohibition itself, and what was said in the debates in the Convention in regard to it. The language used is, as has been pointed out, confined to taxes or duties laid on "Articles exported from any State." The vital objection made to the existence of a power in Congress to tax articles so exported, was that it was "unjust and alarming to the Staple States;" that there were eight northern States with an interest different from the five southern States, and that the "Southern States had, therefore, ground for their suspicions. The case of exports was not the same as that of imports. The latter were the same throughout the States; the former were very different."¹⁵ Mr. Gerry feared that the power would be used to compel the States to comply with the will of the General Government.¹⁶ Mr. Butler was strenuously opposed to a power over exports as alarming to the Staple States.¹⁷ In other words, the impelling motive was a fear that the power to tax articles exported would be used by the majority to oppress the minority through the laying of export duties on the staples or other articles exported from those States. The purpose, therefore, was to prevent the imposition of a tax or duty on specific articles.

It therefore appears that in the one case, in order to protect the exclusive jurisdiction of Congress over foreign commerce and for other equally compelling reasons, it was necessary to exclude the States from any intermeddling in the matter of exports or imports, and for that purpose the Convention used broad and general language, strengthened by the statement of a single exception, and made absolute in scope by the clause which invested Congress with power to regulate commerce with foreign nations; in the other, it was desired to protect the southern States from discriminating burdens upon "Articles exported" from those States (a "security" which they vehemently demanded) and for that purpose appropriately narrow and specific terms were used, which did no more than prohibit Congress from laying taxes or duties upon the articles themselves.

¹⁴ 2 THE CONSTITUTIONAL CONVENTION OF 1787 (Hunt's ed.), pp. 213, 216.

¹⁵ *Id.*, 215, Col. Butler; see also *id.*, 177.

¹⁶ *Id.*, 216.

¹⁷ *Id.*, 214.

IV

Fairbank v. The United States,¹⁸ the other authority upon which the Court mainly relied in the *Hvoslef* case, called in question the validity of schedule A, section 6 of the Act of June 13, 1898, which required a ten-cent revenue stamp to be affixed to every bill of lading or receipt (other than charter parties) for goods, merchandise or effects to be exported from the United States to any foreign port. A bare majority of the Court held this to be in conflict with section 9 of article 1. The portion of the argument of the Solicitor General quoted by Mr. Justice Brewer seems most persuasive:

"To give Congress the power to lay a tax or duty 'on articles exported from any State,' meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some States and in favor of others."¹⁹

The answer of the learned Justice, speaking for the majority of the Court, does not seem convincing. He says:

"This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition."

It may be helpful to interrupt at this point to say that the argument of the Solicitor General does not appear to be fairly stated by the learned Justice. It was, in effect, that a stamp tax of the kind

¹⁸ 181 U. S. 290.

¹⁹ *Id.*, 292.

under consideration was neither within the letter of the constitutional prohibition nor within its spirit. Mr. Justice Brewer's statement that "if mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition," is clearly beside the point, for an *ad valorem* tax upon all exports would clearly be a tax upon "Articles exported," and therefore within the express prohibition of the clause. If the framers of the Constitution had excepted from the prohibition, *ad valorem* duties, they would, no doubt, have accomplished the entire object for which the prohibition was framed, but they did not do so. The fact, however, that the framers of the Constitution used language that was more comprehensive than was necessary to avoid the evil sought to be prevented, is most assuredly not an argument in favor of extending the scope of the prohibition beyond the literal meaning of the words.

The opinion of the majority of the Court continues:

"But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue' but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports."²⁰

The motion of Mr. Clymer and the action of the Convention when examined, however, show no such intention. Mr. Clymer feared to intrust Congress with power to lay taxes or duties on articles imported for the purpose of raising revenue, and made his motion accordingly.²¹ If it had come after the main question had

²⁰ 181 U. S. 292.

²¹ "Mr. Clymer remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States. The Middle States may apprehend an oppression of their wheat flour, provisions, etc., and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobacco, Rice, etc. They may apprehend also combinations against them between the Eastern and Southern States as much as the latter can apprehend them between

been disposed of there might be something in the learned Justice's suggestion, but it was made before any vote upon the main question had been taken, and consequently was opposed alike by those favoring and those opposing the clause. New Hampshire, which opposed any limitation on the power of Congress to tax articles exported, voted against Mr. Clymer's motion, as did Massachusetts, which favored the proposition to allow two-thirds of each house to levy such taxes. Likewise, General Washington and Mr. Madison, who favored giving the Congress full power to tax exports, also voted against Mr. Clymer's motion as something which defeated the purpose they had in view.

In other words, of the eleven States voting, only two favored Mr. Clymer's amendment, while four, with the addition of Washington and Madison, opposed any restriction at all upon the power of Congress to tax articles exported, and five, together with Washington and Madison, voted for the two-thirds amendment. Instead of supporting the position of the majority in the Fairbank case, then, the motion of Mr. Clymer, his remarks thereon, and the action of the Convention all emphasize the fact that nothing more than a tax upon the articles themselves was intended to be prohibited.

It is submitted, therefore, that there is not a word in the clause itself, nor was there a single circumstance connected with the drafting or adoption of it which justifies the expansion of its terms in the manner stated by Mr. Justice Brewer. The majority of the Court in effect, after the lapse of over a hundred years, took it upon themselves to rewrite the terms of the clause, and to place upon the taxing power of the National Government a limitation never expressed and never intended, and not made necessary or proper by the mischief sought to be prevented. They dismiss the matter of the practical construction of the act by saying that before any appeal can be made to practical construction it must appear that the true meaning is doubtful. But obviously practical construction was rightly appealed to by those protesting against an unjustifiable expansion of the language of a constitutional limitation, although obviously that appeal ought not to have been made necessary.

the Eastern and Middle. He moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade by inserting after the word 'duty' sect. 4, art. VII the words, 'for the purpose of revenue.'" 2 CONST. CONV. 1787 (Hunt's ed.), p. 217.

The plain, literal meaning of the prohibition excluded the idea of any restraint upon taxation except taxes or duties levied upon the articles themselves when exported from any State. If a different or wider meaning was to be given to it, it could only be because the nature of the mischief sought to be remedied required a larger meaning, and no such interpretation could be made until every legitimate means had been resorted to in determining the meaning of the provision. In other words, the only theory upon which the conclusion arrived at by the majority of the Court could be sustained, was that the prohibition had a wider scope than was signified by the literal meaning of the words actually used. If you may resort to contemporaneous, practical construction for the purpose of broadening the scope of a provision, *a fortiori* you may by the same means demonstrate that the words were used and intended to be understood in their ordinary and usual sense. What, then, had been the contemporaneous and practical construction of the clause?

On July 6, 1797, an act was passed which, among other things, provided that, "Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents," etc.²² It is significant that this act was passed within eight years after the Constitution went into effect, and at a time when the framers of the Constitution were an active and dominant element in the councils of the nation; yet no suggestion was made that the tax was a tax "upon Articles exported from any State." However, when three years earlier, a tax on carriages was proposed, it was immediately challenged as unconstitutional by Mr. Madison, then a member of Congress, and the question was raised in court as soon as the law went into effect. Obviously, the tax imposed by the law of 1797 was not challenged, because it was apparent then, as it must be now, that a stamp tax upon foreign bills of lading is neither within the words nor the spirit of the prohibition contained in section 9 of article 1. It must be remembered also that the Act of 1797 was passed at a time when one great party in public life was watchfully jealous of the slightest semblance of usurpation upon the part of the Federal Government, but although the act

²² 1 U. S. STAT. 527.

continued in force until April 6, 1802, and a similar law was in force from July 1, 1862 until June 6, 1872, the constitutionality of neither was ever questioned. The act considered in the Fairbank case went into effect July 1, 1898, and was not questioned until March, 1900. Upon this branch of the case, Mr. Justice Harlan, speaking for himself, Mr. Justice Gray, Mr. Justice White, and Mr. Justice McKenna, said:

"Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this court is at liberty to determine the matter as if now for the first time presented. But the answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart v. Laird*,²³ and in other cases, the question should be considered at rest."²⁴

There is, throughout the opinion of the majority of the Court in the Fairbank case, the thought that "freedom of exportation" is guaranteed by the Constitution; for instance, it is said:

"As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation."²⁵

This concisely states the unwarranted premise from which the majority of the Court deduces its erroneous conclusions. The prohibition contained in section 10 in conjunction with the commerce clause does prevent the States from interfering in any way with the freedom of imports or exports, but so far as Congress is concerned, "freedom of exportation" is not and was not intended to be guaranteed by the Constitution. This is shown by the fact that embargoes by the Federal Government, which are certainly

²³ 1 Cranch (U. S.) 299 (1803).

²⁴ 181 U. S. 283, 323 (1901).

²⁵ *Id.*, 295; see also pp. 290 and 292.

not consistent with "freedom of exportation," are not prohibited and were not intended to be prohibited by the clause in question,²⁶ while on the other hand, when Mr. Madison suggested that to the prohibitions upon the States be added, "nor lay embargoes," it was agreed that this was already covered.²⁷

Moreover, it is in accord with sound principles of construction to say that when a small, learned, deliberative body in daily session, after having a subject under consideration for over a month, and after drafting and re-drafting the instrument to be submitted, and after referring it to a committee for the purpose of harmonizing the language of the various provisions, deliberately preserves a difference in the language in which two inhibitions are expressed, it must be assumed that it intended to express a difference in meaning.

All of the cases upon which the majority of the Court in the Fairbank case rests its opinion, are cases in which the action of a State has been called in question because it contravened the prohibition with reference to "imports" or "exports" or because it was obnoxious to the provision vesting Congress with power to regulate foreign or domestic commerce. Consequently, what has been said with reference to *Brown v. Maryland* and *Fairbank v. U. S.*, applies to those cases also.

For the reasons stated, it seems clear that the opinion of the majority of the Court in the Fairbank case, in holding that the provision that no tax or duty shall be laid upon articles exported from a State, disregarded the plain language of the clause itself, disregarded the purpose intended and the mischief sought to be prevented, disregarded the contemporaneous and practical construction of the act during a period of a hundred years, and was erroneous. A regard for sound principles of interpretation demands that its words be given no larger meaning than their natural import, considered in the light of the purpose sought to be accomplished, and that this is done when they are considered as excluding only taxes and duties on the articles themselves.

V

But the Hvoslef case goes much further than the Fairbank case in curtailing the powers of Congress. In the latter, there had been

²⁶ 2 CONST. CONV. (Hunt's ed.), p. 215.

²⁷ *Id.*, 264.

a discriminating stamp duty on bills of lading used in the export trade.²⁸ In the former, there was a general provision which applied to all charter parties whether the vessels were to be used in domestic or foreign trade. In the case following the *Hvoslef* case, *Thames & Mersey Marine Ins. Co. v. United States*,²⁹ the Court went a step further and held that stamp taxes on policies of marine insurance also came within the prohibition of section 9. The drastic doctrine of the court, therefore, is that any governmental burden which affects in any way the processes of exportation is unconstitutional and void. The doctrine of the *Fairbank* case is thus expanded and carried to its extreme and logical limit, but it is submitted that the doctrine of that case is contrary to reason and authority, and ought not to stand.

VI

The United States is at the present moment facing a grave situation, and fully understands the need it has of every legitimate and constitutional source of revenue. It stands as the one great nation in the world whose taxing power is curtailed by express constitutional limitations; limitations which deprive it of all practical means of direct taxation, except upon incomes, and of all power to lay taxes and duties on articles exported from any State. It is obvious that the common defense, the general welfare, and perhaps even the security of liberty demand that these limitations upon the power of the nation to protect itself and its citizens shall not be extended beyond their rightful and true meaning, and if in the *Fairbank* case, a majority of the Court has, as it is believed that it has, given to the language of the Constitution an extended meaning and a restrictive effect which cannot be supported by reason, then the ruling in that case and in those following it ought to be reconsidered and the constitutional powers of Congress fully restored.

Clarence Norton Goodwin.

CHICAGO.

²⁸ 181 U. S. 283, 290 (1901).

²⁹ 237 U. S. 19 (1915).

THE PARENTAL RIGHT TO CONTROL THE RELIGIOUS EDUCATION OF A CHILD

I

THE sixteenth century in England was a period of armed religious strife in which Catholics and Protestants alike, when a suffering minority clamored for liberty of conscience, and when in power proscribed every creed but their own. As Protestantism slowly forged victory out of the conflict it secured itself in the ascendancy by various repressive statutes against Catholicism. As early as 1590 the Elizabethan government aimed at the suppression of Catholic education by enacting that only schoolmasters who repaired to the Established Church might be maintained,¹ followed four years later by a further statute which punished as a *præmunire* the sending abroad of a child for Catholic education.² From time to time further laws³ were passed to render more effectual the suppression of Catholic education, until by 1699 it was a crime punishable by perpetual imprisonment for any Papist to keep school or assume the education of youth.⁴

Naturally during this period, in the face of such public sentiment and of such laws there was little or no litigation in the courts of England on the part of Catholic parents to protect any parental rights in relation to their children. Indeed the temper of the courts, reflecting this prevalent spirit of religious intolerance, is well illustrated by their action in *Shaftsbury v. Hannam*,⁵ where upon an insinuation by counsel for the plaintiff that the defendant was a Papist, although "utterly denied" by her, an order was entered that unless Lady Hannam "dispose herself to receive the

¹ 23 ELIZ. I.

² 27 ELIZ. 2.

³ Sic: 1 JAC. I, c. 4; 3 CAR. I, c. 2; 13 & 14 CAR. II, c. 4. See 2 BACON ABR. Tit. Papists & Popish Recusants.

⁴ 11 & 12 WM. III, c. 4. No attempt is made to cover any of the side currents of religious conflict between Protestant sects such as the struggle between the Church of England and Non-Conformists. Sic: Five Mile Act. 13 & 14 CAR. II, c. 4, etc., etc.

⁵ Finch 323 (1677).

Sacrament according to the rites of the Church of England, before the end of the next term, and produce a legal certificate thereof, the court would then consider to remove the infant into such hands as might secure his education in the Protestant religion."

In order to stimulate the conversion to Protestantism of Catholic children the Act of 1699⁶ compelled Catholic parents to support their Protestant children. In 1701 St. Andrew's Undershaft Parish in London sought to compel a Jew to maintain a daughter whom he had turned out-of-doors because she had embraced Christianity. The action⁷ failed because it was held not to come within any existing statute. Thereupon in the same year a further statute was passed obliging Jews to maintain and provide for their Protestant children,⁸ and the following year a similar provision was incorporated in the anti-Catholic act applying the same principle to Catholics and their Protestant children in Ireland.⁹ To what lengths the court was prepared to go under such statutes to stimulate proselytizing is shown when they awarded a Christian daughter forty-four years of age, and married, maintenance out of her Jewish father's estate even after his death.¹⁰ In the zeal to uphold Protestantism family ties cut no figure. The court did not hesitate to deprive a widow of the custody of her minor children so that they might be brought up Protestants, although both parents had always been Catholics.¹¹ Even when a Catholic mother was bringing up her son as a Protestant according to the wishes of her late husband the court was so blind to all considerations except the possible dangers to the child's Protestant religious education in such a situation that it ordered the separation of the mother and her child of seven years.¹² Marriage to a Catholic of a Protestant widow, even though she continued a Protestant, was considered sufficient to justify depriving her of custody of her daughter.¹³

⁶ 11 & 12 Wm. III, c. 4, § 7.

⁷ *Inhabitants St. Andrew v. De Breta*, 1 Ld. Raym. 699 (1789).

⁸ 1 ANNE 30.

⁹ 2 ANNE 6.

¹⁰ *Vincent v. Farnandez*, 1 P. Wms. 524 (1718). See also *Moses v. Moses*, 1 Sander's Orders in Ch. 457 (1723) & 524 (1727).

¹¹ *Preston v. Ferrard*, 4 Bro. P. C. 298 (1720).

¹² *Teynham v. Lennard*, 4 Bro. P. C. 302 (1724); 9 Mod. 40, 2 Eq. Cas. abr. 486.

¹³ "By reason that she had married a Papist." *Edwards v. Wise*, Barnard, ch. 139 (1740).

Toward the middle of the eighteenth century, when the Protestants felt themselves secure in their power, while the statutes themselves were not repealed, the rigorous insistence on anti-Catholic extremes in the courts began to relax. In 1729 Lord Chancellor King refused to punish in chancery a guardian because he had allowed his ward to be educated a Roman Catholic,¹⁴ and in 1756 Lord Hardwicke took the position that while the Chancery Court can refuse to appoint Papists guardians, there was no law to take a guardianship away from them.¹⁵ By 1765 Blackstone wrote: "What foreigners who only judge from our statute-book are not fully appraised of (is) that these laws are seldom exerted to their utmost rigor."¹⁶ Once sown, the seeds of a liberal and enlightened point of view of the conflicting claims of rival religions took sure root in the courts and grew steadily until by Lord Eldon's time, with the evident approval of the bar and bench, he was able to turn his back squarely on the old precedents¹⁷ and take the position that the court looked with equal favor on all religions.¹⁸

From this time on the courts have been able to maintain a rational judicial attitude toward religious controversies and the religious aspect of the legal relationship of parent and child and of guardian and ward has been allowed to develop along definite legal principles.

¹⁴ *Ex parte Hales*, Mos. 249 (1729).

¹⁵ *Blake v. Leigh*, 1 Ambl. 306 (1756).

¹⁶ *BL. COMM.*, bk. IV, c. 4, p. 57.

¹⁷ "Lord Bathurst made an order to prevent a Protestant child from being sent to a Roman Catholic school. This court, with reference to the distinction between Protestants and Catholics, interfered *then* in the education of children in many cases in which it would not interfere *now*." *Wellesley v. Beaufort*, 2 Russ. 1, 22 (1827).

¹⁸ *Lyons v. Blenkin*, Jac. 245 (1821).

Vice Ch. Leach on an application to appoint guardians raised a question whether of those named in a will the Duke of Norfolk might be an improper person because he was a Papist. Lord Eldon took the position that the law had changed. *Elwes v. Const.*, 1 Mod. Eq. 435 n. The modern liberal doctrine is perhaps most succinctly put by Sir John Romilly. "In the matter of religion, the court holds that the Roman Catholic faith and the Protestant faith are to this extent equally beneficial to the child." *Austin v. Austin*, 34 Beav. 257, 263 (1865). It was, however, left unchallenged that Christianity is part of the law of the land; (*Da Costa v. De Pas*, 1 Amb. 228 (1754)), and this doctrine was so held until overthrown in the mid-Victorian period. *Reg. v. Bradlaugh*, 15 Cox. C. C. 217 (1883). At the same time Lord Eldon recognized that it was lawful for a Jew to educate his children as Jews. *Villareal v. Mellish*, 2 Swan. 533 (1819).

II

While it is now generally recognized that no duty is imposed upon parents to educate their children in any particular phase of religious opinion the English courts have recognized that "one of the first and most sacred duties of the parents is to imbue the mind of the children with some religious belief, and this is done, not merely by precept and instruction, but by the unconscious influence of everyday life and conduct."¹⁹ The court which deprived the poet Shelley of his children because he avowed himself an atheist²⁰ will probably to-day still regard a parent who refuses all religious instruction to a child as having forfeited all rights to the custody and training of the child.²¹

It has been laid down as the law of parent and child that "*Religio sequitur patrem*." Like many maxims, this is a glittering half truth that advances the discussion little. How far does it follow? In what way is it to follow? Indeed experience shows that in many instances it follows only by coming out in quite the opposite direction.

In applying a general rule that the father has the right to choose in what religion his child shall be educated the judges have divided themselves into two well-defined groups. This has been done quite unconsciously. Indeed the courts have failed to recognize the

¹⁹ *F v. F*. [1902] 1 Ch. 688.

²⁰ *Shelley v. Westbrook*, Jac. 266 (1821).

²¹ By separation deed a father agreed that the infant daughter should remain with the mother eleven months each year and the mother refused to allow her child to receive religious instruction. The father did not interfere. The Court of Chancery Appeals (per James, L. J.) in denying the mother custody laid down the principle:

"It would be impossible for the court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian Church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious, opinions which the Appellant avows that she professes and intends to persevere in teaching and promulgating. We have nothing to do with the strength of the conscientious motives by which, as she alleges, she is impelled so to profess, teach, and promulgate. In the absence of the father (the father being assumed to be practically absent) the court is the real guardian of the infant and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother and by separating the child from her. It is a plain, imperative duty which the law casts on the court; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or Buddhist." *In re Besant*, L. R. 11 Ch. D. 508, 519 (1878).

distinction between the precedents which they cite and the rule of law which they have recognized and differently interpreted in practice. It is commonly laid down that the court will enforce the wishes of the father as to the religious education of his children unless there is a coercive reason for disregarding them.²² The first class of cases hold that nothing short of an abandonment or forfeiture of this right on the part of the father justifies a court to direct a child educated in any other religion than that of its father. All other considerations play a minor part.²³ Not merely do these courts give effect to the expressed wish of the father,²⁴ but in the absence of any expression on his part create a presumption that it is his desire that his surviving minor child shall be educated in the religion which he professed even though he neglected it.²⁵ So hard and fast do the cases in this class construe this rule of law that the right is enforced even when the result is "to

²² The authority of a father to guide and govern the education of his children "is not to be abrogated or abridged without the most coercive reason." *In re Meades*, 5 Ir. R. Eq. 98 (1870).

²³ "In no case, however, that I am aware of, where the father has been alive, has the court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the court thought fit altogether to deprive him of the custody of his children." *In re Newton*, [1896] 1 Ch. 740, 748 (per Lindley, L. J.); *In re McGrath*, [1893] 1 Ch. 143; *In re Scanlan, Infants*, L. R. 40 Ch. D. 200 (1888); *Skinner v. Orde*, L. R. 4 P. C. 60 (1871); *F. v. F.*, [1902] 1 Ch. 688; *In re Montague*, L. R. 28 Ch. D. 82 (1884); *In re Walsh*, 13 L. R. Ir. 269 (1884).

"The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations." *Andrews v. Salt*, L. R. 8 Ch. App. 622, 638 (1873).

²⁴ *Talbot v. Shrewsbury*, 4 My. & C. 672 (1840); *In re Newbery*, L. R. 1 Eq. 431 (1865); *Davis v. Davis*, 10 W. R. 245 (1862); *Re Chillman's Infants*, 25 Ont. R. 268 (1894); *In re Kellers*, 5 Ir. Ch. 328 (1856).

²⁵ *Matter of North*, 11 Jur. 7 (1847); *Re Faulds*, 12 Ont. L. R. 245 (1906); *In re Sparrow*, 20 N. S. W. W. N. 42 (1903); *In re Grey*, [1902] 2 Ir. 684.

"The wishes of the father if not clearly expressed by him must be inferred from his conduct. If the father is dead it will be naturally inferred that in the absence of evidence to the contrary his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of

create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly to inflict severe pain on both mother and child." ²⁶

the child that this rule be departed from, or the father has otherwise directed." *In re McGrath*, [1893] 1 Ch. 143, 148.

"... there may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case. . . ." *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539, 544-5 (1871).

"It was further said that the rule of law had its origin in the statutory power of the father to appoint guardians to the children; and that inasmuch as the mother has now co-ordinate power to this respect with the father, she ought now to have co-ordinate power with him in directing the religious education of the children. No doubt the power of the father to appoint guardians of the children afforded the means by which he was enabled to give effect to his views on their religious education; but I think that it cannot be said that it has been conclusively decided that the rule originated in the way alleged. The point was argued and considered in the case of *Skinner v. Orde* (Law Rep. 4 P. C. 60); and Lord Justice James, in delivering judgment, says no more than this (Law Rep. 4 P. C. 70): 'It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.' This appears to me sufficient to show that the rule was not (even in the view of lawyers) so connected with the power of appointing guardians that the Legislature ought to be deemed to have abrogated it merely by conferring on the mother the power of appointing guardians; nor can I suppose that in a matter of so much difficulty and delicacy, the Legislature intended to abolish a well-established rule by a side wind, without even a suggestion as to the rule to be substituted for it, and without indicating how a court is to act when called upon to decide between co-ordinate authorities unhappily unable to agree on a question affecting the religious welfare of an infant." *In re Scanlan, Infants*, L. R. 40 Ch. D. 200, 214 (1888).

"It seems a strange extension of the father's rights when he is in his grave, to allow his expressed wishes, and still more his merely presumed wishes to override the rights of the living parent." *Hawksworth v. Hawksworth*, L. R. 6 Ch. 540 (1871).

²⁶ Per Wickens, V. C., *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, 540 (1871).

"When a father has not forfeited or abandoned his right to educate his children in his own religion the court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented, or better provided for, if left with those who have had the care of it." *In re Marshall*, 33 Nova Scotia 104, 132 (1900).

The second class of these cases regard this right of the father as a trust, not a power. "The best interests of the child," — its moral and spiritual welfare is made the paramount consideration, the wishes of the parent being relegated to a subordinate and very secondary place.²⁷

"When infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard, as I apprehend, to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to . . . the wishes of the father may be in conflict with the well-being and even with the safety of the children."²⁸

III

Whatever may be the parents' power or privileges with regard to their children's religious education, all authorities agree that a parent may by his acts or conduct forfeit, abandon, or waive such parental rights.²⁹ No definite rule can be given as to what

²⁷ *Austin v. Austin*, 34 Beav. 257 (1865); *W. v. M.* [1907] 2 Ch. 557; *In re Newton*, [1896] 1 Ch. 740; *Re Ullee*, 54 L. T. 286 (1885); *In re Butler*, 6 N. S. W. W. N. 10 (1889); *In re Nevin*, [1891] 2 Ch. 299.

²⁸ *Stourton v. Stourton*, 8 DeG. M. & G. 760, 771-2 (1857).

"My difficulty resolves into this, how far the right of the father to educate his child in a particular religion can be made an element in the determination as to what is for the child's welfare. It seems to be put no higher than this, *viz.*, that regard must be had to the 'natural law which points out that the father knows far better, as a rule, what is good for his children than a Court of Justice does.' But here by statute the court has to determine what is for the welfare of the child, and the assumed knowledge of the father as to what religion it is best for the child to be brought up in is only *one* element in the determination of the question." *Donohue v. Donohue*, 1 S. R. D. 1; 18 N. S. W. W. N. 14, 18 (1901).

"It is not the benefit of the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." *In re Agar-Ellis*, 24 Ch. D. 317, 337-8 (1883) (per Bowen, L. J.).

²⁹ *Witty v. Marshall*, 1 Y. & C. 68 (1841); *In re Clarke*, L. R. 21 Ch. D. 817 (1882); *In re O'Malley*, 8 Ir. Ch. 291 (1858); *In re Grimes*, 11 Ir. Eq. 465 (1877); *In matter*

will amount to such abandonment, abdication, or forfeiture. It is a question of fact and will vary according to the infinite diversity of circumstances. Indeed there is perhaps no situation which has betrayed the judiciary to yield to its own religious prejudices so subtly as the issue of parental abandonment in the face of rival religious claims between parents or relatives over some poor child who had been made the object of religious zeal. No mere agreement as to the religious education of children between father and mother before or after marriage is binding and it is always open to either parent to change his mind, as it is his privilege to inculcate upon his children those religious principles which for the time being seem to him best.³⁰ Some decisions base this fundamental principle on a public policy that a parent in the interest of morality should not be held to bind himself conclusively to relinquish control over his children's religious education. Especially must this appeal to those who regard this right as vested in the parents solely for the benefit of their children. Other authorities, however, rest these decisions rather on the practical conditions arising out of ordinary family life.

"Who is to provide the funds to educate the children in a religion which the father objects to? Is the Court to apply the property of the husband, during his lifetime, and against his will, to the education of his child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child he believes will be destructive to his eternal welfare?"³¹

It is further pointed out that for breach of a contract of a parent concerning the religious education of a child no damages can be recovered and it cannot be enforced by a suit for specific performance.³²

Whatever view one adopts of the right of parental control over a child's religious education it is evident that irrespective of good faith and well-intentioned efforts there must be certain well-de-

of *Garnett*, 20 W. R. 222 (1872); *Hill v. Hill*, 31 L. J. (Ch.) 505 (1861); *In re Marshall*, 33 Nova Scotia 104 (1900).

³⁰ *In re Agar-Ellis*, 24 Ch. D. 317 (1883); *In re Nevin*, [1891] 2 Ch. 299; *In re Meades*, 5 Ir. R. Eq. 98 (1870); *In re Browne*, 2 Ir. Ch. 151 (1852); *In re Clarke*, L. R. 21 Ch. D. 817 (1882); *Andrews v. Salt*, L. R. 8 Ch. App. 622 (1873); *In re Laing*, 2 S. R. Eq. 121, 19 N. S. W. W. N. 219 (1902).

³¹ *In re Browne*, 2 Ir. Ch. 151, 160 (1852).

³² *Andrews v. Salt*, L. R. 8 Ch. App. 622 (1873).

fixed limits restraining its capricious exercise. Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its tranquillity and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child had thus acquired.³³ In this connection arises one of the most perplexing questions involved on this subject, and one on which there is, perhaps, the clearest conflict of authority. How is the child's religious development to be ascertained and the possible injurious effect of a change determined? The obvious answer is to hale the child before the court and to have the judge satisfy himself by an examination of the child either in open court, in chambers, or by a master in chancery or similar official under such conditions as shall give a fair opportunity to size up the child. This has been the course adopted in perhaps a majority of the cases.³⁴ In certain cases this may be done without serious danger,³⁵ but a careful analysis of the cases is convincing that it is a dangerous practice and open to very serious objections. Perhaps nothing can be added to the summary by Judge Owen of the New South Wales Court of the evils and defects of this procedure:

"The reasoning both of the Vice-Chancellor and of the Lords Justices in that case (*Hawksworth v. Hawksworth*) satisfies my mind that any such examination would be a mere form, and might lead to injurious results. No doubt the child here is 13 years old, whereas the age of the children in the cases cited was only 9 years, but I cannot suppose that a girl of 13, unless brought up in a proselytising school, and prematurely instructed in matter of doctrinal controversy, as to which

³³ *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539 (1871); *Stourton v. Stourton*, 8 DeG. M. & G. 760 (1857); *In re Agar-Ellis*, 24 Ch. D. 317 (1883).

³⁴ *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539 (1871); *Skinner v. Orde*, L. R. 4 P. C. 60 (1871); *F. v. F.*, [1902] 1 Ch. 688; *In re Newbery*, L. R. 1 Eq. 431 (1865); *Stourton v. Stourton*, 8 DeG. M. & G. 760 (1857); *Andrews v. Salt*, L. R. 8 Ch. App. 622 (1873); *Witty v. Marshall*, 1 Y. & C. 68 (1841); *In re Grimes*, 11 Ir. R. Eq. 465 (1877); *In re Elliott*, L. R. 32 Ir. 504 (1893); *Davis v. Davis*, 10 W. R. 245 (1862); *In re Meades*, 5 Ir. R. Eq. 98 (1871); *In re Sparrow*, 20 N. S. W. W. N. 42 (1903); *Re Faulds*, 12 Ont. L. R. 245 (1906); *Ex parte Rowlands*, 12 N. S. W. W. N. 47 (1895); *In Matter of Garnett*, 20 W. R. 222 (Ir.) (1872); *In re Marshall*, 33 Nova Scotia 104 (1900).

³⁵ Where a child was of such age that within a year she "would have a right to act on her own views" obviously her wishes should be considered by the court. *Queen v. Gyngall*, [1893] 2 Q. B. 232.

there is no evidence, can hold or be capable of forming any opinion worth considering on the matters in controversy between the two characters. Even if she had been so instructed, she might have caught the shibboleths of a party, or some of the current phrases of controversy, but of the controversy itself she could form no intelligent opinion. Subjects that held in doubt for many years the powerful and acute intellect of a Newman are outside the intellectual gauge of a girl of 13; nor can a child of that tender age, however well educated, have touched even the fringe of the learning necessary to form an intelligent opinion on so vast and complex a subject. I might find sentiment or prejudice, or dislike to any change in religious education, but the Court cannot allow such to interfere with its duty of seeing that the child is educated in the religion of her father. Nor do I consider upon principle, that a Judge who may be of any religion, or of no religion, is a fitting tribunal to ascertain the religious views of a child of tender years. The law, which is absolutely impartial in matters of religion, has to be administered by Judges, who, like other men, are liable to be swayed by their own views on this, the most important and most difficult subject that can engage the mind of man. They, as others, are to be found ranged on either side of the great controversies that have split Christendom into hostile camps. The Judge, if he entertains strong views on the subject, is liable, however he may desire to be fair and impartial, to have his judgment warped by an intense conviction of the truth of his own particular opinion, or by his disapproval of the teaching of the church to which the child's father belonged. If he is indifferent, or holds views now known as agnostic, his examination must be equally, if not more, unsatisfactory. I also attach great weight to the opinion of the Judges in *Hawksworth v. Hawksworth*, that if it were known that the Court would examine a child as to its religious views, before deciding in what religion it was to be brought up, a mother, or guardian, might be induced to begin prematurely to teach the child the subjects of controversy between particular churches, so as to prepare it for such examination. There are cases, no doubt, in which a child has from infancy until years of discretion been brought up in one particular form of religion, where the court may consider it dangerous to compel such child to be brought up in a different and conflicting religion, lest the diverse and conflicting teachings should make shipwreck of the child's faith, and impair its moral character. . . ."³⁶

³⁶ *In re Butler*, 6. N. S. W. W. N. 10, 10-12 (1889). See also *Reg. v. Clarke*, 7 E. & B. 186 (1857).

"But an interview of a few minutes between a girl under nine years old and a stranger could hardly lead to my coming to any conclusion like that which the Lords

IV

While we have talked of the parental right to control the child's religious education as if it were a joint right of both parents, the power to exercise it was in fact vested in the father. Although the mother might be entitled to reverence and obedience from her children, she had no power over them. During her husband's lifetime she had no right to her children's custody, nor could she interfere with their education.³⁷ As we have already pointed out, after his death her rights were not greatly increased even though she became guardian.³⁸ If the widow happened to be of a different religious faith from that of the husband she was not only bound to educate her children in the religious faith of the deceased father rather than her own, but to insure that result the court did not hesitate to appoint persons of his religion to act with the mother as guardians.³⁹ It was only when her husband either abdicated or forfeited his rights, and thereupon the mother in fact had assumed the direction of the children's religious education, that the mother could exercise any legal control over the choice of her children's

Justices arrived at in *Stourton v. Stourton*. That decision may have been, and probably was, right with reference to the case of a very unusual child; but I cannot help fearing that it has done some harm. I fear it may have led widowed mothers, in breach of their duty, and to the great injury of their children, to introduce them prematurely into an atmosphere of theological controversy, than which nothing can be more injurious to the mind and heart of a child, and this, it will be observed, for the purpose of convincing them that their dead father had wrong views. In the present case I knew that although I might be bound to give the ward an opportunity of speaking to me privately, the interview must necessarily, under the circumstances, be a form, and it was a form. I did not obtain, and, in fact, I did not in any way try to elicit, any opinion from her as to the questions between the churches. If I had thought that the child had been brought up to a keen and premature consciousness of the true bearing and meaning of those questions I should have formed a much less favourable opinion of the mother than I actually formed. As it is, however much I may regret the conclusion, the law must prevail, and the child must be brought up in her father's faith." *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, 540-1 (1871).

³⁷ *In re Agar-Ellis*, 24 Ch. D. 317 (1883).

³⁸ *In re Scanlan*, L. R. 40 Ch. D. 200 (1888); *In re McGrath*, [1893] 1 Ch. 143; *Petre v. Petre*, 7 Ves. 403 (1802); *Corbet v. Tottenham*, 1 Ba. & B. 59 (Ir.) (1808); *In re Browne*, 2 Ir. Ch. 151 (1852); *Austin v. Austin*, 34 Beav. 257 (1865).

³⁹ *In re Scanlan*, L. R. 40 Ch. D. 200 (1888). A Canadian court, however, refused to follow to this extreme. In adjudging the mother entitled to the custody of a daughter after the father's death, the court said:

"The religious question does not enter into consideration in this matter, because the mother, having a right to bring up her child, has a right to decide what religious teaching she shall receive." *Ex parte Ham*, 27 L. C. Jur. 127, 128 (1883).

religion. It followed from this that when domestic quarrels resulted in separation of husband and wife she was legally helpless to assert any preferences in respect to her children's religious training.

"Although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father, and different from that in which they have been educated during the cohabitation of their parents. . . . If the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children." ⁴⁰

A mother of an illegitimate child controls the religious education of such child.⁴¹

V

Even when both parents are in accord in their views respecting the religious education of their children there must necessarily be cases where their efforts will be frustrated. The court can do nothing more than order a child to be brought up in a particular religion. No order can be made forcing the conscience of the child to accept any designated doctrines. Usually it is considered that the child's religion is controlled by the appointment of guardians or custodians of a particular religious belief confident that the religious surroundings of the child are really the determining factor.

There must occur the very practical and interesting *quære*: how far the court will protect the parents against proselytizing influences brought to bear directly upon the child from outside.

There are as yet no authoritative decisions on this question. Three cases have been found, unfortunately all not agreeing, in dealing with this problem. *Re Lyons*.⁴² A daughter of Jewish parents, when 18 years of age, was induced by others to leave home and be baptized a Christian. The father had attempted to get possession of the child by force. He was restrained from retaking

⁴⁰ *D'Alton v. D'Alton*, L. R. 4 P. D. 87, 88 (1878).

⁴¹ *Bernardo v. McHugh*, [1891] A. C. 388; *King v. New*, 20 Times L. R. 583, affirming S. C. ante, 515 (1904); *Regina v. Bernardo*, 58 L. J. (Q. B.) 522 (1889).

⁴² 22 L. T. 770 (1869).

the child other than by legal proceedings. *Todd v. Lyons*.⁴³ Mr. Vice Chancellor Malins ordered the superior of a monastery to refrain from admitting a young man of 17 to monastic vows against the father's consent, and directed that he be delivered back to the father. *Iredell v. Iredell*.⁴⁴ Mr. Justice Kay granted an injunction restraining certain persons from communicating with a minor where they had been having secret interviews with her to induce her to adopt their religion instead of her father's.

Logically, unless justified on other grounds, *Re Lyons* must be erroneous. If the parents have the legal right, or even a trust to discharge, to inculcate some proper religious training in the minds of their children, in so doing they have the right to be free from the officious meddling of strangers no matter from what highly disinterested motives such interference may be inspired.

VI

In the United States the constitutional limitations⁴⁵ against any established religion have fortunately suggested a different judicial approach to religious litigation.

"In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."⁴⁶

⁴³ Unreported, see SIMPSON, *LAW OF INFANTS*, 3 ed., 127.

⁴⁴ 1 Times L. R. 260 (1885).

⁴⁵ U. S. CONST., First Amendment.

Practically every state constitution has a provision to insure religious liberty and equality before the law of all religions. Thus in Massachusetts:

"It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

MASS. CONST., pt. 1, art. 2

"... all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall be established by law." Amendment XI, MASS. CONST. See STIMSON, *AMERICAN STATUTE LAW*, §§ 40, 42, 43.

⁴⁶ *Watson v. Jones*, 13 Wall. (U. S.) 679, 728 (1871).

The result is that our courts have been remarkably free from litigation over the religious education of children. It is only in very recent years that it is beginning to make its appearance. Most of the states — even a state so important as New York⁴⁷ — are still without any decisions on the subject from a court of last resort. Such litigation as has arisen has either been decided by side-stepping the religious aspects of the controversy altogether and resting the decision on some other grounds entitling one or the other party to custody of the infants,⁴⁸ or, too often, in more or less slipshod fashion the court has treated the matter as if it were a novel issue to be decided as law of first impression, or has fallen into an indiscriminating citation of an English authority to justify some particular disposition of the case under consideration. In recent years, as the minority religious groups have strengthened themselves they have more aggressively asserted a right to protect from proselytism the children of their faith who come before the courts for disposition usually as dependent, delinquent, or neglected children. Generally, however, these efforts have been directed toward securing legislative enactment imposing limitations upon the courts or public authorities in the indiscriminate placing of children of some particular faith in conflicting religious surroundings.⁴⁹

The divergence between the standards of American courts is perhaps illustrated by a contrast of three cases. First, a Florida court adopted a rule that "It is not enough to consider the in-

⁴⁷ The New York decisions, five in number, all of inferior courts, lack distinction and contribute little or nothing to define the position which the courts of the state will ultimately take. *Matter of Marcellin*, 24 Hun 207; *Matter of Jacquet*, 40 Misc. 575, 82 N. Y. Supp. 986 (1903); *Matter of Crickard*, 52 Misc. 63, 102 N. Y. Supp. 440 (1906); *Matter of McConnon*, 60 Misc. 22, 112 N. Y. Supp. 590 (1908); *Bolling v. Coughlin*, 5 Redf. 116 (1881).

⁴⁸ *Desribes v. Wilmer*, 69 Ala. 25 (1881); *Whalen v. Olmstead*, 61 Conn. 263, 23 Atl. 964 (1891); *People v. Gates*, 43 N. Y. 40 (1870); *In re Northern Pac. P. B. of M. v. Ah Wan*, 18 Ore. 339, 349, 22 Pac. 1105 (1890).

⁴⁹ It has been said that statutes of this class are "not made with any view to the external interests of the child in a future state of existence, but with a view to the rights and feelings of the parents." *In re Doyle*, 16 Mo. App. 159, 167 (1884).

For example see:

Pennsylvania. 1 PURD. DIG., 13 ed. 1084; *Parks's Estate*, 7 D. R. 700 (1898); *Appeal of McCann*, 49 Pa. St. 304 (1865); *Nicholson's Appeal*, 20 Pa. St. 50 (1852).

Missouri. REV. STAT. MO., § 5295; *Voullaire v. Voullaire*, 45 Mo. 602 (1870); *In re Doyle*, 16 Mo. App. 159 (1884).

Massachusetts. ACTS 1904, c. 363; ACTS 1905, c. 464.

terest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred"; that the father has the legal right to have his children educated in any religious faith that he sees proper whose tenets do not inculcate violations of law.⁵⁰ The Massachusetts court⁵¹ announces as its fundamental doctrine that "the court will not itself prefer one church to another, but will act without bias for the welfare of the child under the circumstances of each case." — "The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance against them, ordinarily they will be decisive. If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded."

In the third case — in Wyoming — it was held that in view of the statutes prohibiting distinctions being made on account of religious belief in awarding custody of minor children, religious considerations will not be given "the slightest weight in our decision," although "some reputable courts" have considered such differences of religion.⁵² This almost goes to the extremes of a Victoria court which ordered a minor placed at an institution where she might have experience of both the Catholic and Protestant religions so that she might be able to have "a free means of exercising her own judgment" until ultimately she adopted some fixed views.⁵³

As the law develops in American jurisdictions it will probably enlarge the mother's authority over her children's religious education. It is to be expected that it will be recognized that it is equal to that of the father. As between father and mother, any religious question respecting the child's religion will be settled by the award of the right of custody. Already it is safe to predict that if the question of the right and duty of a surviving mother concerning the religious education of her child should arise the courts will probably follow the Canadian case rather than the English authorities⁵⁴ and hold that where the surviving mother has the

⁵⁰ *Hernandez v. Thomas*, 50 Fla. 522, 536, 39 So. 641, 645 (1905).

⁵¹ *Purinton v. Jamrock*, 195 Mass. 187, 199-200, 80 N. E. 802, 805 (1907).

⁵² *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439 (1904).

⁵³ *In re Pennington*, 1 V. L. R. Eq. 97 (1875); S. C. 2 V. L. R. Eq. 49 (1876).

⁵⁴ See n. 39.

right of custody she has a right to dictate the religious teachings the child shall receive irrespective of any question of the father's religion or his possible wishes on the subject.

A desirable American innovation in the not unusual domestic religious situation in many of these cases has already been promulgated by the New Jersey court. It was held that in the absence of any expressed preference and direction by a deceased father as to the religious education of his child, the clearly expressed wishes of a deceased mother should be followed.⁵⁵

The Missouri court had a more startling and more novel proposition presented to it in an attempt to obtain an injunction to compel a father to baptize his child in accordance with an antenuptial contract with the deceased wife. It was, of course, refused.⁵⁶

To the very limited extent that they have as yet considered the subject, the courts seem to have allowed an examination of the child in these cases.⁵⁷

It is evident in view of the paucity of authority on this subject in the United States that a thorough understanding and analysis of the English decisions in the pioneer American cases will enable our courts to avoid difficulties and false standards that will only confuse and increase a troublesome class of litigation that is now beginning to force itself on the attention of our judges.

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BOSTON, MASS.

⁵⁵ *In re Turner*, 19 N. J. Eq. 433 (1868).

It was held, however, in *Hernandez v. Thomas*, 50 Fla. 522, that the will of the mother undertaking to give custody of her children, even though she was divorced and had been awarded custody of her child, was of no effect; that a father alone had testamentary power to appoint a guardian for an infant child.

⁵⁶ *Brewer v. Cary*, 148 Mo. App. 193, 127 S. W. 685 (1910).

⁵⁷ *Matter of McConnon*, 60 Misc. (N. Y.) 22, 112 N. Y. Supp. 590 (1908); cf. *Curtis v. Curtis*, 5 Gray (Mass.) 535 (1855).

PROPERTY IN CHATTELS

II

PROPERTY IN THE BAILOR

ONE from whom chattels had been taken could not sue the second trespasser and this, as we have seen,¹ was ascribed by Brooke to a change of "property" by the first trespass and by Brian, C. J., to the fact that possession was out of him by the first trespass and that, therefore, the second trespasser was not a trespasser as to him. It has been thought that the early law went even further than this and in the beginning denied trespass altogether against the third hand,² and, as it was extremely difficult, perhaps impossible, to frame a count in detinue against the third hand,³ that until the development of the action on the case, the interest of the bailor, whether thought of as "property" or not, was so inadequately protected by judicial remedies as hardly to deserve that name.⁴

That in the earlier law the interest of the bailor was thought of as property, or at least that the bailed goods were thought of as "his" rather than the bailee's, has been placed beyond serious question by Pollock and Maitland.⁵ We find no such puzzling statements as to a change of property by a bailment as we do of a trespass.⁶ Whatever might be the case with the trespasser or thief, the bailee as such was no disseisor. He did not hold the chattel as his own but as that of another.⁷ The instances we are given where he was said to have been "seised" are rare.⁸ Commonly speaking, the bailed

¹ *Supra*, p. 383.

² 2 P. & M., 2 ed., 172.

³ *Ibid.*, 176; Ames, "History of Trover," 3 SELECT ESSAYS, 434. But see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 274.

⁴ 2 P. & M., 2 ed., 153, 182.

⁵ *Ibid.*, 176.

⁶ *Supra*, p. 374.

⁷ 2 P. & M., 2 ed., 176.

⁸ Maitland gives an instance where seisin is attributed to the pledgee by Glanville (1 LAW QUART. REV. 325). There are many instances where "seised" was used of the distrainer, thief, testator, and executor. (Maitland, "Seisin of Chattels," 1 LAW QUART. REV. 324.) See also 2 P. & M., 2 ed., 176, and *supra*, p. 380.

goods were in his *custodia* just as the lands of the ward were in the *custodia* of the guardian. The special association of "custody" with the servant is recent.⁹ The bringing of detinue, in which a bailment or loss was ordinarily alleged, affirmed property continually in the plaintiff.¹⁰ Where in order to support the bailee's right to the general writ of trespass, it was said that he had a property, this was as against strangers and not against the bailor.¹¹ Counsel in 1409 argued that the bailor for a term did not have property during the running of the term, but Hankford, J., replied: "I know well that the cases are not in accord with what you have said."¹²

Professor Gray's studies in the law of future interests in personal property¹³ give added force to Pollock and Maitland's argument, "that, if once the bailee had been conceived as owner, and the bailor's action as purely contractual, the bailor could never have become the owner by insensible degrees and without definite legislation. We know, however, that this happened; before the end of the middle ages the bailor is the owner, has 'the general property' in the thing, and no statute has given him this."¹⁴ From the decision of an English judge in 1889¹⁵ and the *dicta* of modern text-writers.¹⁶ Professor Gray goes back¹⁷ to a case in 1459¹⁸ to show that the law at that time saw no difficulty in one's having an interest in a personal chattel for life while the property was in another. The technical law of estates had no application to such chattels and that is all that was meant by Brooke in his famous statement that "a gift or

⁹ Mr. Justice Stephen used "custody" as a technical term in contradistinction to "possession" to indicate the holding of the servant as distinguished from a holding by one on his own account (CRIMINAL LAW, Art. 281, App. note XIII), but how little custody had come to be used in that technical way even in the criminal law may be seen by an examination of the cases under Distinction between Possession and Custody in BEALE, CASES IN CRIMINAL LAW, pp. 731-765. Mr. Justice Holmes followed Mr. Justice Stephen (COMMON LAW, 226) and the present vogue of the term as a technical term to indicate the holding of the servant is believed to be due to the influence of his work.

¹⁰ Y. B. 22 HEN. VI, 15-26; Y. B. 6 HEN. VII, 8-4, by Vavasor, J.; *Ibid.*, 9-4, by Brian, C. J.; 1 Rolle 128, by Doderidge, J.

¹¹ Y. B. 11 HEN. IV, 17-39; Y. B. 11 HEN. IV, 23-46; Y. B. 9 EDW. IV, 34-9, by Needham and Choke, JJ.

¹² Y. B. 11 HEN. IV, 23-46.

¹³ RULE AGAINST PERPETUITIES, 3 ed., § 821 *et seq.*

¹⁴ 2 P. & M., 2 ed., 177.

¹⁵ *In re Tritton*, 6 Morrell, Bankr. Cases, 250; 5 GRAY, CASES ON PROPERTY 2 ed., 124.

¹⁶ §§ 831, 854.

¹⁷ § 826.

¹⁸ 37 HEN. VI, 30-11.

device of a chattel for an hour is forever.”¹⁹ In 1565, not long after the close of the Year Book period, it was even said that one to whom and the heirs of his body divers jewels and pieces of plate had been devised “had no property in such plate but only the use and occupation,” and it was the late Lord Chief Justice of England who had made the devise.²⁰ However inadequate the protection given the bailor may have been, we can hardly doubt that from the first it was to him that the common law ascribed the property.²¹

Such foundation as there is for the opposite view lies in the belief that before the development of the action on the case, detinue was the only action open to the bailor,²² that detinue was contractual,²³ and that, therefore, the only right of the bailor was contractual. If detinue was contractual, however, it was so in the sense that debt was contractual, and debt was closely connected with the most proprietary of all actions, the writ of right.²⁴ It was at least debated in 1292 that the right of action in detinue was based on the tortious detainer and not on the bailment,²⁵ and Pollock and Maitland regarded the nature of the action as remaining open to our own time.²⁶ But, however it may have been as to the limitations or scope of detinue,²⁷ it is believed that the right of the bailor to trespass was more extensive than is currently accepted and that the foundations of that right go back even beyond the case and text law of Bracton’s time to our earliest judicial records.

That the bailor in England was at one time denied all relief against the third hand was suggested to students of the continental law like Laughlin²⁸ and Holmes²⁹ by the existence of a definitely formulated scheme to that effect in the continental law and the evi-

¹⁹ BRO. ABR. DEV. 13.

²⁰ Fitz-James Case, Owen 33; 5 GRAY, CASES ON PROPERTY, 2 ed., 112; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 80. But see GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 825.

²¹ In BRACTON & AZO, p. 183, Maitland says we cannot be certain that this was true of all kinds of bailments.

²² See 2 P. & M., 2 ed., 172.

²³ Ames, “History of Trover,” 3 SELECT ESSAYS, 432.

²⁴ 2 P. & M., 2 ed., 177.

²⁵ Y. B. 20-1, EDW. I, 191, quoted 2 P. & M., 2 ed., 180.

²⁶ 2 P. & M., 2 ed., 180, n. 2.

²⁷ See 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 274, for an opinion that the scope of detinue may not have been as limited as is currently accepted.

²⁸ ESSAYS IN ANGLO-SAXON LAW, p. 197 *et seq.*

²⁹ COMMON LAW, p. 164 *et seq.*

dent kinship between the English appeal of larceny and action for a *chose adirée* and the corresponding continental actions.

Of the continental scheme Pollock and Maitland say: ³⁰

"When French and German law take shape in the thirteenth century, they contain a rule which is sometimes stated by the words, *Mobilia non habent sequelam* (*Les meubles n'ont pas de suite*), or, to use a somewhat enigmatical phrase that became current in Germany, *Hand muss Hand wahren*. Their scheme seems to be this: If my goods go out of my possession without or against my will — if they are unlawfully taken from me, or if I lose them — I may recover them from anyone into whose possession they have come; but if, on the other hand, I have of my own free will parted with the possession of them — if I have deposited them, or let or lent or pledged or 'bailed' them in any manner — then I can have no action for their recovery from a third possessor. I have bailed my horse to A.; if A. sells or pledges it to X., or if X. unlawfully takes it from A., or if A. loses and X. finds it — in none of these cases have I an action against X.; my only action is an action against my bailee, against A. or the heirs of A. 'Where I have put my trust, there must I seek it.' We have not here to deal with rules which in the interest of free trade protect that favorite of modern law, the *bonâ fide* purchaser. Neither the positive nor the negative rule pays any heed to good or bad faith. If my goods go from me without my will, I can recover them from the hundredth hand, however clean it may be; if they go from me with my will, I have no action against anyone except my bailee."

They then go on: ³¹

"Of late years learned writers have asserted that the negative or restrictive half of this scheme was at one time a part of English law. There is much, it is said, in the Year Books, something even in our modern law, which cannot be explained unless we suppose that the rule *Mobilia non habent sequelam* held good in this country, and that the man who had bailed his goods had no action against any save his bailee."

And finally, in answer to the implied query, they say: ³²

"That the bailor has no action against any person other than his bailee, no action against one who takes the thing from his bailee, no action against 'one to whom the bailee has sold or bailed the thing — this is a proposition that we nowhere find stated in all its breadth. No

³⁰ Page 155.

³¹ Page 156.

³² Page 172.

English judge or text-writer hands down to us any such maxim as *Mobilia non habent sequelam*. Nevertheless, we can hardly doubt that this is the starting point of our common law. We come to this result if one by one we test the several actions which the bailor might attempt to use. These are but three: (1) the appeal of larceny, (2) the action of trespass, and (3) the action of detinue. The first two would be out of the question unless there had been an unlawful taking, and in that case, as already said, there seem to be ample reasons for believing that the taker could be successfully attacked by the bailee and by him only."

That the developed continental scheme exercised a direct influence on the common law is not likely, for then we should have expected to find in England those maxims in which on the Continent the denial to the bailor of a remedy against the third hand is embodied, and we do not find them. It has been urged, however, that both the continental scheme and the English appeal of larceny can be traced back to a common origin in the old Germanic action for cattle stealing³³ and, although this is based on inference,³⁴ it has now come to be accepted that the bailor was denied that action.³⁵

But to argue from an inferential denial of that action to the bailor in early Anglo-Saxon times to a denial of the appeal of larceny to the bailor in the 1200's is to assume a development in the law of crimes and criminal procedure in England parallel to that on the Continent, and in general that development was not parallel. We have Pollock and Maitland's word for it that "the common law of theft is wholly post-Norman."³⁶ The 1100's marked a revolution in the law of crimes and torts in England, and it is from that revolution that our modern law of crimes and torts dates.³⁷ The procedural instrument by which that revolution was wrought seems to have been the appeal of felony.³⁸

For one thing, the appeals were much more highly penal than the actions that they had superseded. This is illustrated by the contrast drawn by Pollock and Maitland between the *actio furti* of Bracton and the definite appeal of larceny.³⁹ The former could be used to recover property from an innocent purchaser from a thief,

³³ See *supra*, p. 503, notes 28, 29, and 2 P. & M., 2 ed., 157 *et seq.*

³⁴ HOLMES, COMMON LAW, p. 166, n.

³⁵ 2 P. & M., 2 ed., 159, citing Brunner, 2 D. R. G. 510.

³⁶ 1 P. & M., 2 ed., 56.

³⁷ 2 P. & M., 2 ed., 448, 458.

³⁸ *Ibid.*, p. 462.

³⁹ *Ibid.*, p. 165.

although the thief was not found;⁴⁰ in the latter it was coroner's law that property could only be recovered if the thief were attainted at the suit of the appellor.⁴¹ In the *actio furti* the accused could vouch the one from whom he had received the property and the action then proceeded against his vouchee.⁴² This voucher to warranty disappeared in the appeals.⁴³ Bracton does not mention it in connection with the appeal of robbery at all,⁴⁴ although he elaborates it in his account of the *actio furti*.

Of more direct bearing on the right of the bailor to an action against the third hand was the change as to the requirement of fresh suit on the part of the prosecutor. Bracton says it was still necessary in all appeals "to raise the hue and cry as quickly as possible and to go with the hue to the neighboring and next villis and there declare the crimes and injuries perpetrated,"⁴⁵ but Britton speaks as if fresh suit were no longer necessary and a requirement of prosecution within a year and a day substituted in its place.⁴⁶ In this he was doubtless giving a larger interpretation to the Statute of Gloucester⁴⁷ than was subsequently accepted,⁴⁸ but although the Statute of Gloucester be confined to appeals of homicide, it is probably a recognition that the old fresh pursuit had become antiquated and that a new turn was being given to it, that of fresh prosecution and attainder at the suit of the appellor.⁴⁹ In the enforcement of this requirement the judges were at times so severe as to make the restitution of stolen goods look like a "prize for good conduct."⁵⁰ It seems doubtful whether the old "fresh

⁴⁰ BRACTON, fol. 151.

⁴¹ AMES, "History of Trover," 3 SELECT ESSAYS, 421; Y. B. 8 EDW. III, 10-30.

⁴² BRACTON, fol. 151.

⁴³ 2 P. & M., 2 ed., 165.

⁴⁴ Fol. 146, Fleta follows BRACTON, Lib. 1, C. 39. Britton groups the appeals of robbery and larceny and gives the voucher to warranty as a defense common to both. (1 NICH. 116.) This would seem to be a tribute to its former importance rather than evidence of its continued use. Early instances of its use where robbery was charged are SEL. PL. CR., pl. 124, and BRAC. NO. BK., pl. 67.

⁴⁵ Fol. 139 b; 2 P. & M., 2 ed., 160.

⁴⁶ 1 NICH. 118.

⁴⁷ C. 9.

⁴⁸ 2 CO. INST. 317.

⁴⁹ The changed conditions of restitution which Professor Ames (LECTURES, p. 54) recognized in the time of Henry VIII seem to have been an accomplished fact in the time of Britton. That the judges did not feel themselves bound by the letter of the old rules is intimated in 2 P. & M., 2 ed., 161.

⁵⁰ 2 P. & M., 2 ed., 165.

pursuit" was ever a vital requisite to the appeals as distinguished from the local actions they superseded.

But if it is a big jump to argue from what is known of the early Germanic action for cattle stealing to the appeal of larceny of the 1200's, it is even more of a jump to argue from the former to the appeal of robbery, and although the fact has generally been overlooked, it is to the appeal of robbery rather than to the appeal of larceny that trespass is to be traced. In the older law robbery is not a kind of aggravated larceny, but a distinct offense,⁵¹ and the appeal of robbery antedates the appeal of larceny by some time.⁵²

That the appeal of robbery rather than the appeal of larceny was the precursor of trespass in the king's court is evident in many ways. Larceny was a fraudulent taking, a taking by stealth; robbery, like trespass, a taking by force. Bracton apparently identifies the appeal of robbery with the *actio vi bonorum raptorum* of the Institutes.⁵³ Bigelow gives as a "prototype" of trespass an appeal of robbery in 1194 when it was charged that the defendants came "*cum vi et armis et robberia.*"⁵⁴ In later days it is from the appeal of robbery that Littleton⁵⁵ and Choke⁵⁶ argue to trespass. In fact the appeal of larceny seems to have been almost still-born. In Bracton's time it seems to have been used almost solely by the approver,⁵⁷ and how little impression it made on the law may be gathered from the fact that, although Pollock and Maitland say that Bracton seems hardly to have known the appeal of larceny,⁵⁸ it is only in a quotation from Bracton that the indexer of Staunford's Plee's Del Coron saw any reference to it in that work,⁵⁹ while the references to the appeal of robbery are numerous. It is scarcely

⁵¹ *Ibid.*, 493.

⁵² *Ibid.*, 494.

⁵³ BRACTON & AZO, p. 182.

⁵⁴ HIST. PROC. p. 277; PLACITA ANG.-NORM. p. 285. See also 2 P. & M., 2 ed., 526.

⁵⁵ Y. B. 2 EDW. IV, 15-7.

⁵⁶ Y. B. 9 EDW. IV, 33-9.

⁵⁷ Six out of the ten appeals of larceny listed in Bracton's Note-Book involved approvers. In Pollock and Maitland's table of actions taken from the Northumberland Assize Rolls for the years of 1256, 1269, and 1279, and from the Roll of the Common Bench for the Easter term of 1271 (2 P. & M., 2 ed., 565, 567) there are ten appeals of robbery and only three appeals of larceny, all three of which were brought by approvers.

⁵⁸ 2 P. & M., 2 ed., 494.

⁵⁹ Staunf. P. C., 28 a.

mentioned in Fitzherbert's⁶⁰ and Brooke's⁶¹ Abridgments, while appeals of robbery are fairly common. The truth seems to be that the action for a theft hardly left the seclusion of the local courts, while the appeal of robbery had quite a vigorous existence even after the closely related *vee de nam*, replevin, and trespass had occupied much of its former field.

The speculative character of the denial of the appeals to the bailor is brought out by Pollock and Maitland's summary:

"And, having thus given the action to the bailee, we must in all probability deny it to the bailor. As already said, in the days when the *actio furti* still preserved many of its ancient characteristics, when it began with hue and cry and hot pursuit, it was natural that the bailee rather than the bailor should sue the wrongful possessor. But already in the thirteenth century a force was at work which tended to disturb this arrangement."⁶²

If it were necessary to choose between them, the one-time importance of fresh pursuit is a reason for assigning the appeals to the bailee and denying it to the bailor, but Mr. Justice Holmes, who argues that it was necessary to choose, has to go to the law of the Lombards to support his position.⁶³ A century after Bracton's time Cavendish, C. J., saw no such necessity, but gave trespass to both.⁶⁴ The foundations for his opinion lay in what had been said and practiced as to the appeals in Bracton's time and even before. If we proceed from what is better known to what is less known, it is believed that little reason will be seen for thinking that the exclusion of the bailor from any action against the third hand ever got any important foothold in our law.

In an action of trespass brought in 1374⁶⁵ by an agister, Cavendish, C. J., said:

"And I say in this case, he who has the property can have a writ of trespass, and he who has the custody, another writ of trespass."

⁶⁰ Under "Corone et plees del corone," Fitzherbert mentions the appeal of robbery some twenty-seven times, the appeal of larceny six times, and the appeal of felony twice.

⁶¹ Under "Appell," Brooke mentions the appeal of robbery fourteen times, the appeal of larceny once, and the appeal of felony four times.

⁶² 2 P. & M., 2 ed., 170.

⁶³ COMMON LAW, p. 166. See also LAUGHLIN, ANG.-SAX. LAW, p. 202.

⁶⁴ Y. B. 48 EDW. III, 20-8.

⁶⁵ *Ibid.*

Percy:

"Sir, it is true, but he who shall recover first will oust the other of his action; and so it will be in several cases, as if tenant by *elegit* is ousted, both shall have an assize, and if one recovers first, the writ of the others is abated, *sic hic*." ⁶⁶

Like language was used by counsel in 1344 in an action for the recaption of beasts against the peace brought by one who claimed that the one from whom the beasts had been taken was his villein. Huse said:

"A writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the goods are taken, because both servant and master will have an appeal in respect of the same felony." ⁶⁷

It is evident that the twofold basis of property and custody or possession for an action for a taking against the peace was not new with Cavendish, C. J., in 1374, nor peculiar to trespass. As we shall see, it was the current doctrine as to the appeals in the preceding century. The special significance of this case is the argument for two actions based on the practice in the appeals as to the master and servant. That practice goes back to our earliest extant plea rolls in 1194. ⁶⁸

The notion that two rights were protected by the appeals of Robbery and Larceny is emphasized in the "Mirror of Justices:"

"In these actions two rights may be concerned — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing has been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs." ⁶⁹

Britton also emphasizes both property and custody. He says "that if those who rob, or steal the goods of another, amounting to twelve pence or more, be freshly pursued for the same by those to whom the things belong, or by those out of whose custody the things were stolen or robbed and the goods are found on them, they shall

⁶⁶ 1 GRAY, CASES ON PROPERTY, 255.

⁶⁷ Y. B. 18 & 19 EDW. III, 508. See also FITZ. ABR. REP. 32.

⁶⁸ 1 ROT. CUR. REG. 51.

⁶⁹ SEL. SOC., bk. II, c. 16, p. 57.

be forthwith taken.”⁷⁰ And again, that if the defendant be acquitted “and yet the prosecutor has proved that the thing challenged belonged to him, and that it was stolen from him or out of his custody, in such case he must be answerable to the lord of the thing.”⁷¹ The corresponding passage in Bracton is to the same effect: “And it does not matter whether the thing carried away was the appellant’s own or another’s, provided it was in his custody.”⁷²

These statements are brief and unsatisfactory. They were incidental to an account of criminal proceedings and lack the precision they would have had if they had been part of an exposition of the law of bailments. They allow the appeals to the owner and to the one having custody and leave us to speculate as to whether the owner whose goods were taken from the custody of another was allowed them or not. They give little if any indication, however, that such a one was denied them and by their emphasis on property and custody must have helped pave the way for the law as we find it in the following century.⁷³

There are two other passages in Bracton bearing on the rights to the appeals. The first occurs in the general discussion of actions, and is as follows:

“And it is to be known that the *actio furti sive condictio* is competent to the owner of the thing against the thief and his successor and against the holder of the thing. The action *vi bonorum raptorum*, on account of movables carried off by force or robbed, is allowed to the owner of a thing or to him from whose custody they have been carried off and who has entered into payment in relation to his lord so that he has an interest to bring the action.”⁷⁴

⁷⁰ 1 NICH. 55.

⁷¹ *Ibid.*, 59

⁷² Fol. 151.

⁷³ The emphasis on property and custody is merely a reflection of the case law of the time. Numerous appeals are quashed because the goods are not the appellant’s. See SEL. PL. CR., pl. 138, and BRAC. NO. BK., pl. 1664. In the latter case one of the appellants alleged custody in himself. This is one of the cases cited by Bracton to show that some interest in addition to custody was necessary to support an appeal. (*Infra*, p. 512.) See also BRAC. NO. BK., pl. 1456 and 723. In a case where one Edith had brought an appeal and had offered her brother Richard to wage battle for her, the appeal was quashed because it was waged by the said Richard of other cattle than his own and nothing was said in the appeal as to their having been stolen from his custody, nor was anything of his own involved. BRAC. NO. BK., pl. 824.

⁷⁴ TWISS, fol. 103 b; BRACON & AZO, p. 179.

Maitland's note on this is instructive. He says:

"Bracton in a desultory way is endeavoring to identify English with Roman actions. . . . Apparently when here and elsewhere Bracton speaks of the *actio furti* as of a practicable English action, he is referring to the exceedingly ancient procedure for the recovery of stolen goods which is lingering in the local courts, though its place is gradually being taken in the royal court partly by the definitely criminal appeal of larceny, partly by the civil actions of trespass and detinue. . . . He probably identifies the *actio vi bonorum raptorum* with the appeal of robbery. It will be noticed that he gives the *actio furti sive condictio* only to the *dominus* of the stolen goods, while the *actio vi bonorum raptorum* lies for the owner or for the person from whose custody the goods were taken if he has an interest in them. This is a curious departure from the Institutes and one that we should hardly have expected. All that we know of the history of the old English procedure for the recovery of stolen goods would lead us to believe that it was competent only to the person from whose possession the chattels had been taken, and that, therefore, if the goods were taken from the bailee, the action was open to the bailee, and not to the bailor. In the Institutes the *actio furti* is competent to many bailees. . . . In this respect the difference between the *actio furti* and the *actio vi bonorum raptorum* is not a strongly marked one. . . . The explanation may perhaps be that Bracton, in the furtherance of a movement which is gradually giving the bailor remedies against third persons, is inclined for the moment to go great lengths in the protection of mere *dominium*; but then we cannot be certain that there are not some kinds of bailment which in Bracton's view make the bailee *dominus rei*. English law is hesitating about these questions."⁷⁵

The second of the other two passages in Bracton occurs in the treatment of the appeal of robbery and is an elaboration of what had already been said as to the *actio vi bonorum raptorum*. It is as follows:

"A person sometimes appeals another concerning the goods of another, and not his own, as if a person has been robbed of certain things, which he had in his charge, being property belonging to his lord or to another, and in which case it behooves him to show that he has an interest to appeal, because otherwise he will not have an appeal, no more than for the death of a strange person and concerning which we have partly treated, according as he has received a wound or such like. But concerning another person's goods it behooves him to show that they

⁷⁵ BRACTON & AZO, p. 182.

have been stolen out of his charge together with his own things, or without them, and that the keeper of them and the appellor has entered into the payment of so much money towards his lord." ⁷⁶

In support of what he says, Bracton cites two cases, one of which we have in his Note-Book,⁷⁷ and gives two illustrative counts. The great interest of the passage lies in the requirement of something more than custody to support the appeals. That is a matter for subsequent consideration, but in so far as Bracton would have denied the appeals to the custodian, it would seem that he must have allowed it to the owner.

It is evident that the case Bracton had especially in mind in these passages as to the appeal of robbery was that of the servant or the villein who was acting for his lord,⁷⁸ and the frequency with which the case of the servant or villein occurs in the case law of the time ⁷⁹ makes it likely that the villein or servant was the one primarily in mind in the other and briefer passage from him and in those from Britton. In later times, too, it is the servant who is cited as having the appeals rather than the bailee.⁸⁰ We need not on that account, however, restrict the application of these passages to the servant or villein. It was long before custody was to be especially appropriated to the servant.⁸¹ Bracton expressly includes the case where no lord is involved,⁸² and writers with one accord have used these passages to show that the bailee had the appeals.⁸³ But if it is true that it was the case of the servant that was especially in mind where property and custody were mentioned as the basis for the appeals, it tends to confirm that intimate connection between the two actions for the bailor and bailee and the appeal by both master and servant which is evidenced by the remark of counsel in 1344.⁸⁴ The cases we have of that double appeal are cases where the master appealed first and the servant after him,⁸⁵ but where the servant had agreed to be responsible for the goods it seems likely that two separate ap-

⁷⁶ TWISS, fol. 146.

⁷⁷ Pl. 1664; *supra*, p. 510, n. 73.

⁷⁸ See also MAITLAND, BRACTON & AZO, p. 183.

⁷⁹ See cases cited, *supra*, p. 509, n. 68; p. 510, n. 73.

⁸⁰ Y. B. 18 & 19 EDW. III, 508; Y. B. 2 EDW. IV, 15-7, per Littleton; Staunf. P. C. 60 a.

⁸¹ *Supra*, p. 502.

⁸² *Supra*, p. 511.

⁸³ HOLMES, COMMON LAW, p. 168; AMES, "History of Trover," 3 SELECT ESSAYS, 424; 2 P. & M., 2 ed., 170.

⁸⁴ *Supra*, p. 508.

⁸⁵ See AMES, 3 SELECT ESSAYS, 425, n. 7.

peals must have been possible, for it does not seem likely that such an agreement could have been pleaded to defeat the appeal of the master.

One thing that makes it likely that the appeals of robbery or larceny may have been allowed to more than one person was their highly criminal character.⁸⁶ In an age when the criminal law was not contrary to but an expression of the spirit of the times, the increased importance of the criminal element in the appeals must have inclined the judges not to be overparticular as to the interest of the prosecutor when his interposition was not an impertinence.

With all this, if the question had come before the judges of the 1200's it is possible that they would have denied the appeals to the bailor; but they do not seem to have passed on such a question and, when trespass came in, the groundwork was already laid for giving the action to bailor and bailee alike.

How well the ground had been prepared⁸⁷ for Cavendish, C. J.'s, statement in 1374 giving trespass to the bailor on the basis of his property is evident from the unquestioned acceptance it received.⁸⁸ And, as we have seen, property was not divested by a bailment for a term,⁸⁹ nor at least in somewhat later days by a pledge.⁹⁰ Judges were not willing to give trespass to the bailor against one who took by the tortious delivery of the bailee, for it was hard for them to find in such a case any trespass *vi et armis*,⁹¹ but some of them at least

⁸⁶ This is also a reason given by Professor Ames for giving the action to the bailee. LECTURES, p. 221.

⁸⁷ Professor Ames (3 SELECT ESSAYS, 424) cites Y. B. 16 EDW. II, 490, as evidence that the right of the bailor to trespass had already been recognized in 1323. This is probably an inference from Mutford and Herle, JJ.'s, distinction between a taking by a third party from the bailee and a *devant en sa main*. See AMES, LECTURES, p. 74, n. 1. Professor Ames, however, assumes that this was applicable only to the bailment at will. 3 SELECT ESSAYS, 424.

⁸⁸ Y. B. 22 EDW. IV, 5-16; Y. B. 21 HEN. VII, 39-49; Y. B. 20 HEN. VII, 5-15; Y. B. 3 HEN. VII, 4-16; Y. B. 6 HEN. VII, 12-9; Y. B. 16 HEN. VII, 2-7; Y. B. 20 EDW. IV, 11-10; Y. B. 2 EDW. IV, 25-26; Y. B. 49 HEN. VI, 18-23; 2 ROLLE ABR. 569, pl. 5; COM. DIG. TRESPASS (B 4); BACON, ABR. TRESPASS (C 2); Parke, B., in *Manders v. Williams*, 4 Ex. 239 (1849); HOLMES, COMMON LAW, 171; Wms. Saunders, 47 a.

⁸⁹ *Supra*, p. 3, and see also what is said by Brian, C. J., Y. B. 17 EDW. IV, 2-2, translated in BLACKBURN, SALE (Can. ed.), p. 286.

⁹⁰ Fleming, C. J., in *Ratcliff v. Davis*, Yelverton 178, Bulstrode 29; Dodderidge, J., 3 Bulstrode, 17; *Mores v. Conham*, Owen 123.

⁹¹ Y. B. 21 HEN. VII, 39-49; Y. B. 16 HEN. VII, 2-7; Y. B. 2 EDW. IV, 5-9; Ames, "Disseisin of Chattels," 3 SELECT ESSAYS, 550; 2 P. & M., 2 ed., 172.

were willing to give it to him when without any delivery the third party took with the consent which the bailee had no right to give.⁹² And they allowed the action to the owner where the delivery to the third party was made by a servant.⁹³ The distinction between the servant and the bailee was gradually coming to be drawn.

Brooke's reason⁹⁴ for denying trespass against the second trespasser that the property had been changed by the tort could not have been used against the bailor for property was not changed by the bailment, and that Brian, C. J.'s, reason in the same case⁹⁵—that the second trespasser was not a trespasser as to the one from whom the property had first been taken—was not applied against the bailor is more easily understood when we remember that it was apparently through the case of the master and servant that the law worked to that of the bailor and bailee.⁹⁶ The argument from the case of master and servant was used long afterwards to support the denial of trespass and trover to the bailor for a term,⁹⁷ but that was when the necessity of finding a violation of the possession of the plaintiff had become much more pronounced than it was in the earlier law.⁹⁸ Mr. Justice Wright accepted the modification in the law wrought by *Ward v. Macauley* in 1791 and *Gordon v. Harper* in 1796 denying the bailor for a term of trespass,⁹⁹ but, if in the following statement the words "under a revocable bailment" be omitted and the "right to possession" be changed to "right of property," it is believed to give a correct statement of the law as it existed before those cases were decided.

"A right in one person to sue for a trespass done to another's possession . . . exists whenever the person whose actual possession was violated held as servant, agent or bailee under a revocable bailment for or under or on behalf of the person having the right to possession."¹⁰⁰

Constructive possession in the later law came to be identified with right to possession,¹⁰¹ although as Mr. Justice Wright shows this

⁹² See citations in n. 88, *supra*.

⁹³ Y. B. 2 EDW. IV, 4-9; POLLOCK & WRIGHT, p. 153, n. 1.

⁹⁴ *Supra*, p. 383.

⁹⁵ *Ibid*.

⁹⁶ *Supra*, p. 512.

⁹⁷ *Ward v. Macauley*, 4 T. R. 489, by Buller, J.; *Gordon v. Harper*, 7 T. R. 9, by Grose, J.

⁹⁸ See *infra*, p. 518. This will be treated at greater length in a subsequent article.

⁹⁹ See notes 97 and 98, *supra*.

¹⁰⁰ POLLOCK & WRIGHT, POSSESSION, p. 145.

¹⁰¹ *Gordon v. Harper*, 7 T. R. 9 (1796).

was by no means accurate even after *Gordon v. Harper*.¹⁰² In the earlier law the judges do not seem to have felt the need of working out a constructive possession to support the right of the bailor to trespass, but there was a class of cases in which a constructive possession had to be worked out, and there it was worked out, not on the ground of right to possession, for such a ground would have given a right against the second trespasser,¹⁰³ but on the ground of property, and if in the earlier law need had been felt for it, this constructive possession could have been used to support the bailor's right.

In 1323, in course of the discussion in an action of detinue it was said¹⁰⁴ that if, after the death of an ancestor, a stranger took the title deeds before the heir had them, the latter would have an action of trespass, and on this being denied "because he was never in possession and *Quare vi et armis* does not lie except of a thing taken from another's¹⁰⁵ possession," it was replied "that after the death of his father he has possession at once although he does not have them in his hands." This rule that the heir might have trespass for title deeds before seizure, though he was not entitled to trespass for an injury to the land until entry, marked an important difference between trespass to realty and trespass to personality, and this found expression in a case in 1522, where it was said:

"There is a diversity between a thing local and a thing transitory, for of those which are transitory one will be in possession without seizure as, if my tenant dies, his heir under age, I will have ravishment of ward without any seizure, but not an ejectment from wardship as to the land for that is local, and so if I give you my black horse which is in London now against any stranger the possession is in you and if any take him you will have an action of trespass for it is transitory."¹⁰⁶

This and an earlier case in 2 Edw. IV¹⁰⁷ were the foundation for Brooke's statement that "by the gift the property is in him, and

¹⁰² P. & W., Pt. III, ch. 1, 78.

¹⁰³ *Ibid.*

¹⁰⁴ 16 Edw. II, 490.

¹⁰⁵ Professor Ames translates *dautri* as "the plaintiffs" (LECTURES, p. 74, n. 1). It would seem, however, that the point made was that there could be no trespass *vi et armis* where the goods had not been taken from the possession of another and that here the heir had never had possession, so that it was not shown that any trespass *vi et armis* had been committed.

¹⁰⁶ Y. B. 14 HEN. VIII, 23 b.

¹⁰⁷ Fol. 25, pl. 26.

then the law adjudges possession . . . and it seems to be the law for goods are transitory while land is local."¹⁰⁸ This was applied in *Hudson v. Hudson*¹⁰⁹ to the case of the executor, where it was said that "property draws with it the actual possession of goods." Williams, in his notes to Saunders' Reports,¹¹⁰ gives other examples illustrating the same principle, but he wrote after *Gordon v. Harper*,¹¹¹ and at the end of the paragraph cites that case as showing that there must be a right of possession as well as of property.

If, as seems likely, there was a time when delivery of seisin was as important in the transfer of a chattel as it was in the transfer of land,¹¹² we should have expected the actual seizure of the chattel to have been as much a prerequisite to trespass as an actual entry on the land, but the remedies for chattels were very much more limited than those for land, and the judges were not overparticular as to the one bringing trespass provided there had been an unlawful taking.¹¹³ They harmonized the law of realty and personalty, however, by this fiction that the right of property in the case of personal chattels carried with it possession.

It is not surprising that the lawyers were less troubled about the possession of the bailor than they were about that of the heir or executor or vendee. It was more difficult to acquire possession than to lose it.¹¹⁴ And where the goods had been taken from the bailee there was without doubt a trespass *vi et armis*, whoever might be entitled to sue for it. There was nothing in the writ to indicate that such violence as the writ called for had to be done to the plaintiff himself and, although the idea appeared at an early time that trespass to property was an extension of the protection thrown round the person,¹¹⁵ this seems to have been applied where the person from whose possession the property was taken held not under or on behalf of¹¹⁶ but adversely to the plaintiff.¹¹⁷

¹⁰⁸ BRO. ABR. TRES. 303.

¹⁰⁹ Latch, 214, 263.

¹¹⁰ 2 Wms. Saunders, 47 a.

¹¹¹ *Supra*, p. 515. See also *infra*, p. 518.

¹¹² 2 P. & M., 2 ed., 180; Maitland, 2 LAW QUART. REV. 496 n.; Cochrane v. Moore, 25 Q. B. D. 57 (1890).

¹¹³ For abundant illustrations of this, see POLLOCK & WRIGHT, Pt. III, ch. 1, 5, 8.

¹¹⁴ See HOLMES, COMMON LAW, p. 235 *et seq.*; POLLOCK & WRIGHT, POSSESSION, p. 18.

¹¹⁵ *Supra*, p. 383.

¹¹⁶ *Supra*, p. 504.

¹¹⁷ See Ames, "History of Trover," 3 SELECT ESSAYS, 424, n. 5.

We have come to think of trespass as a distinctly possessory action, but there is nothing in the writ to indicate it as such and the sufficiency of possession itself to support trespass was not clearly established until the 1700's,¹¹⁸ and then only with regard to land.¹¹⁹ The first clear statement that denied trespass to the lessor for a term and placed that denial on the necessity of possession in the plaintiff comes from 1603.¹²⁰ It was an outcome of the tendency to draw more sharply the line between trespass and trespass on the case. The judges of the 1700's, however, made trespass a distinctly possessory action and this found expression in *Ward v. Macauley*,¹²¹ where Lord Kenyon summarily denied trespass to the landlord for a term for furniture taken during the term on the ground that trespass was based on possession. He said the proper remedy in such a case was trover, as it was based on property. Five years later,¹²² when trover was brought by a landlord under similar circumstances, he repudiated his *dictum* as to trover, said that it would be anomalous to allow the landlord under such circumstances to recover the full value of the property, and refused to express any further opinion as to what action would lie. Grose, J., was more specific as to the basis of trover. He said that it too was based on possession, that this might either be actual or implied, and identified constructive possession with right to possession. From that time it has generally been accepted that either actual possession or a constructive possession based on right to possession is necessary to both trespass and trover, but that there had been a departure from the earlier authorities was recognized by Baron Parke¹²³ and appears to have been accepted by Mr. Justice Holmes,¹²⁴ contrary as this was to the general trend of his argument.

¹¹⁸ The modern doctrine is stated by Willes, C. J., *Lambert v. Stroother*, Willes, 218, 221 (1740); Lord Mansfield, *Harker v. Birkbeck*, 3 Burr. 1556, 1563 (1764); Lord Kenyon, *Graham v. Peat*, 1 East 244, 246 (1801). See also AMES, LECTURES, p. 227. This will be taken up in a subsequent article.

¹¹⁹ As late as 1840 Baron Parke regarded it as still an unsettled question with regard to chattels. *Elliott v. Kemp*, 7 M. & W. 306, 312 (1840).

¹²⁰ *Bedingfield v. Onslow*, 3 Lev. 209 (1685). In a *Nisi Prius* case in 1649 trespass was denied a bailor against the opinion of the reporter who was counsel in the case. *Wilby v. Bower*, Clayton 135, pl. 243; 1 GRAY, CASES ON PROPERTY, 241.

¹²¹ 4 T. R. 489 (1791).

¹²² *Gordon v. Harper*, 7 T. R. 9 (1796).

¹²³ *Manders v. Williams*, 4 Ex. 339 (1849).

¹²⁴ COMMON LAW, p. 172-3.

Apparently the only authority prior to *Ward v. Macauley* which tends to support the result reached there is Hale's Pleas of the Crown, where it is said of an indictment for larceny that "if A. have a special property in goods, as by pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of A.,"¹²⁵ but Lord Hale cites no authority, and in *East*¹²⁶ and in the original text of *Russell*¹²⁷ it is said that in such a case the property may be laid in either the bailor or bailee. Under the influence of *Ward v. Macauley*,¹²⁸ however, the law came to accord with the statement in Hale and the text of *Russell* was changed.¹²⁹ Professor Ames¹³⁰ cites a case from the Year Books¹³¹ to show that the pledgor was denied trespass at that time, but the point raised in that case was quite different and the case does not seem to have been so understood.¹³²

That the change wrought by *Ward v. Macauley* and *Gordon v. Harper* was an improvement in the law is doubtful. The requirement of a right to possession in trover was termed a technical one by Field, J., in a case of pledge¹³³ and in the case of *Johnson v. Stear*¹³⁴ it was apparently overlooked entirely. It is hard to reconcile with the right of the bailor to trover or trespass when the bailee has a lien at the time the goods are taken from him.¹³⁵ If it is felt undesirable to allow the bailor to recover more than the value of his interest there are precedents for giving less than the full value of the property in trespass and trover.¹³⁶ But anomalous as it may seem, the old rule that either the bailor and bailee, even for a term, were allowed to recover the full value of the chattel had distinct practical advantages. The ascertainment of the respective interests in the chattel must ordinarily be even more uncertain

¹²⁵ 1 Hale P. C. 513.

¹²⁶ 2 P. C. c. 16, § 90.

¹²⁷ RUSSELL, CRIMES, 8 Am. ed., 90.

¹²⁸ See the citations in *Rex v. John Belstead*, Russell & Ryan's C. C. 411 (1820).

¹²⁹ *Supra*, n. 127.

¹³⁰ Ames, "History of Trover," 3 SELECT ESSAYS, 425.

¹³¹ Y. B. 10 HEN. VI, 25-86.

¹³² BRO. ABR., TRES. 412; VIN. ABR., TRES. (E B) 563.

¹³³ *Cumnock v. Newburyport Savings Inst.*, 142 Mass. 342, 346, 7 N. E. 869, 872 (1886), quoted 1 GRAY, CASES ON PROPERTY, 234 n.

¹³⁴ 15 C. B. (N. S.) 330 (1863), 1 GRAY, CASES ON PROPERTY, 213.

¹³⁵ *Ames v. Palmer*, 42 Me. 197 (1856), 1 GRAY, CASES ON PROPERTY, 246.

¹³⁶ See the cases cited in *Johnson v. Stear*, *supra*, n. 134.

than ascertaining the respective interests of landlord and tenant in land, and if a total recovery is to be allowed to either there would seem to be as much reason for allowing it to the owner as to the one having a less interest. In fact, the result reached in *Ward v. Macauley* and *Gordon v. Harper* would seem to be just another instance of the technicality which was introduced into the law by the attempt to differentiate trespass from case and which in part led to the reformed procedure.

Thus far we have been considering the case of a bailment where a trespass *vi et armis* had undoubtedly been committed and the question was as to who could sue for that trespass. The judges of the Year Books saw no difficulty in giving it to the bailor. But suppose the bailee destroyed the chattel which had been bailed to him. In such a case, could there be a trespass *vi et armis*, and aside from that, would not the allowance of trespass in such a case be an undue interference with the action of detinue? The judges of the late 1400's were bothered about these things,¹³⁷ but as a whole they seemed inclined to allow trespass *vi et armis* in such a case.¹³⁸ When Littleton said "If I lend to one my sheep to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending,"¹³⁹ it was not a case of "Jove nodding."¹⁴⁰ Choke, his great contemporary, was even more explicit in allowing a general action of trespass in such a case.¹⁴¹ On the other hand, the more conservative Brian, C. J., could not see the *vi et armis* in such a case,¹⁴² and the development of the action on the case for a conversion made the matter unimportant as far as the civil remedy was concerned. In the Carrier's case like doctrine threatened to find its way into the criminal law.¹⁴³ Trespass was in a fair way to anticipate trover, but it is fortunate that it was not so, for the allegation that the defendant had "converted the goods to his own use" was so much

¹³⁷ Y. B. 12 EDW. IV, 8-20; Y. B. 15 EDW. IV, 20 b; Y. B. 21 EDW. IV, 19-21; Y. B. 22 EDW. IV, 5-16.

¹³⁸ In Y. B. 22 EDW. IV, 5-16, Brian, C. J., lets the remark of counsel that trespass *vi et armis* would lie in such a case go by without comment.

¹³⁹ Co. Lit. 57 a.

¹⁴⁰ Prof. Beale refers to it as a "nod of Homer." 6 HARV. L. REV. 249.

¹⁴¹ See the first two cases in n. 137, *supra*.

¹⁴² Y. B. 12 EDW. IV, 8-20; Y. B. 13 EDW. IV, 9-5.

¹⁴³ Y. B. 13 EDW. IV. 9-5.

more general than the allegation that the defendant had taken and carried away the goods that it is doubtful whether trespass could ever have come to occupy that vast field which became the domain of trover. Trespass *vi et armis* to chattels continued to be of importance in the criminal law and the increasing emphasis placed on possession in the action of trespass made the judges feel that to apply to larceny the logic of the law of trespass as held by Littleton and Choke would be to condemn a man on a fiction; and so, although they went to great lengths in finding larceny where the felonious intent existed at the time of taking even though there had been a delivery, they refused to follow the lead of the Carrier's case and made necessary the modern statutes as to larceny by a bailee.

Percy Bordwell.

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NATURAL LAW AS A LIMITATION ON LEGISLATIVE AUTHORITY. — Probably the nearest approach in this country to a flat ruling that the authority of a legislature is limited by principles of "natural law" was recently handed down by Surrogate Fowler of New York County. The legislature had enacted that under certain circumstances the real property of an intestate should descend to the heirs of the deceased husband or wife of the intestate, as the case may be, and that the persons thus entitled to inherit "shall be deemed to be the heirs of such intestate."¹ "What does this statute mean?" asks the Surrogate. "It cannot, I think, be supported as an attempt to raise up a new class of heirs at law. It is an old principle of our common law 'that God only, and not man, can make an heir at law.' Glanvill VII, 1. . . . It is a principle of American public law that our legislatures cannot enact any law contrary to 'natural right.' . . . In this respect our public law continues the better traditions of the law of English-speaking people. . . . I do not in reality ascribe to the Legislature any such fatuity as an attempt by the act under consideration to raise up a new class of heirs at law to . . . any man or woman dying seised of real property." And so the statute was construed as an assignment of the state's right of escheat, and the assignees of this right were denied standing in court to contest the will of the deceased on the ground that the will could not have

¹ NEW YORK, DECEDENT ESTATE LAW, § 91.

been attacked by the state. *Matter of the Estate of Mrs. Frank Leslie*, 92 Misc. (N. Y.) 663.

The court's assumption that a state would have no standing in court to contest a will in order to advance its escheat seems doubtful. The considerations of public policy hinted at are difficult to perceive. No authority is cited for the proposition; a New York case *contra* appears to have been overlooked.²

As to the limitation on legislative power: The extract quoted from Glanville, whatever its value were the construction put upon it correct, has no application here. For when Glanville wrote, "Thus a man may give, in his lifetime, the whole of his purchased Land; but he cannot make any one his Heir to it, neither a College, nor any particular individual, it being an Established Rule of Law, that God alone, and not Man, can make an Heir,"³ he was merely enunciating the early English law of his day that real property could not be transmitted by will.⁴ Thus, save for a reference to one of the legal curiosities of the 17th century,⁵ admittedly no longer law, this novel curtailment of legislative power seems to rest upon the court's intuition — for Judge Fowler would have law an art and not a science⁶ — as to the extent of mortal capacity for law making.⁷ In 1871 a dissenting justice wished to declare invalid a divorce statute. But he, at least, relied upon the authority of the Bible, saying: "In this authority, from which every well defined right of person and property is derived, we find — Matthew, ch. 19, verses 3 to 10 inclusive — the law of divorce stated. . . . Now I must elect between a statutory regulation demoralizing in its every influence and tendency, encouraging a system of kin to free-loveism, and an express divine law. I do not hesitate to disregard the one [the statute] and to observe the other [the Bible]." ⁸

The conception of a natural or universal law limiting the authority of legislatures was prevalent among the pages of our early reporters. Introduced into this country by students of the continental law-of-nature school,⁹ its popularity lay in an identification with the principles

² *Gombault v. Public Administrator*, 4 Bradf. Sur. (N. Y.) 226, approved in *Matter of Davis*, 182 N. Y. 468, 474. And see 21 HARV. L. REV. 452.

³ GLANVILLE, VII, 1.

⁴ This meaning is obvious upon a consideration of more than the brief extract quoted by Surrogate Fowler. It will be remembered that Glanville's work was published between 1187 and 1189, and that the Statute of Wills, allowing testamentary disposition of land for the first time since the Norman Conquest, was not enacted until 1540. Note, too, that the word "heredem" (accusative of "heres") used by Glanville, who wrote in Latin, is applicable as well to one who takes by will as by intestacy. F. O., LAW FRENCH AND LAW LATIN DICTIONARY, *sub. tit.*, heir.

⁵ In the reign of James I, Lord Chief Justice Hobart said: "Even an Act of Parliament, made against natural Equity, . . . is void in itself, for *jura naturae sunt immutabilia* and they are *leges legum*." *Day v. Savadge*, Hob. 85, 87. The Surrogate regrets that "this great principle . . . has disappeared from the law of England."

⁶ See Fowler, "The Future of the Common Law," 13 COL. L. REV. 595, 603.

⁷ It has never been supposed that the legislative alteration of rules of descent, prior to the vesting of an estate upon the death of an intestate, was limited by constitutional restraints. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 512.

⁸ *Lanier v. Lanier*, 5 Heisk. (Tenn.) 462, 471-2.

⁹ See 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL, 53, 136, 144, 145, 149, 150, 169, etc. And observe, for example, citation of Grotius, Pufendorf, and Bynkershoeck in *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166; of Pufendorf, Montes-

of liberty by which the colonial revolt against England was justified.¹⁰ Justice Chase said: "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."¹¹ Chief Justice Marshall, although deciding the case of *Fletcher v. Peck* as governed by the contract clause of the Constitution, inclined to the view that the doctrine that a *bonâ fide* purchase for value cuts off all equities was so fundamental as to be a part of a universal law binding even on legislatures.¹² And Justice Johnson, expressly rejecting the application of the Constitution to the case, concurred "on general principle, on the reason and nature of things: a principle which will impose laws even on the deity."¹³ Justice Iredell, however, definitely repudiated any such doctrine, recognizing it as the mere imposition of judicial judgment upon legislatures, judgments of individual judges "regulated by no fixed standard."¹⁴

But although a standard of eternal principles derived from personal intuitions, as are the principles of natural law, is "no fixed standard,"¹⁵ yet generally intuitive notions of justice identify right with custom. And so it is no mere coincidence that the eternal principles of natural right which came to be expounded in this country were, in the main, none other than the familiar doctrines of the common law. Thus Chief Justice Marshall thought the principles of English equity jurisprudence eternal truths.¹⁶ And Surrogate Fowler, in the principal case, seeks to immortalize that procedure of descent to which he is accustomed.¹⁷ It has been said that the right to compensation for lands taken

quieu, and Vattel in *Sinnickson v. Johnson*, 17 N. J. L. 129, 145; and of Grotius, Pufendorf, Bynkershoek, and Vattel, 2 Kent, Commentaries, 339, n. f. For an account of the unpopularity of the English common law at this time as an influence in turning American thought to French jurists, see Prof. Pound, "The Influence of French Law in America," 3 ILL. L. REV. 354.

¹⁰ See Otis' argument in *Paxton's Case*, Quincy's Rep. 520 *et seq.* 1 THAYER, CASES ON CONSTITUTIONAL LAW, 48. The unpopularity of the common law because of its English origin was a contributing factor. See 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL, c. IX, and Prof. Pound, "The Influence of French Law in America," 3 ILL. L. REV. 354.

¹¹ *Calder v. Bull*, 3 Dall. (U. S.) 386, 388.

¹² *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 133.

¹³ *Id.*, 143.

¹⁴ *Calder v. Bull*, 3 Dall. (U. S.) 386, 398-9.

¹⁵ Thus Justice Miller considered a juggling with marital relations on the part of a legislature contrary to natural law. See *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 663. But not so Lord Holt, who would, however, have declared void a legislative act making a person a judge in his own cause. See *City of London v. Wood*, 12 Mod. 669, 687-8. Chief Justice Marshall, however, was not concerned over a legislature being its own judge, but over its failure to be guided by principles of equity. See *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 133.

As to diversity of opinion on the relation of slavery and liquor to natural law, see Prof. Pound, "Liberty of Contract," 18 YALE L. J. 454, 468, n. 79. And note the idea of a right of privacy, the existence of which many courts deny, as "derived from natural law" and having "its foundation in the instincts of nature . . . recognized intuitively, consciousness being the witness that can be called to prove its existence." *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194, 50 S. E. 68, 69-70.

¹⁶ See n. 12, *supra*.

¹⁷ That the law of descent is particularly ill adapted to any conception of divine origin or universal basis may explain apparent lack of precedent for the doctrine of the principal case. Arising out of the exigencies of a feudal system, even the English law of descent was not uniform. Cf. the special practices of "gavelkind" and "bur-

by eminent domain "is operative as a principle of universal law; and the legislature of this State can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into and made a part of its State constitution."¹⁸ (This was before the passage of the Fourteenth Amendment.) And a Wisconsin court has conceived the right to transmit property by will to inhere in nature.¹⁹ When these ideas of natural right were inherited by non-philosophizing jurists, men "with little time for philosophic tangles," though each with "his own philosophy of law,"²⁰ this doctrine became almost a subconscious legal philosophy, little more than a temperamental opposition to change, intellectualized — that is, justified by reasoning — and grafted on to constitutional limitations when occasion demanded. And so many a decision restricting a legislature in its attempt to meet the actualities of a present civilization has as a background this old notion of a natural law, a universal, unchanging order of things based on those conceptions known to the common law of the past.²¹ But such decisions are based on constitutional construction. The idea of a natural limitation to legislative authority is now thoroughly obsolete,²² and has long since been expressly repudiated by the New

rough English." See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 269, 277. But Austin says the laws of God are universal. See 1 AUSTIN, JURISPRUDENCE, 84-5. In this country rules of descent have always been legislative. "The distinguishing rules of the common law doctrines of descent are the converse of those in this country." 4 KENT, COM. 411. "In no two states are the laws of descent identical." See 1 STIMSON, AMERICAN STATUTES, 389.

¹⁸ *Sinnickson v. Johnson*, 17 N. J. L. 129, 146. See also *Bonaparte v. Camden, etc. R. Co.*, Bald. Rep. 205, 220; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166-7. (Note the court's reference to the constitutions of Penn., Del., Ohio, France, and the United States, although not binding on it, as indicative of an identification of natural law with the customary.) *Bradshaw v. Rodgers*, 20 Johns. Ch. 103, 106. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 325; and *Chicago, etc. R. Co. v. Chicago*, 166 U. S. 226, 237-8. But see *contra*, *State v. Dawson*, 3 Hill (S. C.) 100.

Courts accustomed to the *ex post facto* provision of the Constitution have conceived its principle inherently binding. *Case of William Ross*, 2 Pick. (Mass.) 165, 169; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 303-4. One court conceives the principle of the "contract clause" as laid down in *The Dartmouth College Case* to inhere "in the nature and spirit of the social compact" and bind the legislature quite apart from constitutional provisions. *Regents of Univ. of Maryland v. Williams*, 9 Gill & J. 365, 408. Another speaks of "*the sacredness of vested rights*" (italics in original) which "rest not merely upon the constitution, but upon the great principles of Eternal Justice." *Benson v. Mayor, etc. of New York*, 10 Barb. 223, 244-5. And note in the discussion of the necessity of service, in *Borden v. State*, 11 Ark. 519, 526 *et seq.*, the complete identification of common law, custom, and natural law.

¹⁹ *Nunnemacher v. State*, 129 Wis. 190, 198-202. For further examples of natural law notions in the American cases, see *Jeffers v. Fair*, 33 Ga. 347, 365-7; *In re Petition of Leach*, 134 Ind. 665, 668, 34 N. E. 641, and cases collected in Note to *Paxton's Case*, *Quincy's Rep.* 528, n. 29; 1 THAYER, CASES ON CONSTITUTIONAL LAW, 53, n. 1; and in STIMSON, HANDBOOK TO LABOR LAW, 4, n. 4.

²⁰ Such is Judge Fowler's ideal lawyer. See Fowler, "The Future of the Common Law," 13 COL. L. REV. 595, 602-3. But note the danger of an unaided and untested philosophic hinterland. See Prof. Pound, "Scope and Purpose of Jurisprudence," 24 HARV. L. REV. 591, 608.

²¹ For an account of such decisions with a discussion of their legal and social significance, see Prof. Pound, "Liberty of Contract," 18 YALE L. J. 454.

²² See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 232-41; 1 WILLOUGHBY, CONSTITUTIONAL LAW, § 24, and cases cited.

York Court of Appeals.²³ The principal case deserves consideration only as an interesting legal anachronism.

THE AIR SPACE AS CORPOREAL REALTY. — Is the air space a corporeal part of the realty, and if so, may any portion of it exist as a separate freehold apart from the soil beneath it? A century ago Lord Ellenborough, explaining his decision by supposing a case of an aeronaut traversing the air in a balloon high over divers closes, held that trespass did not lie for a board projecting over the plaintiff's garden.¹ So also, shots passing at an average height of seventy-five feet have been treated as nuisances, rather than trespasses.² The tendency of the old English cases seems to be to treat overhanging cornices and the like on the same basis,³ although that, perhaps, may be largely because the remedy of abatement was more desired than damages, and because the equitable jurisdiction to enjoin trespasses was slow in developing. The theory has accordingly been advanced that the air is only in the nature of an appurtenance to facilitate the enjoyment of the soil.⁴

It is clearly established, however, that there may be two or more distinct freeholds in a building over the same spot,⁵ and when a building thus owned is destroyed, a question arises whether an owner of a portion of it who had no rights in the soil can claim the space formerly occupied by his property. It is evident that a mere lease for a term generally con-

²³ "The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." *Bertholf v. O'Reilly*, 74 N. Y. 509, 514.

¹ *Pickering v. Rudd*, 4 Camp. 219. See *Bagram v. Karformah*, 3 Beng. L. R. Orig. Jur. Civ. 18, 43.

² *Clifton v. Viscount Bury*, 4 T. L. R. 8.

³ *Baten's Case*, 9 Co. 53 (b); *Penruddock's Case*, 5 Co. 100 (b), citing *Rolf's case*, Pasch. 25 Eliz. See *Beswick v. Combdon*, Moor 353. These cases were followed in 1845. *Fay v. Prentice*, 1 C. B. 828. Cases of overgrowing trees or vegetation seem *sui generis*. No action lies in England unless the damages are very substantial. See *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5, 10; *Smith v. Giddy*, [1904] 2 K. B. 448, 450. But the landowner may cut these obstructions at will. *Lemmon v. Webb*, [1895] A. C. 1.

⁴ See *Kuhn* in 4 AM. J. INT. L. 109, 122-128, citing *Corbett v. Hill*, L. R. 9 Eq. 671; see also 71 CENT. L. J. 1.

⁵ *Loring v. Bacon*, 4 Mass. 575; *Cheeseborough v. Green*, 10 Conn. 318; *Rhodes Pegram & Co. v. McCormick*, 4 Ia. 368; *McCormick v. Bishop*, 28 Ia. 233; *Ottumwa Lodge v. Lewis*, 34 Ia. 67; *Keilw.* 98, pl. 4; see *Doe v. Burt*, 1 T. R. 701, 703; *Anon.*, 11 Mod. 7; *Graves v. Berdan*, 26 N. Y. 498, 501; *Harris v. Ryding*, 5 M. & W. 60, 71; *Dugdale v. Robertson*, 3 Kay & J. 695, 700; *Smart v. Morton*, 5 E. & B. 30, 47; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449, 450; CO. LIT. 48 (b); *SHEP. TOUCH.* 206; 2 WASHB., REAL PROP., 6 ed., 342. But cf. "Per le vend de l'auncestor, il fuit maintenât disanexe del frankteneit, et vesty en l'achatour come chattel," *Count D'Arundel's Case*, Y. B. 11 HEN. IV, 32.

templates the transfer of no such right, and it would be highly inconvenient if the law created it.⁶ An estate in fee may also be intended to embrace only a portion of the building itself and not the space it occupies; but the question still remains whether ownership of unattached air space is possible where a clear attempt is made to create it.⁷ In a recent South Carolina case the owner of several adjacent lots conveyed one of the middle ones, limiting the right of the grantee and assigns to build to a height of fourteen feet above the ground, and reserving the right to build above the fourteen foot level. The parties then built in accordance with an understanding evidenced by contracts which expressly bound the assigns of both, and which provided for rebuilding under the same conditions in case of fire. The grantee, the ground floor man, assigned to the plaintiff, subject to the contracts with the grantor. A fire having occurred, and the building having been rebuilt, the plaintiff complained of the obstruction of a skylight secured to him by the contract between the parties to the original conveyance.⁸ Decision was rendered in his favor. *Pearson v. Matheson*, 86 S. E. 1063.

This result might be reached on the ground that the attempted exception or reservation failed, and that hence the plaintiff owned the whole property absolutely, but it is of interest to inquire whether that is the ground upon which to proceed. The court adopted what is submitted to be the sound theory, that the grantor retained a corporeal freehold in the air, and that this was servient to an easement of light in favor of the lower freehold. In spite of the indications to the contrary above set forth, the general common law view seems still to be that a piece of land is thought of as a solid of indefinite extent upwards and downwards. The American cases, while divided upon the question whether ejectment lies for permanent encroachments above the surface,⁹

⁶ *Stockwell v. Hunter*, 11 Metc. (Mass.) 448; *Winton v. Cornish*, 5 Oh. 477; *Kerr v. Merchants Exchange Co.*, 3 Edw. Ch. 315; *Graves v. Berdan*, 26 N. Y. 498. Such is *a fortiori* true of church pews although they may be separately owned as realty. *Daniel v. Wood*, 1 Pick. (Mass.) 102; *Gay v. Baker*, 17 Mass. 435; see *Church v. Wells' Executors*, 24 Pa. St. 249, 251; *Aylward v. O'Brien*, 160 Mass. 118, 126, 35 N. E. 313, 314.

⁷ *Duranton*, discussing the destruction of a house of several stories each owned by a different proprietor, suggests that a single proprietor should be compelled to contribute to rebuilding if the others so desire, or forfeit his rights, but he apparently is not certain just what those rights are. He continues: "Mais nous ne croyons pas que, par l'effet de cette destruction, le terrain soit devenu commun, de manière à devoir être partagé ou lité entre les divers propriétaires, même proportionnellement à la valeur relative qu'avait chaque étage avant la destruction ou la démolition de l'édifice; sauf à eux à établir une communauté à ce sujet, sin bon leur semble; car le propriétaire du rez-de-chaussée ne doit point être forcé d'en céder une partie plus ou moins considérable; et, vice versâ, les autres peuvent avoir intérêt au rétablissement de leur étage pour l'avoir en entier." 5 COURS DE DROIT FRANÇAIS, § 488.

⁸ The court assumes, without discussing on this point matters other than the expressed and apparent intention of all the parties, that both the benefit of the servitude here mentioned, and the burden of another given in consideration therefor, ran to the assignee.

⁹ The weight of authority seems to allow ejectment. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716; *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365; *McCourt v. Eckstein*, 22 Wis. 153; *Sherry v. Frecking*, 4 Duer (N. Y.), 452; cf. *Rasch v. Noth*, 99 Wis. 285, 74 N. W. 820; *Zander v. Valentine Blatz Brewing Co.*, 89 Wis. 164, 61 N. W. 763. *Contra*, *Norwalk, etc. Co. v. Vernam*, 75 Conn. 662, 55 Atl. 168; *Aiken v. Benedict*, 39 Barb. (N. Y.) 400; *Vrooman v. Jackson*, 6 Hun (N. Y.) 326; cf. *Wil-*

seem to support this theory,¹⁰ and *dicta* of Lord Blackburn,¹¹ Lord Fry,¹² and Lord Bowen¹³ have caused a difference of opinion among text writers as to how the English law stands to-day.¹⁴ The attention of the aeronautic jurists, many of whom, especially on the continent of Europe, have favored the view that the air is free to all, has been directed chiefly toward questions of international law, and the rights in the upper strata, and probably comparatively few, if confronted with the present case, would deny private ownership of the air to the height of the building involved.¹⁵ It appears definitely from the mining cases that *terra firma* may be divided by horizontal boundaries so that the space occupied by removed minerals may remain in the mine owner and not in the owner of the surface.¹⁶ If the air space above the surface is cor-

marth v. Woodcock, 58 Mich. 482, 25 N. W. 475. And ejectment does not lie for incorporeal hereditaments, Chism v. Smith, 138 App. Div. (N. Y.) 715.

¹⁰ Smith v. Smith, 110 Mass. 302; see Winton v. Cornish, 5 Oh. St. 477, 478; 1 WASHB., REAL PROP., 6 ed., 3; cases cited in n. 9, *supra*. But where a landowner recovered from a balloonist for falling on his land the court said: "I will not say that ascending in a balloon is an unlawful act, for it is not so." See Guille v. Swan, 19 Johns. 381, 383. Cf. Scott's Trustees v. Moss, 17 Ct. of Sess. 4th ser. (1889) 32.

¹¹ "That . . . raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, but not the legal reason of it." See Kenyon v. Hart, 6 B. & S. 249, 252.

¹² "An ordinary proprietor of land can cut and remove a wire placed at any height above his freehold." See Wandsworth Board of Works v. United Telph. Co., 13 Q. B. D. 904, 927.

¹³ S. c. at p. 919. See also Brett, M. R., at p. 915.

¹⁴ See HAZELTINE, LAW OF THE AIR, 75, 76; POLLOCK, TORTS, 9 ed., 357-359; SALMOND, TORTS, 2 ed., 165, 166; Baldwin in 4 AM. J. INT. L. 95, 97, 98; see also, 51 Sol. J. 771. The old maxim "*cujus est solum, ejus est usque ad coelum et ad inferos*" has been frequently quoted, sometimes with slight variations, from Coke's day to the present time. See CO. LIT. 4 (a); 2 BL. COM. 18; GALE, EASEMENTS, 8 ed., 6; 1 WILLIAMS, REAL PROP., 22 ed., 34; Butler v. Frontier Telph. Co., 186 N. Y. 486, 491, 79 N. E. 716, 718, 51 Sol. J. 771; Central London Ry. Co. v. London Tax Comrs., [1911] 1 Ch. 467, 479, [1911] 2 Ch. 467, 473, 486.

¹⁵ See Fauchille's proposed codes, 19 ANNUAIRE, De L'Inst. De Dr. Int. 19, 32-34; 2 REV. DE LA LOCOMOTION AÉRIENNE, 206; Vote of the Society in 1906 ANNUAIRE, 295, 299, 305; CATELLINI LE DROIT AÉRIEN (trad. par Bouteloup), 11-15, 22-28; MEILE, DAS LUFTSCHIFF IM INTERNEN RECHT & VÖLKERRECHT, 27-28; Blewett Lee, 1913, TENN. BAR. ASSN. 53, 59-73. Valentine 14 AM. L. N. 69; 51 Sol. J. 771. By the French code the landowner owns upward without limit CODE NAP. Art. 552. But see CATELLINI LE DROIT AÉRIEN, 14. In Germany he has nominal ownership, but he may not forbid interference at such a height that he has no interest in its prevention. GER. CIV. CODE, § 905. The Swiss code affirmatively limits ownership to the requirements of use. SWISS CIV. CODE, § 667. The air was free by the Roman law. JUST. INST. BK. II, tit. 1, § 1; Dig. BK. I, tit. 8, § 2, 1. By the civil law the air was free. See 4 BURGE, COL. & F. LAWS, 321, 323; Herbert's GROT. INTROD. TO DUTCH JURIS. BK. II, Ch. 1, § 23; GROT. DE JURI BELLI ET PACIS, Lib. II, Cap. 2, § 3. But cf. HAZELTINE, LAW OF THE AIR, 76.

¹⁶ Wilkinson v. Proud, 11 M. & W. 33; Duke of Hamilton v. Graham, L. R. 2 H. L. (Sc.) 166; Earl of Cardigan v. Armitage, 2 B. & C. 197, 211; Harris v. Ryding, 5 M. & W. 60, 66, 73, 76; Batten Poole v. Kennedy, [1907] 1 Ch. 256; Ramsey v. Blair, 1 A. C. 701, 703; Dand v. Kingscote, 6 M. & W. 174 (*semble*); Proud v. Bates, 34 L. J. Ch. 406; Caldwell v. Fulton, 31 Pa. St. 475; Massot v. Moses, 3 S. C. 168. But the mine rights have been spoken of as carved out of the fee in Massachusetts. See Adams v. Briggs Iron Co., 7 Cush. 361, 367. Of course, the right granted in a mine may be only a license or *profit à prendre*. Rogers v. Taylor, 1 H. & N. 706; Doe v. Wood, 2 B. & Ald. 724; Chetham v. Williamson, 4 East 469; Clement v. Youngman, 40 Pa. St. 341; Funk v. Haldeman, 53 Pa. St. 229. See CO. LIT. 164 b.

poreal realty, it is submitted that it may be divided into separate freeholds by horizontal planes.¹⁷

If, however, air space is incorporeal, a less desirable, but a possible solution of the principal case is to consider the right to occupy the air as an easement appurtenant to the grantor's adjacent land, analogous to a very extensive right to bridge.¹⁸ However, if there are any sufficient practical reasons why air space should not constitute corporeal hereditaments, they would seem to be of the nature of the considerations which lie back of the policy against novel incidents, and they should be equally fatal to such an easement. If this difficulty were surmounted in favor of the grantor, however, the easement of light here claimed by the plaintiff might well run in equity against the grantor's easement as a servient tenement.¹⁹

THE POWERS OF CONSTITUTIONAL CONVENTIONS. — What is the nature and power of a constitutional convention? What is its relation to the other branches of government? May the legislature limit the powers of the convention? Can the courts enforce such restrictions? ¹ These questions are suggested by the decision of the Louisiana Supreme Court in *Foley v. Democratic Parish Committee*, 70 So. 104 (La.).² In that case clauses in a new constitution, enacted by a constitutional con-

¹⁷ See HAZELTINE, LAW OF THE AIR, 79. Horizontal division of realty was unknown in the Roman law, and rights in a horizontal stratum were regarded as a servitude upon the fee. See HAZELTINE, op. cit. 74; 51 Sol. J. 771. The incidents of the *ius superficies* were in accord with this conception. See 4 BURGE, COL. & F. LAWS, 336.

¹⁸ An easement carries with it all subsidiary easements necessary for its enjoyment. See GALE, EASEMENTS, 8 ed., 492-494. In the present case, then, whether the easement or the better fee theory be followed, there would be a right to the support of the grantee's building at least before the fire. Such a right is an incident to the ownership of any upper chambers. *McConnel v. Kibbe*, 33 Ill. 175; *Keilw.* 98, pl. 4; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449, 450; *Harris v. Ryding*, 5 M. & W. 60, 71; *Smart v. Morton*, 5 E. & B. 30, 47; *Dugdale v. Robertson*, 3 Kay & J. 695, 700. In accord with this are cases holding that one owner can not recover from the other contribution for repairs made on his own part and benefiting the other. *Loring v. Bacon*, 4 Mass. 575; *Wiggin v. Wiggin*, 43 N. H. 561; *Ottumwa Lodge v. Lewis*, 34 Ia. 67. But the upper man must not increase the burden. 1 WASHB., REAL PROP., 6 ed., 18. Cf. CODE NAP. 640. The weight of authority is perhaps, that there is no affirmative duty to repair at common law. See *Tenant v. Goldwin*, 6 Mod. 311, 314; 1 Williams' Saund. (ed. 1871) 557, n. 1; TUD. LEAD. CAS. 3 ed., 219; 2 WASHB., REAL PROP., 6 ed., 342; see *contra*, Anon., 11 Mod. 7; *Keilw.* 98, pl. 4; *Cheeseborough v. Green*, 10 Conn. 318; *Graves v. Berdan*, 26 N. Y. 498, 501. There is such a duty in Scotland. ERSK. INST. (fol. ed.) 357. And in France, where the division of responsibility for the different parts of the house has been worked out with great elaboration. CODE NAP. 664; see 5 Duranton, COURS DE DROIT FRANÇAIS, 385-387; Merlin, REPERTOIRE DE JURIS. tit. Batiment, § 2.

¹⁹ See *John Bros. Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Hanbury v. Jenkins*, [1901] 2 Ch. 401, 422; GALE EASEMENTS, 8 ed., 11.

¹ These questions are of peculiar interest in Massachusetts at the present time, since Governor McCall in his inaugural address, in recommending a constitutional convention to revise the Massachusetts constitution, suggested withholding the Bill of Rights and the articles relating to the judiciary from revision by the convention. THE BOSTON EVENING TRANSCRIPT, Jan. 6, 1916.

² Another recent case in Louisiana involves a similar decision. *State v. American Sugar Refining Co.*, 68, So. 742. For a statement of the facts of these cases, see RECENT CASES, p. 550.

vention contrary to certain restrictions imposed by the enabling act and popular vote calling the convention, were declared invalid. One must recognize in dealing with this sort of case that any theory must be greatly modified by the difficulties experienced by courts in dealing with the validity of the fundamental law.

Under our system of government it is apparently well settled that the ultimate sovereignty is in the people, in the restricted sense of those who are enfranchised.³ The power to change the fundamental law — the written constitution — is in them alone.⁴ It is this principle which causes the courts to recognize generally the right of the legislature, as the organ of the people, to submit a call for a convention of the people, and to regard such a convention as a valid method of constitution making, although the existing constitution contains no provision to that effect.⁵ It is the same idea which leads us to consider with equanimity a revolutionary convention. Such a convention must be distinguished from a constitutional convention, with whose powers this discussion is primarily concerned.⁶ The former arises without the law, existing in opposition or succession to the earlier government — a provisional government with unlimited powers. The latter gains its name both because it is its function to revise the constitution and because it is organized under the existing law. In practice, however, the readiness with which a constitutional convention may usurp powers renders the distinction less important as well as less clear.⁷

The theoretical answer to the questions suggested above is furnished by the extent of the convention's lawful powers, a matter much in dis-

³ See *Penhallow v. Doane's Heirs*, 3 Dall. (U. S.) 54, 80, 94; 1 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE*, 4 ed., 268. For a very full discussion of sovereignty in its relation to conventions, see JAMESON, *CONSTITUTIONAL CONVENTIONS*, 4 ed., ch. 2.

Observe the preamble to the Constitution of the United States, "We, the people of the United States, . . . do ordain and establish this Constitution for the United States of America."

⁴ See *Holmberg v. Jones*, 7 Idaho 752, 758, 65 Pac. 563, 564. See also *Wells v. Bain*, 75 Pa. St. 39, 46; *Commonwealth v. Griest*, 196 Pa. St. 396, 404, 46 Atl. 505, 508. This seems an inevitable corollary to the proposition that the ultimate sovereignty is in the people. See n. 3.

⁵ This seems to be a clearly settled rule in nearly all our jurisdictions. See DODD, *REVISION AND AMENDMENT OF STATE CONSTITUTIONS*, 44; *Collier v. Frierson*, 24 Ala. 100, 108; *Wells v. Bain*, 75 Pa. St. 39, 47. It is also expressly recognized in the earlier of the two principal cases. See *State v. American Sugar Refining Co.*, 68 So. 742, 744 (La.). Judge Jameson mentions twenty-seven conventions called in this way without express constitutional authority. JAMESON, 210. The two expressions of a contrary opinion have received much adverse criticism. *In re the Constitutional Convention*, 14 R. I. 649; *The Opinion of the Justices*, 6 Cush. (Mass.) 573. See JAMESON, §§ 570 *et seq.*; DODD, 45; BRADLEY, *THE METHODS OF CHANGING THE CONSTITUTIONS OF THE STATES, ESPECIALLY THAT OF RHODE ISLAND*.

⁶ For a rather full discussion of the distinguishing characteristics of these two sorts of conventions, see JAMESON, *CONSTITUTIONAL CONVENTIONS*, 4 ed., §§ 6-17. For a briefer discussion, see Braxton, "The Powers of Conventions," 7 VA. LAW REG. 79-82.

⁷ See JAMESON, § 12. It is interesting to note that the Federal Constitutional Convention, which framed our Constitution, exercised revolutionary powers. 1 STORY, *COMMENTARIES ON THE CONSTITUTION*, 5 ed., §§ 274, 275, 279 n. (a). For two recent instances of such action by state conventions, see McKinley, "Two New Southern Constitutions," 18 POL. SCI. QUART. 480, 506-511.

pute. To the leading writer on this subject the convention seems to have but a delegated authority of the strictest sort, a delegation which may be limited either by the people directly or by mere legislation, to be a body in fact subordinate to the legislature.⁸ The chief reason offered for such a view seems to be the danger of too much power in a single uncontrolled assembly. The fact that it is generally declared that a convention should always submit its work to the people for approval, unless that is expressly dispensed with, seems to take much of its force from that argument.⁹ In addition, the ease with which a convention may usurp power and the difficulty of enforcing restrictions are facts which no theory can fail to recognize. At the other extreme is the theory of conventional sovereignty,¹⁰ which regards the convention as a purely representative body, a body not of delegated powers, but one which, being in substance the people themselves, has all the people's sovereign powers. This theory has been most commonly expressed by members of conventions in session, although it is not without judicial recognition.¹¹ But a rather better view, less extreme than either of the preceding ones, regards the convention as a regular organ of the existing government coördinate with the other branches.¹² In its sphere of constitution making it should be supreme, subject only to limitation by the people. It should be free from legislative attempt to limit its powers of revision;¹³ on the other hand it should probably be subordinate to the legislature in purely legislative

⁸ This is the theory running throughout Judge Jameson's book. But see particularly, § 24.

⁹ See JAMESON, § 411; DODD, 62-71; LOBINGIER, *THE PEOPLE'S LAW*, 320-327. Judge Lobingier apparently considers popular ratification an indispensable requirement. He disapproves of giving a convention power to enact a new constitution even by express authority, and characterizes the action of the Virginia convention in enacting without such authority, as "without support in law, logic, or morals." For a discussion of this matter, see LOBINGIER, 301-325; DODD, 68-69. But see Taylor v. Commonwealth, 101 Va. 829, 44 S. E. 754.

¹⁰ See JAMESON, § 307. The chief object of his book was to denounce this theory. JAMESON, § 313.

¹¹ For various expressions of this theory by members of conventions and others, see the text and notes in JAMESON, §§ 308 *et seq.*; Braxton, "Powers of Conventions," 7 VA. LAW REG. 79, 86, 86 n. See also Loomis v. Jackson, 6 W. Va. 613, 708; Sproule v. Fredericks, 69 Miss. 808; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522; Opinion of the Judges of New York (not reported), JAMESON, Appendix D.

¹² A further explanation of the distinctions between these three theories may be desirable. Under the theory of a conventional sovereignty all conventions are really revolutionary; they are above and outside the regular organized government. Judge Jameson emphasizes the distinction between revolutionary and constitutional conventions, since it is only on the ground that their action is revolutionary that he can satisfactorily explain the instances where conventions have ignored restrictions. The third recognizes this distinction, but as of theoretical rather than of practical importance; for whatever may be the rights of conventions its powers are likely to be much in excess of them. This view differs from the theory of conventional sovereignty in that submission to popular vote may be enjoined under it, and that amendments may probably be declared invalid, when they violate binding restrictions.

¹³ See DODD, 80; Braxton, "Powers of Conventions," 7 VA. LAW REG. 79, 96. Where the limitations are included in the popular call for a convention, they should probably be binding. If the people initiated the call, this would be clear. But where, as is more usual, the legislature frames the call, this may in substance give the legislature power to restrict. The only way in which the people could avoid such a restriction would be to reject all proposals containing it, and elect a legislature which would submit a proposal without it; a clumsy and inadequate remedy.

matters, as, for instance, in the manner of submitting the constitution to popular ratification. But just where to draw the line is a difficult and much disputed question.¹⁴ In practice this theory may really approach closely to that of conventional sovereignty.¹⁵ But a realization that in exercising certain powers a convention is revolutionary, should induce a greater respect for properly imposed restrictions.

For two reasons the practical results of all these theories are less different than the theoretical. The first is a lack of power in the courts to enforce many limitations on conventional powers; the second is the frequency of an express or implied ratification by the people of acts done in violation of such restrictions. Consider first the power of the courts to deal with a constitution which has been enacted by the convention without submission to popular vote, but has been accepted as in force by the other branches of the government.¹⁶ If the court assumes to declare the whole constitution invalid, maintaining that it is organized under the old, such a proceeding should be entirely futile.¹⁷ There is no organized government under the old constitution and by its hypothesis, the court has disclaimed its authority to bind any government claiming to be organized under the new. Where, as in the principal case, the court apparently admits the validity of the new constitution, but declares part of it invalid, its course seems even less justifiable. In recognizing part of the new constitution it must recognize its complete validity. Since a court cannot attack the fundamental law, it can declare the new constitution invalid only by action under the old. But this can no longer exist,¹⁸ for its existence is hopelessly inconsistent with the validity of the new. For whether it be called a lawful revision or a peaceful revolution, by the enactment of the new constitution the old government has been displaced and a new one substituted. The court is further beset in these cases by the difficulty that this acquiescence by the legislature may amount to a ratification by the people through the organized govern-

¹⁴ Dodd does not consider methods of submission, or submission if that is an open question, as within the power of the legislature. DODD, 87. See also *State v. Neal*, 42 Mo. 119. Judge Jameson of course holds the contrary view. JAMESON, §§ 413-418; *Wells v. Bain*, 75 Pa. St. 39.

¹⁵ See *supra*, n. 7 and 12.

¹⁶ As in the principal cases. ACTS OF LOUISIANA, EXTRA SESSION, 1913, 1. Although apparently of recent development such a provision is no longer unusual. For instances of such provision, see HALL, CASES ON CONSTITUTIONAL LAW, 10 n. 1. But see LOBINGIER, 324. Though much disturbed by such a provision, or by enactment without such a provision, Judge Lobingier fails to suggest any basis for jurisdiction to attack such action.

¹⁷ See *infra*, n. 22. This can only be possible when the old court hangs over; otherwise the contention would be ridiculous. In theory a court might possibly admit it was organized under the new, and then decide that the constitution was invalid. This would involve that it declare itself non-existent. The futility of such a proceeding would seem to render that a highly improbable decision. See *Koehler v. Hill*, 60 Ia. 543, 614, 15 N. W. 609, 614; *Miller v. Johnson*, 92 Ky. 589, 595-7, 18 S. W. 522, 523-4. In fact a court might remain in existence and usurp the power to make such a decision, if the other branches of the government, though organized under the new constitution, would enforce it. It is to be hoped that no clear-thinking court would deliberately do this.

¹⁸ In the principal cases this is especially clear since the new constitution contains an express provision that the earlier constitution is superseded. LA. CONST. 1913, Art. 326.

ment as their agent.¹⁹ If the court recognizes the power of the legislature to bind the convention, it is inconsistent to deny the legislature the power to unloose that bond.²⁰ If it believe in conventional sovereignty it will, of course, never declare the constitution invalid. If in addition the constitution has been submitted and adopted by popular vote, it would seem that any court which admits that the ultimate sovereignty is in the people must recognize its validity.²¹

But where the convention has merely amended the existing constitution a different question is presented. Here assuming the validity of the restrictions imposed on the convention, a court should have no difficulty in enjoining the submission of an amendment which involves a violation of those restrictions.²² But if the amendment is submitted for popular approval and is ratified, it seems that that expression of popular will should override any irregularity in violating any restriction not imposed by the constitution itself. If the amendment is merely enacted without submission to popular vote, then unless the acquiescence of the legislature can be construed to be an adoption, its validity may certainly be attacked.²³ A closely related question is whether the valid-

¹⁹ It was argued in the principal case, and adopted by the dissenting judge as an alternative ground that the submission and rejection of a proposal for a new constitutional convention between the enactment of the constitution involved in the principal case and the date of the principal case, amounted to an express ratification. This does not seem to be sound, since there cannot be said to be any such intention. It must be deemed to be important evidence of popular acquiescence, however. See *infra*.

²⁰ It is hard to see why this is not a logical result of Judge Jameson's theory. But in fact there is probably not an intention to ratify. Such acquiescence should be of real importance only if we consider the validity of adoption as a political question. See *infra*, n. 24.

²¹ *Miller v. Johnson*, 92 Ky. 589, 18 S. W. 522; *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519; *Brittle v. People*, 2 Neb. 98; *Loomis v. Jackson*, 6 W. Va. 613; see the dissent in *Ellingham v. Dye*, 178 Ind. 336, 415, 99 N. E. 1, 29. In the following cases there was no popular ratification. *Taylor v. Commonwealth*, 101 Va. 829, 44 S. E. 754; *contra*, *Bradford v. Shine*, 13 Fla. 393.

²² It is at this point that the distinction becomes marked between the conventional sovereignty theory and the theory advocated above. There seems to be no reason why submission should not be enjoined if the proposed amendment is invalid. This would seem to be the only proper way in which to attack the validity of such amendments. Such procedure has, however, not been usual. The submission of a new constitution drawn up by a convention has been enjoined. *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1. Elections under an ordinance passed by a convention in alleged excess of its powers has been enjoined. *Wells v. Bain*, 75 Pa. St. 39; *Woods' Appeal*, 75 Pa. St. 59. But in one case an injunction was refused against submission of an amendment proposed by the legislature. *People v. Mills*, 30 Colo. 262, 70 Pac. 322. *Cf.* *Threadgill v. Cross*, 26 Okl. 403, 109 Pac. 558. Notice that there is no difficulty in enjoining ordinary elections held without authority. *De Kalb County v. City of Atlanta*, 132 Ga. 727, 65 S. E. 72; *Tolbert v. Long*, 134 Ga. 292, 67 S. E. 826.

²³ The great weight of authority allows the courts to examine the validity of constitutional amendments, proposed either by a convention or by the legislature, whether or not they have been popularly ratified. In the following cases the courts have declared the amendment invalid. *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *State v. Tuffy*, 19 Nev. 391, 12 Pac. 835; *Bott v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 881; *Koehler v. Hill*, 60 Ia. 543, 14 N. W. 738, 15 N. W. 609; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; see *Collier v. Frierson*, 24 Ala. 100, 111; *contra*, *West v. State*, 50 Fla. 154, 39 So. 412; *The Constitutional Prohibitory Amendment*, 24 Kan. 700; *cf.* *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616. In these cases the amendments have been examined although finally held valid. *State v. McBride*, 4 Mo. 303;

ity of adoption is a political or judicial question; a difficulty which can only be pointed out without discussion here.²⁴ The difficulty of treating it as a judicial question is evidenced by a peculiar doctrine of our law. Courts which declare their power to overthrow an invalid amendment, will refuse to do so if such an amendment has been in force unquestioned for a considerable time.²⁵ To reconcile these two ideas seems impossible; but the doctrine may indicate that this should more properly be treated as a political question, and that the courts should have no power to overthrow any amendment which the other branches of the government have recognized as valid. These questions seem to bare a weak spot in our governmental system. But it is weaker in theory than in practice. The absence of any definite rule is of little consequence where a few cases arise; it is of even less consequence when those cases are such that the practical results of a decision must and should weigh heavily in making it.

NEGLIGENCE IN THE LAW OF DEFAMATION.—The ghost of malice, many a time laid by text-writers and judges,¹ still returns to plague the courts in suits for slander or libel. In England, since the famous *Artemus Jones* case,² malice is, it is true, no more than a formality of pleading. A late Alabama decision, however, gives the term a more substantial vitality. The publisher of a city directory, through an innocent error, placed an asterisk before the name of the plaintiff, that being the customary mode of designating a negro. The plaintiff, of pure Caucasian blood, brought suit for libel. Conceding the Southern doctrine that it is libelous to call a white man a negro,³ the court nevertheless denied recovery, on the ground that where published matter, though "calculated to defame and injure another," is not "necessarily libelous," the defendant can rebut the usual presumption of malice by showing that he acted neither recklessly nor with knowledge that the words were libelous. *Jones v. R. L. Polk & Co.*, 67 So. 577.

It is one of the results of the unfortunate terminology of the common law of libel that three distinct issues, each susceptible of separate defini-

People v. Sours, 31 Colo. 369, 74 Pac. 167; *In re McConaughy*, 106 Minn. 392, 119 N. W. 408; *Lobaugh v. Cook*, 127 Ia. 181, 102 N. W. 1121; *State v. Winnett*, 78 Neb. 379, 110 N. W. 1113. Whether a sufficient number of votes has been cast to ratify is a judicial question. *In re Denny*, 156 Ind. 104, 59 N. E. 359; *Rice v. Palmer*, 78 Ark. 432, 96 S. W. 396; *State v. Powell*, 77 Miss. 543, 27 So. 927. In the following cases the popular ratification has been held defective. *Collier v. Frierson*, 24 Ala. 100; *State v. Swift*, 69 Ind. 505.

²⁴ It is apparent that the whole tendency of our courts is to treat this as a judicial question. See cases in n. 23. DODD, 209 *et seq.* Where there is no popular ratification, this seems sound, although that it may lead to difficulties is apparent from the cases cited *infra*, n. 25.

²⁵ *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *cf. Peck v. Pease*, 18 How. (U. S.) 595.

¹ See especially BOWERS, CODE OF ACTIONABLE DEFAMATION, Appendix II, and cases there cited. Also Jeremiah Smith, "*Jones v. Hulton*," 60 PA. L. REV. 365, 367 ff.

² *E. Hulton & Co. v. Jones*, [1909] 2 K. B. 444, [1910] A. C. 20.

³ *Flood v. News & Currier Co.*, 71 S. C. 112, 50 S. E. 637.

tion, have been bundled together under the term "malice." To make out a case of defamation, a plaintiff must show an injury to his reputation, and a culpable relation to that injury on the part of the defendant. The burden is then on the defendant to relieve himself from this *prima facie* liability by establishing an excuse, such as the truth of the words, or a privilege of uttering them, though false.⁴ It is clear that as to the element of excuse, every person acts at peril. An honest, and even a reasonable belief that defamatory words are true, or, it is conceived, that they were privileged, will afford no excuse if in fact the words were false, or the occasion unprivileged.⁵ There seems to be no modern decision disputing this proposition.

Before the excuse element enters into the case, however, some culpable relation between the defendant and the injury to the plaintiff's reputation must be established. Two issues are involved in this part of the inquiry: one concerns the application of the words to the person who is suing, the other their defamatory character. The question is what degree of culpability in these two respects is necessary to render the defendant liable.

As to the first issue, it is only in rare cases that there is any doubt that the application of the words to the plaintiff was intentional. Some American decisions consider an intention to apply the words to the plaintiff essential.⁶ The English House of Lords, on the other hand, have unanimously concluded that one who publishes defamatory words of a supposedly imaginary person, takes the risk that they may be within the ambit of publication some person to whom a substantial body of the public may apply the words.⁷ In this respect, written words are placed in the familiar category of acts done at peril, together with trespass to chattels or realty, injury by wild beasts, or by water artificially stored.⁸

As to the defamatory character of the words, a similar issue arises. One may suppose words on their face innocent, but in fact conveying a meaning which, in the mind of a person acquainted with certain extrinsic facts, is highly defamatory. What must be the relation of the defendant to those extrinsic facts? In an early New York case it was decided that "where a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment and

⁴ See Holmes, "Privilege, Malice, and Intent," 8 HARV. L. REV. 1. Cf. M'Pherson v. Daniels, 10 B. & C. 263, 272.

⁵ ODGERS, LIBEL AND SLANDER, 5 ed., p. 181; BOWERS, CODE OF ACTIONABLE DEFAMATION, p. 88, n. 1; Jeremiah Smith, "Jones v. Hulton," 60 PA. L. REV. 365, 372.

⁶ Smart v. Blanchard, 42 N. H. 137; Smith v. Ashley, 52 Mass. (11 Met.) 367. The latter case was relied on by the court in the principal case. It has been doubted, however, in its own jurisdiction. Hanson v. Globe Newspaper Co., 159 Mass. 293, 295, 303. The view that, prior to the decision in the Artemus Jones case, libel belonged to the class of intentional injuries was shared by the learned editor of the LAW QUART. REV., vol. 25, p. 341. See also 26 LAW QUART. REV. 103. This view is ably presented in the dissenting opinion of Fletcher Moulton, L. J., in the Court of Appeal, in Jones v. E. Hulton & Co., [1909] 2 K. B. 444, 458.

⁷ E. Hulton & Co. v. Jones, [1910] A. C. 20.

⁸ See the famous opinion of Blackburn, J., in Fletcher v. Rylands, 4 H. & C. 263, 269.

proof to have existed in the breast of the defendant at the time of publication." ⁹ On the other hand, in a Scotch case a birth notice, printed by a newspaper in good faith and in the normal course of business, was held actionable because of the extrinsic fact, entirely unknown to the publisher, that the supposed parents had been married less than a month.¹⁰ This decision has found general favor with text-writers.¹¹

Between liability at peril and liability only for intentional harm an intermediate position has been suggested, and in a few instances acted upon—that as to the applicability of the words to the plaintiff and their defamatory character as determined by extrinsic facts the law should set only a standard of due care.¹² This would not be inconsistent with the settled rule that as to the truth of words due care is not defense. The law may well require an excuse to be established at peril, once *prima facie* liability exists, and yet hesitate to impose that *prima facie* liability without fault. A standard of negligence, unless there are countervailing considerations of social policy, most nearly approaches the popular conception of justice, for when a jury says a man has acted negligently, it is merely saying in artificial words that he has so conducted himself that he in justice should bear the loss.¹³ Grounds of social policy must be invoked, to justify holding a man liable who has acted reasonably.¹⁴ But considerations such as those which justify ab-

⁹ *Caldwell v. Raymond*, 2 Abb. Prac. (N. Y.) 193.

¹⁰ *Morrison v. Ritchie Co.*, 4 Scotch Sess. Cas., 5th ser. 645. For a discussion of this case, see 22 JURID. REV. 254. See, however, n. 14, *infra*.

¹¹ SALMOND, TORTS, 3 ed., 411; Jeremiah Smith, "Jones v. Hulton," *supra*, at P. 473.

¹² *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392. On account of misplaced initials, a defamatory statement appeared on its face to refer to the plaintiff. The court below required an intent to defame the plaintiff. The appellate court reversed, saying that carelessness would be enough. But see same case, 118 Cal. 366.

Clark v. North American Co., 203 Pa. 346, 53 Atl. 237. The defendant published a news report that "John Clark, Watchman in Starr Jordan Park," had been arrested for burglary. James Clark, a watchman in Starr Garden Park, and a brother of the John Clark who was arrested, sued. The court held erroneous an instruction that the question was whether the plaintiff was meant by the article. The jury should consider, the court said, "whether, notwithstanding the difference in name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to."

But see, on the other hand, Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415, 436: "The whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words." And POLLOCK, TORTS, 9 ed., 568: "Generally speaking, there is no such thing as liability for negligence in word as distinguished from act; and this distinction is founded in the nature of the thing."

¹³ See HOLMES, THE COMMON LAW, 94 ff. See also, by the same author, "Law in Science and Science in Law," 12 HARV. L. REV. 443, 458.

¹⁴ Even the Scotch court seems to hesitate at carrying to its full conclusion the theory of liability at peril. In *Wood v. Edinburgh Evening News, Ltd.*, 1910 Scotch Sess. Cas. 895, a newspaper, in good faith, printed an advertisement reading "Nurse (wet) wanted immediately. Apply Kinlieth Arms, Juniper Green." The advertisement appears to have been furnished by a practical joker, for the only married couple at the address had been wedded only five months. This couple brought suit, but the court held that the words would not bear the innuendo of immorality sought to be put upon them. Two of the judges reserved opinion, despite the earlier case of *Morrison v. Ritchie* (*supra*, n. 10) whether a newspaper would be liable without negligence for a statement on its face innocent. This was a case, it will be noted, which com-

solute liability in workmen's compensation laws are obviously absent in libel cases.¹⁵

In the principal case the mistake was primarily one as to the truth of the publication. The statement was that the plaintiff was a negro, and the defense was that this statement, though untrue, was made without recklessness or knowledge of falsity. Obviously this would be no defense where the elements of *primâ facie* liability exist. It is a peculiarity of this class of libels, however, that truth is not only an excuse, but negatives *primâ facie* liability, for to say of a man that he is a negro is considered injurious to his reputation only if he was in fact, or at least by repute, a white man. The case falls, therefore, in the category of words on their face innocent, but defamatory because of extrinsic unknown facts.

THE INCOME TAX AND THE SIXTEENTH AMENDMENT. — Under the Constitution, taxes are divided into two classes,¹ it being provided that direct taxes must be apportioned among the states,² and that duties, excises, and imports shall be uniform.³ The Sixteenth Amendment, ratified in 1913, gives Congress power to lay a tax on income "from whatever source derived," without apportionment. In *Brushaber v. Union Pacific R. R. Co.*,⁴ Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is "indirect," rather than as making an exception to the rule that direct taxes must be apportioned. This construction was unnecessary to the result of the case, for, although a contrary result would, as the court said, make two parts of the Constitution inconsistent, it is perfectly possible for an Amendment to make an exception to a constitutional rule or even a complete change therein. Nevertheless, the interpretation adopted by the court will probably be accepted, as the Amendment was hardly intended to create a tax subject neither to apportionment nor to uniformity, and so the case seems to settle the place of the income tax in the constitutional scheme of classification.

The exact distinction between a "direct" and an "indirect" tax does not seem to have been very clearly understood by the framers of the Constitution.⁵ The shiftableness of the ultimate burden is the usual

bined the features of the Artemus Jones case and the Morrison case: it involved the issue of the degree of culpability both with respect to the application of the words to the plaintiff and the defamatory character of the words.

¹⁵ See Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129.

¹ It seems to be generally agreed to-day that all possible taxes fall within one or the other of the two constitutional classes. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 557. It was formerly believed, however, that there might be a tax falling in neither class, which Congress might levy in any manner it saw fit. See *Hylton v. United States*, 3 Dall. (U. S.) 171, 173, 176. See 1 STORY, ON THE CONSTITUTION, 5 ed., § 955.

² Art. I, Sec. 2, cl. 3; Art. I, Sec. 9, cl. 4.

³ Art. I, Sec. 8, cl. 1.

⁴ Sup. Ct. Off., No. 140, decided January 24, 1916. See RECENT CASES, p. 558.

⁵ Mr. Madison records: "Mr. King asked what was the precise meaning of direct taxation. No one answered." See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 563.

economic test; and according to Locke, Turgot, and the physiocrats, whose views were widely accepted in the eighteenth century, the only possible direct tax would be on realty or the income therefrom,⁶ because of their belief that the burden of all taxes ultimately falls on the land. The question was first presented to the Supreme Court in *Hyllon v. United States*.⁷ In that case, the court, composed almost entirely of members of the Constitutional Convention, held that an unapportioned tax on carriages kept for personal use or for hire was valid, and stated that direct taxes, in the constitutional sense, included only a capitation, or poll tax, and a tax on land. They expressly refused to decide the status of a tax on the produce of land.⁸ This ruling was followed in a number of later decisions, in which a tax on the income of insurance companies,⁹ a tax on bank note circulation,¹⁰ a real estate succession tax,¹¹ and finally, in *Springer v. United States*,¹² a general income tax were held valid without apportionment. The only taxes apportioned by Congress were those on real estate and on slaves.¹³

Thus, the rule announced in the *Hyllon* case became the settled interpretation of the constitutional provisions, and was accepted by all the text-writers on the subject.¹⁴ In 1895, however, the Supreme Court, in the famous case of *Pollock v. Farmers' Loan & Trust Co.*,¹⁵ decided by a majority of six to two, that a tax on the income from land, being in substance a tax on the land itself, was a direct tax. On rehearing,¹⁶ it was further held by a vote of five to four, that the same rule must apply to a tax on the income from personalty, since, on the test of shiftableness, no distinction could be made between a tax on the ownership of realty, and one on the ownership of personalty. The *Hyllon* case was rather summarily dismissed, as not covering the point at issue.¹⁷ It was said in the first hearing that *Springer v. United States* was not in point, because only the question as to income from realty was before the court;¹⁸ on rehearing, the case was not mentioned by the majority. This decision

⁶ See 24 HARV. L. REV. 31, 33.

⁷ 3 Dall. (U. S.) 171. The decision went on the ground of the manifest absurdity and injustice of apportioning a tax on carriages or similar commodities, as well as on the supposed technical meaning put on "direct taxes" by the framers of the Constitution.

⁸ By Paterson, J., 3 Dall. (U. S.) 171, 177.

⁹ *Pacific Insurance Co. v. Soule*, 7 Wall. (U. S.) 433.

¹⁰ *Veazie v. Fenno*, 8 Wall. (U. S.) 533.

¹¹ *Scholey v. Rew*, 23 Wall. (U. S.) 331.

¹² *Springer v. United States*, 102 U. S. 586.

¹³ For a list of the direct taxes levied previous to 1880, see *Springer v. United States*, 102 U. S. 586, 598.

The inclusion of slaves in these taxes is to be explained on the ground that slaves were regarded as realty in many of the slave-holding states. See *Springer v. United States*, 102 U. S. 586, 599.

¹⁴ See KENT, COMMENTARIES, Holmes' ed., 254; 1 STORY, ON THE CONSTITUTION, § ed., § 955; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 686.

¹⁵ 157 U. S. 429. In this case, as in the *Brushaber* case, the suit was brought by a stockholder to enjoin the corporation from paying the tax. The dissent believed that the injunction could not be granted, since an injunction against the payment of taxes is forbidden by REV. STAT., § 3224, U. S. COMP. STAT., § 5947. The majority, however, took the other view without argument.

¹⁶ 158 U. S. 601.

¹⁷ *Ibid.*, 626.

¹⁸ 157 U. S. 429, 579.

has been much criticised, both because it overthrew a well-settled rule of construction, and disregarded the intention of the framers of the Constitution,¹⁹ and because since an apportioned income tax was impracticable, it prevented the government from availing itself of this valuable source of necessary income.²⁰

The difficulty thus created was finally met by the adoption of the Sixteenth Amendment, which was immediately followed by the Tariff Act of 1913,²¹ providing for a graduated tax on all incomes over \$4000, with certain exemptions, and imposing on all corporations a duty to retain and pay over the tax due on the interest from corporate bonds and mortgages. The plaintiff in the *Brushaber* case attacked the constitutionality of the tax, on the ground that, as it did not comply with the provisions of the Amendment, since the words "income from whatever source derived" forbade exemptions, it was a direct tax which must be apportioned under the rule of *Pollock v. Farmers' Loan & Trust Co.*²² The court decided, however, that the tax was within the scope of the Amendment, the words in question having been introduced merely to do away with the distinction between income from property and professional earnings made in the *Pollock* case. It was also claimed that the tax, if indirect, violated the uniformity rule, and that the progressive tax based on wealth, and the duty imposed on corporations, were in conflict with the due process clause of the Fifth Amendment. It is well settled, however, that the due process clause is not a limitation on the taxing power of Congress,²³ unless the classification is so arbitrary as to amount to a real confiscation of property. Moreover, it is clear that only geographical uniformity is necessary to satisfy the requirements of Article I, Section 8.²⁴ Thus, the unanimous opinion of the court in upholding the constitutionality of the tax is unquestionable, whether the Amendment is regarded as authorizing an exception to the rule of apportionment, or as definitely classifying the income tax as indirect.

IS LEGAL OR MORAL WRONG INVOLVED IN THE "KNOWLEDGE OF RIGHT AND WRONG" TEST OF INSANITY? — In an opinion of marked force and ability, the New York Court of Appeals, speaking through Judge

¹⁹ See 9 HARV. L. REV. 198; 20 HARV. L. REV. 280; 24 HARV. L. REV. 31.

²⁰ The practical effect of the decision seems to have been much less than might have been expected. Four years later, the Supreme Court, in *Knowlton v. Moore*, 178 U. S. 41, sustained an unapportioned succession tax on land. And, in 1911, in *Flint v. Stone, Tracy Co.*, 220 U. S. 107, a tax upon the business of corporations, measured by the entire net income, was unanimously upheld. In both these decisions, the court distinguished the *Pollock* case on the ground that the tax there discussed was imposed on property because of its ownership, while in these cases it was a tax on the right to use property in a certain way. But the distinction seems more formal than substantial. See 24 HARV. L. REV. 563.

²¹ Sec. II, ch. 16, 38 U. S. STAT. AT L. 166.

²² 158 U. S. 601, 635.

²³ *Patton v. Brady*, 184 U. S. 608; *McCray v. United States*, 195 U. S. 27, 61; *Billings v. United States*, 232 U. S. 261, 282.

²⁴ *Head Money Cases*, 112 U. S. 580, 594; *Knowlton v. Moore*, 178 U. S. 41, 83; *Patton v. Brady*, 184 U. S. 608, 622; *Flint v. Stone, Tracy Co.*, 220 U. S. 107, 158; *Billings v. United States*, 232 U. S. 261, 282.

Cardozo, has given a broad construction to the narrow statutory test of insanity in force in that state. In the case under discussion, the trial court had excluded the defense that the accused, though he knew he was committing the legal crime of murder, insensibly believed that he acted under the direct command of God. Conviction was affirmed because the record contained an admission that the defendant was sane, but the ruling of the trial court was disapproved in an elaborate *dictum*, which will doubtless have the effect of establishing the New York rule. *People v. Schmidt*, 216 N. Y. 324.

The New York Penal Law¹ adopts the language of *McNaghten's Case*,² which gives a defense to insane persons only when they did not know the nature or quality of the act they were doing, or did not know "that the act was wrong." It seems that the judges in *McNaghten's Case*, who only stated the law as they found it, understood "wrong" as meaning only legal wrong.³ Judge Cardozo, however, considers the word to have the broader signification of moral, as well as legal wrong. Some reliance is placed on English cases where the jury were charged in general terms that the accused must have known the act to be "contrary to the laws of God and man," or must have understood the "wickedness" of his act, and other similar phrases. But in the ordinary case it is really not necessary to distinguish legal from moral wrong, and courts may incline to use such general expressions rather than burden the jury with unnecessary technical refinements. On the other hand, if the few reported American cases that are either decisive or explicit reflect the meaning of the rest, the ambiguous language of the state courts of to-day refers to "wrong" in its broader interpretation.⁴ The penal codes of the various states⁵ are as silent on the question as that of New York, but of the foreign codes that have adopted substantially the same test six expressly use the words "criminality" or "illegality" whereas only two define "wrong" in its moral sense.⁶

¹ § 1120.

² 10 Cl. & F. 200.

³ In the debate in the House of Lords prior to asking the opinions of the judges on the *McNaghten Case*, Lord Brougham said "he knew the learned judges used the phrase with reference to the commands of the law." 67 HANSARD'S DEBATES, Third Series, 732. See also the opinions in accord in OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 34 ff., 142, and 148 ff., and in STROUD, MENS REA, 73-77. See WOOD RENTON, LAW OF AND PRACTICE IN LUNACY, 902, for the other view. The doubt on the subject is due largely to ambiguous phrases used in charges to juries. See *Bellingham's Case*, I. COLLINSON, LUNACY, 636, 673; *Regina v. Townley*, 3 F. & F. 839; *Regina v. Layton*, 4 Cox C. C. 149. But compare the explicit language of *Bramwell's charge in Regina v. Dove*, cited in WOOD RENTON, LAW OF AND PRACTICE IN LUNACY, 901: "You must be satisfied that he had not a sufficient degree of reason to know he was doing an act which was wrong. Of course, that means doing an act prohibited by law. . . ." It is interesting to know how Sir J. F. Stephens would have charged the jury on the facts of the principal case. In his HISTORY OF THE CRIMINAL LAW, II, p. 160, in a note he says: "My own opinion however is that if a special divine order were given to a man to commit murder I should certainly hang him for it unless I got a special divine order not to hang him."

⁴ *Kearney v. State*, 68 Miss. 233, 241, 8 So. 292, 294, seems to be the only direct decision, but in the charge in *Guiteau's Case*, 10 Fed. 161, 182, the court said: "If a man sincerely believes he has a command from the Almighty to kill, it is difficult to understand how a man *can* know it is wrong to do it." Usually the language of the courts is loose and indefinite. See *State v. Jackson*, 87 S. C. 407, 415, 69 S. E. 883, 886.

⁵ Collected in 3 JOURNAL OF CRIMINAL LAW, 890, and 4 *Id.*, 67.

⁶ Collected in OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, c. 3.

In theory, legal wrong would seem the proper interpretation. If the law is to be an efficient preventive of crime, all who could be deterred should be threatened with its sanctions.⁷ Only with the irresponsible, against whom the threat of the law is vain, must the law have recourse to the hope of a cure by the psychopaths. Irresponsibility results from an absence of choice, that is, where mental disease or infirmity either inhibits the ability to choose or affects the understanding of the alternatives. It is true, the *McNaghten* test has been criticised as looking only to the understanding and ignoring the volition element, and some courts have consequently recognized irresistible impulse as a defense negating a voluntary choice.⁸ But that possibility is admittedly excluded in New York by the code provision.⁹ If, then, the supposed command of God, in the principal case, was irresistible, there would be no defense under the code on that ground. If resistible, then it is a case of one who voluntarily broke the law of the land for moral reasons, and in this respect the insane man is in no better position than the Mormon who feels impelled by divine command to commit bigamy.¹⁰ For the law is not concerned with insanity as such, but only as it bears on the responsibility of the actor. In each case the defendant has made his choice, with a capacity to understand and obey the law, and he should be visited with its penalties.

It is entirely natural that the court should chafe at the narrowness of the statutory test, and seek to give it the broadest interpretation. Our attitude toward the insane defendant has undergone a change. A hundred years ago courts were presented with the alternatives of hanging the defendant or of casting him into a madhouse; there was little room for mercy in the choice. But to-day the defendant can be sent to a hospital in hope of a cure; and the danger is that mercy will exaggerate the hope. However, the construction adopted would cover only a small and anomalous class of cases of questionable expediency, and would leave unremoved the essential objection to the *McNaghten* test. The proper direction for reshaping the law on this subject is the adoption, not of any legal test however broad, but of the recommendations of the American Institute of Criminal Law and Criminology.¹¹ Let the psychopathic experts, chosen by the impartial court, examine the defendant as a patient and tell the jury how his alleged mental disease had impaired his understanding and volition in respect to the act charged; let the court charge the jury as to what understanding and volition are necessary to the crime; then let the jury measure the facts by the legal requirements. Such a division of labor would abate somewhat the long-standing conflict between the legal and medical professions, recognizing, as it does, the distinctness of the legal and medical problems involved.

⁷ See Lord Bramwell, "Insanity and Crime," 18 NINETEENTH CENTURY, 893.

⁸ *Plake v. State*, 121 Ind. 433, 23 N.E. 273. For further citations, see 3 WITTHAUS & BECKER, MEDICAL JURISPRUDENCE, 2 ed., 450 and 455.

⁹ See *Flanagan v. People*, 52 N. Y. 467; *People v. Wood*, 126 N. Y. 249, 268, 27 N. E. 362, 367.

¹⁰ *Reynolds v. United States*, 98 U. S. 145.

¹¹ See REPORT OF COMMITTEE B, 1911, 2 JOURNAL OF CRIMINAL LAW, 521, 525. Alabama (*Parsons v. State*, 81 Ala. 577, 2 So. 854) and New Hampshire (see *Doe, J.*, in *State v. Pike*, 49 N. H. 399, 408) have progressed so far as to abolish the legal tests for insanity, but they both lack the important feature of an impartial selection of the experts by the court.

UNIFORM CONSTRUCTION OF THE UNIFORM ACTS. — With the widespread adoption of the growing number of Uniform Acts, recommended by the Commissioners on Uniform State Laws, the question of what principles should be applied by the courts in their construction is becoming increasingly important. In a recent case before the Supreme Court it was urged that the Uniform Warehouse Receipts Act was but a step in the development of the state law, and that prior decisions of the state court were safe guides to its construction; but the court rejected that view, and so interpreted the act as to accomplish as far as possible its fundamental purpose to bring the law of the state into harmony with the commercial law of the whole country. *Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, Sup. Ct. Off., No. 117.¹

The Conference of Commissioners on Uniform State Laws held its first meeting in 1892.² Since that time it has approved and recommended for adoption by the states fifteen Uniform Acts.³ The purpose of the Conference is to secure uniformity of law on matters which from their nature are largely interstate, by voluntary action on the part of all the states, since this end is unattainable through the federal government because of constitutional limitations.⁴ But obviously, if the courts place diverse constructions on the statutes so as to perpetuate former local doctrines, this attempt to bring order out of chaos will fail of success.⁵ Uniformity of the "judge-made law" is as essential as uniformity of the statute law. In many cases the courts have recognized the purpose of the Uniform Acts, and have construed them liberally, examining decisions from other courts under the same sections of the acts in order to secure uniformity, even though this may have necessitated a change from the old rule in their own state.⁶ But a number of courts have ig-

¹ For a more complete statement of this case, see RECENT CASES, p. 561.

² See PROCEEDINGS OF THE TWENTY-FIFTH CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Aug. 1915, p. 1.

³ *Ibid.*, p. 139.

⁴ See 36 AM. BAR ASS'N REP. 897, 898.

⁵ Mr. Justice Hughes forcibly expressed this danger in the principal case, p. 6: "It is apparent that if these Uniform Acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. . . . [The Uniform Act] should not be regarded merely as an offshoot of local law."

⁶ Under the Uniform Bills of Lading Act. *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025.

Under the Uniform Sales Act. *Pope v. Ferguson*, 82 N. J. L. 566, 83 Atl. 353.

Under the Uniform Warehouse Receipts Act. *Kershaw v. Booth Fisheries Co.*, 177 Ill. App. 117.

Under the Negotiable Instruments Law. *Wirt v. Stubblefield*, 17 App. D. C. 283; *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 112 N. W. 807; *Mechanics' & Farmers' Savings Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071; *Vanderford v. Farmers' & Mechanics' National Bank of Westminster*, 105 Md. 164, 66 Atl. 47; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086; *Rockfield v. First National Bank of Springfield*, 77 Oh. St. 311, 83 N. E. 392; *Felt v. Bush*, 41 Utah 462, 126 Pac. 688; *Trustees of American Bank of Orange v. McComb*, 105 Va. 473, 54 S. E. 14; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451; *First National Bank of Shawano v. Miller*, 139 Wis. 126, 120 N. W. 820, and cases cited in n. 18.

nored the ideal⁷ and have placed a strict construction on the acts, in favor of the law as declared in their own decisions before the adoption of the statutes, often without any examination of the decisions in other states.⁸

As the Negotiable Instruments Law is the oldest and the most widely adopted of the Uniform Acts,⁹ it has been interpreted the most frequently; but the way the courts deal with it typifies their attitude toward the others. The Louisiana court, overlooking the Negotiable Instruments Law and following the former rule of the state, held that an anomalous indorser was presumed to be, not an indorser, but a surety.¹⁰ The Nebraska court decided that a check was still an assignment under the law,¹¹ clinging to its former doctrine and citing no cases from other jurisdictions, though Virginia had previously reached the opposite conclusion.¹² Other courts have failed to refer to the law at all in cases to which it applied.¹³ The New York courts have been among the worst offenders, frequently ignoring the law entirely, and very rarely citing any decisions except their own former ones.¹⁴ They have been very reluctant to admit that any former rules are changed by the law.¹⁵

⁷ These courts disregard the express provision for uniform construction contained in the commercial acts. The Uniform Warehouse Receipts Act, § 57: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." A similar provision is contained in the Uniform Sales Act (§ 74) and in the Uniform Bills of Lading Act. The Negotiable Instruments Law is entitled: "A General Act Relating to Negotiable Instruments (being an Act to Establish a Law Uniform with the Laws of Other States on that Subject)." See WILLISTON, SALES, § 617; BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 1. See 39 AM. BAR ASS'N REP. 1068; 2 AM. BAR ASS'N JOURNAL, No. 1, pp. 60-78.

⁸ Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239; First National Bank of Lisbon v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 546. See also cases cited in notes 11, 14, 19. See 34 AM. BAR ASS'N REP. 1030; 39 *Id.*, 1065, 1067.

⁹ The Negotiable Instruments Law was approved by the Commissioners on Uniform Laws in 1896, and had been adopted in forty-seven jurisdictions in August, 1915. See PROCEEDINGS OF THE TWENTY-FIFTH CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, pp. 139, 141; 39 AM. BAR ASS'N REP. 1085.

¹⁰ John M. Parker & Co. v. Guillot, 118 La. 223, 42 So. 782; Hackley State Bank v. Magee, 128 La. 1008, 55 So. 656. The Negotiable Instruments Law, §§ 63, 64, governs this point. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 75, 76.

¹¹ Farrington v. F. E. Fleming Commission Co., 94 Neb. 108, 142 N. W. 297. This case is criticised in 27 HARV. L. REV. 177. The result is directly opposed to the express words of the Negotiable Instruments Law, § 189. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 155.

¹² Baltimore & Ohio R. Co. v. First National Bank of Alexandria, 102 Va. 753, 47 S. E. 837.

¹³ First National Bank of Lisbon v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 546; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Polhemus v. Prudential Realty Corporation, 74 N. J. L. 570, 67 Atl. 303; Heavey v. Commercial National Bank of Ogden City, 27 Utah 222, 75 Pac. 727; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119.

¹⁴ Birmingham Trust & Savings Co. v. Whitney, 95 N. Y. App. Div. 280, 88 N. Y. Supp. 578; Oriental Bank v. Gallo, 112 N. Y. App. Div. 360, 98 N. Y. Supp. 561; Haddock, Blanchard & Co. v. Haddock, 118 N. Y. App. Div. 412, 103 N. Y. Supp. 584; Williamsburgh Trust Co. v. Tum Suden, 120 N. Y. App. Div. 518, 105 N. Y. Supp. 335; Hyman v. Doyle, 53 N. Y. Misc. 597, 103 N. Y. Supp. 778; Citizens' Savings Bank v. Couse, 68 N. Y. Misc. 153, 124 N. Y. Supp. 79.

¹⁵ "We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws, and not make new rules; and certainly it was never intended that settled usages in respect of commer-

As an illustration, the New York doctrine that one receiving a note as collateral security for a preëxisting debt was not a holder for value,¹⁶ was declared by the first case after the adoption of the law to be changed,¹⁷ the result which was reached by courts of other states which had previously held the New York view;¹⁸ but later New York cases, not citing decisions from any other jurisdiction, held the former rule not altered by the law.¹⁹ The point has not yet been directly decided by the Court of Appeals, so that the final result in New York is still uncertain.²⁰

The Commissioners on Uniform Laws recognized the menace to uniformity in the growing divergence in judicial interpretation,²¹ and in 1913 they appointed a Committee on Uniformity of Judicial Decisions to combat this tendency.²² This committee has not only brought the need of a uniform construction to the attention of every court of last resort in the United States, but is also tabulating all the decisions rendered under the commercial acts, and on request furnishes references of all the cases under any section of any act to the courts.²³ The principal case, throwing the influence of the Supreme Court vigorously on the side of uniform construction, is an encouraging sign. It is to be hoped that all the courts will come to recognize the purpose of the acts to secure uniformity, and after freely examining decisions from other

cial paper, founded upon decisions covering a period of eighty years and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such a body." Sutherland v. Mead, 80 N. Y. App. Div. 103, 109, 80 N. Y. Supp. 504, 509.

¹⁶ Coddington v. Bay, 20 Johns. 637, is the leading case for the old New York rule.

¹⁷ Brewster v. Shrader, 26 N. Y. Misc. 480, 57 N. Y. Supp. 606. The Negotiable Instruments Law, §§ 25, 27, governs this point. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., 32 ff. It seems clear that the law was intended to change the old New York rule on this point and bring it into uniformity with the prevailing doctrine.

¹⁸ Graham v. Smith, 155 Mich. 65, 118 N. W. 726; State Bank of Freeport v. Cape Girardeau & C. R. Co., 172 Mo. App. 662, 155 S. W. 1111. See Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822. In Payne v. Zell, 98 Va. 294, 36 S. E. 379, the court said that whatever the rule had been at common law, the Negotiable Instruments Law had settled it in accord with the above cases.

¹⁹ Sutherland v. Mead, 80 N. Y. App. Div. 103, 80 N. Y. Supp. 504; Roseman v. Mahony, 86 N. Y. App. Div. 377, 83 N. Y. Supp. 749; Hover v. Magley, 48 N. Y. Misc. 430, 96 N. Y. Supp. 925. Cf. *In re Hopper-Morgan Co.*, 154 Fed. 249. See criticism of above cases in 27 AM. BAR ASS'N REP. 658; 34 *Id.*, 1034 ff.

²⁰ In later New York cases there are *dicta* to the effect that the Negotiable Instruments Law has changed the former New York rule. See King v. Bowling Green Trust Co., 145 N. Y. App. Div. 398, 402, 129 N. Y. Supp. 977, 980; Broderick & Bascom Rope Co. v. McGrath, 81 N. Y. Misc. 199, 201, 142 N. Y. Supp. 497, 498. And it is fair to say that the more recent New York decisions show a more liberal disposition toward the Uniform Acts. Van Vliet v. Kanter, 139 N. Y. App. Div. 603, 124 N. Y. Supp. 63; King v. Bowling Green Trust Co., 145 N. Y. App. Div. 398, 129 N. Y. Supp. 977; Casper v. Kuhne, 79 N. Y. Misc. 411, 140 N. Y. Supp. 86. "The desirability of uniformity in the laws of various states with reference to negotiable instruments is so obvious, and the legislative intent to harmonize our theretofore conflicting decisions with those of other jurisdictions is, to my mind, so clearly expressed, that full effect should be given thereto." Broderick & Bascom Rope Co. v. McGrath, 81 N. Y. Misc. 199, 201, 142 N. Y. Supp. 497, 498.

²¹ See 34 AM. BAR ASS'N REP. 1051 ff.; 38 *Id.*, 1009 ff.; 39 *Id.*, 1065.

²² See 38 AM. BAR ASS'N REP. 980.

²³ See PROCEEDINGS OF THE TWENTY-FIFTH CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, p. 202; 39 AM. BAR ASS'N REP. 1067, 1068.

states will construe the acts liberally so as to bring their own decisions into accord. Not till then will there be actual uniformity of law.

IS A MAN'S ILLEGAL PLACE OF BUSINESS HIS CASTLE? — Although under the early law a plea of self-defense to a charge of homicide could not be availed of, and the jury were allowed to convict, leaving the prisoner to the mercy of the king, it gradually came to pass that the plea was accepted as a valid legal defense.¹ As the killing is not in self-defense, unless it reasonably appears to the assailed that there is no other way of saving his life² the assailed must "retreat to the wall" before any right of self-defense can arise. Such is the law in many jurisdictions to-day.³

But from the earliest times there has been something sacred about the dwelling house. "A man's house is his castle" is not an overstatement of the rights of the householder.⁴ His house is more than his castle; it is his "wall" from which he has no duty to retreat when attacked.⁵ Although there are conflicting statements in the books, the doctrine that a man when assailed in his own house, rather than flee, may kill to save his life, is probably not based on the theory that the homicide is justifiable as preventing an attack on property, but that it is excusable because committed in self-defense.⁶ What the householder is protecting is

¹ In a case in Y. B. 4 HEN. VII, 2, the bar claimed that a pardon was unnecessary, but the justices were of a contrary opinion. In Y. B. 26 HEN. VIII, 5, the prisoner was released without a pardon. See Professor Beale's article, "Retreat from a Murderous Assault," 16 HARV. L. REV. 567-573; also 2 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW, 476-483.

² See charges to jury, *Regina v. Symondson*, 60 J. P. 645; *Regina v. Smith*, 8 C. & P. 160.

³ *Allen v. United States*, 164 U. S. 492, 497; *State v. Donnelly*, 69 Ia. 705, 27 N. W. 369; *State v. Rheams*, 34 Minn. 18, 24 N. W. 302. See *Keith v. State*, 97 Ala. 32, 11 So. 914. See also 4 BL. COM. 185, "The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him."

⁴ See 1 HALE P. C. 487, "For his house is his castle of defense." Meade's and Belt's case, 1 Lewin C. C. 184, 185, Holroyd, J. (charging jury), "for a man's house is his castle, and therefore in the eye of the law it is equivalent to an assault."

⁵ *Alberty v. United States*, 162 U. S. 499, 505; *People v. Tomlins*, 213 N. Y. 240, 107 N. E. 496; *Brinkley v. State*, 89 Ala. 34, 8 So. 22; *State v. Patterson*, 45 Vt. 308, 318; *Elder v. State*, 69 Ark. 648, 657, 65 S. W. 938, 941; *People v. Newcomer*, 118 Cal. 263, 272, 50 Pac. 405, 409; *People v. Lewis*, 117 Cal. 186, 193, 48 Pac. 1088, 1090; *State v. Middleham*, 62 Ia. 150, 154, 17 N. W. 446, 447; *Estep v. Commonwealth*, 86 Ky. 39, 4 S. W. 820; *Wright v. Commonwealth*, 85 Ky. 123, 132, 2 S. W. 904, 908; *State v. O'Brien*, 18 Mont. 1, 11, 43 Pac. 1091, 1093. See *Regina v. Symondson*, 60 J. P. 645. See also Prof. Beale, "Retreat from a Murderous Assault," 16 HARV. L. REV. 567, 579; Prof. Beale, "Homicide in Self-defense," 3 COL. L. REV. 526, 540. The doctrine that a man's house is his castle has been extended in a few jurisdictions in the United States to cover not only the house itself, but also the surrounding premises. *Beard v. United States*, 158 U. S. 550, 559; *Baker v. Commonwealth*, 93 Ky. 302, 19 S. W. 975; *Naugher v. State*, 105 Ala. 26, 17 So. 24. See *Rex v. Scully*, 1 C. & P. 319. But see *Thomas v. State*, 69 So. 315 (Ala.)

⁶ Bracton speaks as if homicide in warding off a murderous attack in the dwelling house was justifiable rather than excusable. "*Item erit si quis Hamsokne quae dicitur invasio domus, contra pacem domini regis in domo sua se defenderit, et invasor occisus fuerit, impersecutus et inultus remanebit, si ille quem invasit aliter se defendere non potuit, dicitur enim quod non est dignus habere pacem qui non vult observare eam.*" BRACTON, F 144 b. This seems to imply that reasons other than self-defense are be-

not the house but his own life. So where the doctrine has been held to cover a man's place of business the same principles should apply.⁷

Yet in a recent case the Alabama Supreme Court held that where a man is attacked at his illegal liquor still, he is bound to retreat. *Hill v. State*, 69 So. 941, 946 (Ala.).⁸ It was said that because the business is illegal the owner has no legal right on the premises. But the illegality of a business does not abrogate the owner's rights in this respect; and if a man's place of business is as much his castle as his dwelling house, he has, as against private persons, a legal right there whether or not the business is unlawful.⁹ However, the decision in the principal case may perhaps be due to a revulsion of feeling against the view held in many jurisdictions that one man's "honor" is worth more than another's life — a doctrine which is the logical result of denying that there is any duty to retreat when one is attacked in a place where he has a legal right to be.¹⁰ That one man may stand on his rights at the expense of another's life is a doctrine which, although it finds some support in continental law, seems contrary to the principles of the common law and to modern ideas concerning the sacredness of human life.¹¹ After all, it may well

hind the exception. But it is clear that homicide in defense of the house was not considered justifiable unless the attack was felonious. See 1 HALE P. C. 487; 4 BL. COM. 180. And the right of the assailed to stand his ground in his own house is therefore a right of self-defense merely. See 1 HALE P. C. 486; *Rex v. Scully*, 1 C. & P. 319; *State v. Patterson*, 45 Vt. 308, 320; Prof. Beale, "Homicide in Self-defense," 3 COL. L. REV. 526, 541.

⁷ Many American jurisdictions have held the right of self-defense to be the same in the place of business as it is in the dwelling house. *Askew v. State*, 94 Ala. 4, 10 So. 657 (livery stable); *Willis v. State*, 43 Neb. 102, 114, 61 N. W. 254, 258 (saloon); *Bean v. State*, 25 Tex. App. 346, 357, 8 S. W. 278, 279 (cotton gin); *Sparks v. Commonwealth*, 89 Ky. 644, 651, 20 S. W. 167, 168 (store); *Tingle v. Commonwealth*, 11 Ky. L. Rep. 224, 11 S. W. 812 (office); *Foster v. Territory*, 56 Pac. 738 (Ariz.) (saloon). See *Morgan v. Durfee*, 69 Mo. 469, 479 (office). But see *contra*, *Hall v. Commonwealth*, 94 Ky. 322, 325, 22 S. W. 333, 334 (grocery store); *State v. Smith*, 100 Ia. 1, 6, 69 N. W. 269, 270 (store). The fact that the parties are co-owners is not important. *Jones v. State*, 76 Ala. 8, 16. A servant's right is probably as good as the owner's. See *Stevens v. State*, 138 Ala. 71, 83, 35 So. 122, 126; *Perry v. State*, 94 Ala. 25, 10 So. 650.

⁸ The defendant and the deceased were joint owners of the still. The refusal of the trial court to give a charge omitting reference to the duty to retreat was sustained by the Supreme Court.

⁹ In *People v. Rector*, 19 Wend. (N. Y.) 569, the defendant conducted a bawdy house, where he also resided. The court (p. 591) said that though the business was illegal, the house was nevertheless the defendant's castle.

¹⁰ *Runyan v. State*, 57 Ind. 80; *Foster v. State*, 8 Okla. Cr. 139, 150, 126. Pac. 835, 839; *La Rue v. State*, 64 Ark. 144, 41 S. W. 53; *State v. Petteys*, 65 Kan. 625, 70 Pac. 588. See *State v. Bartlett*, 170 Mo. 658, 668, 71 S. W. 148, 151; *Hammond v. People*, 199 Ill. 173, 182, 64 N. E. 980, 983; *Fowler v. State*, 8 Okla. Cr. 130, 135, 126 Pac. 831, 833. For a vigorous criticism of this doctrine, see Prof. Beale, "Retreat From a Murderous Assault," 16 HARV. L. REV. 567, 576-582.

¹¹ The German law is that there is no duty to retreat unless the assailant is irresponsible, as in such case to retreat would be without "shame." The reasoning is that an innocent man's rights should not be restricted in favor of a wrongdoer ("Wie dürfte zur Schonung eines solchen Angreifers der Angegriffene in der Freiheit seines Tuns und Lassens beschränkt werden?"). See VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS, 266-267, 281-283. In France there is no right of self-defense if there is any other way out *except by flight*. It appears in general that on the continent there is no duty to retreat and the tendency is to give the assailant fewer concessions. See 2 VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN

be more honorable to flee, when consistent with safety, than to kill; and it is not always cowardly, in resisting the impulses of the native blood, to be too proud to fight.

Although the doctrine that the dwelling house may be a fortress of defense is perhaps a survival from feudal times, it is firmly imbedded in our law to-day. But it is submitted that the extension of this exception to the "duty-to-retreat" rule to cover the place of business has been unwise, and should be strictly limited. In a sparsely settled country it is indeed monstrous that a man should be forced to flee from his home, but under conditions of average city life to-day there is less justification for the "castle" doctrine; and the conception of one being forced to run from his office or saloon rather than kill an assailant fails to shock excessively. It is rather more shocking to contemplate the possibility of the rule as to the duty to retreat being eaten up by the exception. Therefore, the Alabama decision is commendable in limiting the asserted right of one who is attacked to stand his ground at all costs.

RECENT CASES

ADMIRALTY — TORTS — APPLICATION OF GENERAL AVERAGE TO LIABILITY FOR A TORT COMMITTED IN SAVING THE SHIP. — The plaintiff's ship was in imminent danger of sinking, and the master was obliged to run her against a dock, as an alternative to running her aground, which would probably have involved even greater loss. The plaintiffs, having been forced to pay for the damage to the dock, now sue the owners of the cargo for a general average contribution to this payment. *Held*, that they may recover. *Austin Friars Steamship Co. v. Spillers & Baker*, [1915] 3 K. B. 586.

General average includes only the expenses incurred as a result of a voluntary act of the master in saving the ship or cargo from extraordinary perils. See *The Star of Hope*, 9 Wall. (U. S.) 203, 228. The tendency of the courts is to give large latitude to the master's judgment, provided only he acts reasonably in the emergency. *Shepherd v. Kottgen*, 2 C. P. D. 578; *Norwich & N. Y. Transportation Co. v. Insurance Co. of North America*, 118 Fed. 307. And a contribution is allowed for even consequential results of a general average act. Thus contribution was allowed for the losses of an unadvantageous sale of cattle forced by the entering of a quarantined port for repairs. *Anglo-Argentine, etc. Agency v. Temperley Shipping Co.*, [1899] 2 Q. B. 403. And where water used to extinguish a fire caused the grain in the cargo to swell, a general average contribution was allowed for damage thereby resulting to the ship. *Lee v. Grinnell*, 5 Duer (N. Y.) 400, 427. It is clear, therefore, that the tort liability in the principal case was a proper subject of general average. The case also involves a contribution between joint tortfeasors, since the master acted as agent of the owners of both the ship and cargo. *Anglo-Argentine, etc. Agency v. Temperley Shipping Co.*, *supra*, 409. See *Ralli v. Troop*, 157 U. S. 386, 420. Such a contribution is generally allowed in admiralty. See *The Sterling & The Equator*, 106 U. S. 647. See 24 HARV. L. REV. 150. Even at

UND AUSLÄNDISCHEN STRAFRECHTS, 303-327. The common-law point of view is well expressed by Blackstone: "And though it may be cowardice in time of war between two independent nations to flee from an enemy, yet between twofellow subjects the law countenances no such point of honor." 4 BL. COM. 185.

common law contribution is allowed between the co-principals of an agent who has made them liable for a tort, unless the principals were personally culpable. *Wooley v. Batte*, 2 C. & P. 417; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320.

AGENCY — SCOPE OF AGENT'S AUTHORITY — ENLARGEMENT OF AUTHORITY IN EMERGENCY — RAILROAD'S LIABILITY TO PHYSICIAN EMPLOYED BY AGENT TO ATTEND INJURED TRESPASSER. — The defendant's station agent engaged the plaintiff to attend a man who had been seriously injured by one of defendant's trains. The plaintiff had rendered first aid when he was notified that defendant would not be liable for medical attendance on the injured man who had been found to be a trespasser. The plaintiff now sues to recover for services rendered both before and after the notification. *Held*, that he may recover for the first-aid services only. *Bryan v. Vandalia R. Co.*, 110 N. E. 218 (Ind.).

It has sometimes been held that a station master has authority to bind the railroad to a physician only when the injured person has a cause of action against the company for the injury. *Union Pacific Ry. Co. v. Beatty*, 35 Kan. 265, 10 Pac. 845. The physician must, therefore, guess the railroad's liability at his peril. Elsewhere the rule has been stated that the servant's authority is never sufficient to bind the railroad to a contract for attendance on an injured trespasser. *Mills v. International, etc. R. Co.*, 41 Tex. Civ. App. 58, 92 S. W. 273; *Adams v. Southern R. Co.*, 125 N. C. 565, 34 S. E. 642. But in some jurisdictions the servant has emergency authority, during the interval between the injury and the discovery of the causes, to contract in the name of the railroad for whatever may lessen damages in case it is later found liable. *Bonnette v. St. Louis, etc. Ry. Co.*, 87 Ark. 197, 112 S. W. 220; *Terre Haute, etc. Co. v. McMurray*, 98 Ind. 358; *Cincinnati, etc. R. Co. v. Davis*, 126 Ind. 99, 25 N. E. 878. As the imposition by law of an emergency authority can best be supported on the theory that a railroad would normally desire its agents to have power to guard it from injury in unforeseeable contingencies where the fact that authority was not given would not imply that authority was denied, the latter rule seems most sound. But when liability is no longer threatened and the company's interest no longer at stake, there is nothing to support an implied authority. And with no just grounds of implication, the law should not force the company to authorize acts it has no duty to perform.

ATTACHMENT — EFFECT OF ATTACHMENT — APPEARANCE — FILING OF FORTHCOMING OR REPLEVY BOND. — In a foreign attachment proceeding, the non-resident defendant, who did not enter the jurisdiction, secured the release of the property by giving a bond with sureties for its return. *Held*, that there was not such an appearance as to justify judgment by default against him and his surety, even for the value of the property. *American Surety Co. v. Stebbins, Lawson & Spraggins Co.*, 180 S. W. 101 (Tex.).

When an alien defendant is not in the state, there can be no jurisdiction over his person except by his consent. See DICEY, CONFLICT OF LAWS, 383. But, by an attachment suit, jurisdiction can be had over any property within the state. In such a case there must also be notice, actual or constructive. *Haywood v. Collins*, 60 Ill. 328. See *Walker v. Cottrell*, 6 Baxt. (Tenn.) 257, 274; 1 WADE, ATTACHMENT, § 45. The question of whether the filing of a bond dispensed with the giving of such notice must be largely determined by the particular statute, since without statutory authority there is no jurisdiction *quasi in rem*. *Harland v. United Lines Telegraph Co.*, 40 Fed. 308; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559. Statutes for constructive service are to be strictly construed. See *McCook v. Willis*, 28 La. Ann. 448, 449; *Greene v. Tripp*, 11 R. I. 424, 425. Now a bail bond, as it is conditioned on paying any judgment recovered, clearly carries consent to the jurisdiction and turns the

action into a personal one. *Butcher v. Cappon & Bertsch Leather Co.*, 148 Mich. 552, 112 N. W. 110; *Blyler v. Kline*, 64 Pa. St. 130. Again a replevy bond may be given the effect of an appearance by express statute. *Camp v. Cahn*, 53 Ga. 558; *Buice v. Lowman, etc. Mining Co.*, 64 Ga. 769. Such a provision would make the filing of a replevy bond, as of a bail bond, confer personal jurisdiction, since the defendant may get his property only on condition that he give the required consent. But the Texas statute is silent as to the effect of the replevy bond as an appearance. See 1 MCEACHIN'S TEXAS CIVIL STATUTES, art. 258, 269, 1885. Hence the filing of such a bond, as it is not conditioned on paying the judgment but merely on returning the property, should not be treated as a general appearance. See *contra, Richard v. Mooney*, 39 Miss. 357, 358. But a replevy bond, even though not construed as a general appearance, gives consent to the attachment so as to waive technical defects in the summons. *New Haven Co. v. Raymond*, 76 Ia. 225, 40 N. W. 820; *McCord-Collins Mercantile Co. v. Dodson*, 32 Okla. 561, 121 Pac. 1085. *Contra, Burch v. Watts*, 37 Tex. 135. It would seem that since defendant is thereby shown to know of the action, the filing of the bond should similarly waive the technical defect of lack of constructive notice. *Peebles v. Weir*, 60 Ala. 413; *Reynolds v. Jordan*, 19 Ga. 436.

BANKRUPTCY — EXEMPTIONS — HOMESTEADS — VALIDITY OF HOMESTEAD EXEMPTION ACQUIRED AFTER ADJUDICATION. — A state statute provided that the head of a family residing upon his own premises might, by executing and filing for record a proper declaration, convert them into a homestead exempt from levy and forced sale. REV. CODE OF MONT. (1907), §§ 4694-4722. A bankrupt filed such a declaration after the adjudication against him. *Held*, that the exemption will be allowed. *In re Lehfeldt*, 225 Fed. 681 (U. S. Dist. Ct., Mont.).

The Bankruptcy Act provides that the bankrupt's title shall vest in the trustee as of the date of the adjudication, except as to property which is exempt. 1898, 30 STAT. AT L. 544. The power of the bankrupt to hold as owner is completely determined as of that moment. See *Mueller v. Nugent*, 184 U. S. 1, 14. It would seem that the exemption, to be valid, should be then existing. The homestead statute in the principal case in terms gives no exemption until the filing of the declaration; and it and similar statutes have been so construed. See *Vincent v. Vineyard*, 24 Mont. 207, 214, 61 Pac. 131, 132; *Alexander v. Jackson*, 92 Cal. 514, 519, 28 Pac. 593, 594; *Nevada Bank v. Treadway*, 17 Fed. 887, 893. No doubt a liberal policy prevails in the construction of exemption statutes. See *Smith v. Thompson*, 213 Fed. 335, 336; *In re Crum*, 221 Fed. 729, 732. Thus, a partner has been allowed an exemption though dissolution of the firm was subsequent to the judgment against it. *O'Gorman v. Fink*, 57 Wis. 649, 15 N. W. 771; *Blanchard, Williams & Co. v. Paschal*, 68 Ga. 32. But even such a case is distinguishable, as no title in the creditor is involved. A number of decisions, however, in accord with the principal case, sustain exemptions acquired by a bankrupt after adjudication. *In re Mayhew*, 218 Fed. 422; *In re Culwell*, 165 Fed. 828; *In re Fisher*, 142 Fed. 205. Whatever policy there may be sustaining such a view, it seems insufficient to override the clear language of the statute, and one court at least has reached the opposite result. *In re Youngstrom*, 153 Fed. 98.

BILLS AND NOTES — CHECKS — CERTIFIED CHECKS — RETRACTION OF CERTIFICATION MADE UNDER MISTAKE. — The drawer of a check payable to the plaintiff ordered the bank on which it was drawn to stop payment. The cashier, overlooking this stop order, certified the check. Before the plaintiff had changed his position, the cashier notified him of his error and attempted to retract the certification. The plaintiff now sues on the certified check with-

out showing that he has suffered any loss because of the mistake. *Held*, that he cannot recover. *Baldinger and Kupperman Mfg. Co. v. Manufacturers-Citizens Trust Co.*, 156 N. Y. Supp. 445 (N. Y. Sup. Ct.).

An exception to the general rule that money paid under a mistake of fact may be recovered when the parties can be put in *statu quo* has grown up in the law of negotiable instruments, where the drawee of a forged bill pays or accepts it. *Price v. Neal*, 3 Burr. 1354. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 62. An exactly parallel situation is presented when, as in the principal case, an instrument has been certified or paid by a bank under a mistake as to the amount of the drawer's deposit. In these cases, as in cases of a forged instrument, the holder and the payer have both parted with value in good faith; neither were negligent; and, if the situation is looked at as an entirety, their equities appear equal. See Ames, "The Doctrine of *Price v. Neal*," 4 HARV. L. REV. 297. Again, in both groups of cases, if the situation is further analyzed, the equity of the holder is found to rest solely on the fact that he has parted with value in exchange for a worthless claim to a desired *res*, to which he later acquired title. However, in the second type of cases it is well settled that the bank will be given relief if it notifies the holder in time to save his rights against the drawer and indorsers. *Irving Bank v. Wetherald*, 36 N. Y. 335; *Security Savings & Trust Co. v. King*, 69 Ore. 228, 138 Pac. 465; *MERCHANTS NATIONAL BANK v. NATIONAL BANK OF THE COMMONWEALTH*, 139 Mass. 513, 2 N. E. 89. This would seem to indicate that the doctrine of *Price v. Neal* has not become a broad principle of the law of negotiable instruments but remained a solitary anomaly.

BILLS AND NOTES — NEGOTIABLE INSTRUMENTS LAW — PRESENTMENT AND NOTICE OF DISHONOR — WHETHER NECESSARY TO CHARGE INDORSER SHOWN BY PAROL EVIDENCE TO BE JOINT MAKER OR SURETY.— The payee of a note which was indorsed on the back before delivery, sues the indorser without having demanded payment of the maker, offering parol evidence that the defendant was a co-maker. *Held*, that he cannot recover. *Overland Auto Co. v. Winters*, 180 S. W. 561 (Mo.).

The directors of a corporation gave to a bank, as collateral security for notes discounted for the corporation, a note made by one of their number to the order of another, and indorsed before delivery by all the directors. The bank now seeks to enforce the collateral note against the estate of one of the indorsers, without having presented it to the maker for payment. *Held*, that the indorser's estate is liable. *In re Marquardt's Estate*, 95 Atl. 917 (Pa.).

Both Missouri and Pennsylvania have adopted the Uniform Negotiable Instruments Law. See REV. ST. MO. 1909, ch. 86; 3 PURDON'S DIGEST (Pa.), 13 ed., 3250-3318. This law provides that "a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 63. Some courts have held that this merely creates a presumption, which may be rebutted by oral evidence. *Mercantile Bank v. Busby*, 120 Tenn. 652, 657, 113 S. W. 390, 392. Cf. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682. Such a construction is not only unwarranted by the language of the act, but defeats its purpose of securing uniformity. The better view, therefore, is that the statute fixes the legal effect of the signature, and that parol evidence of an intention to be bound as joint-maker, as surety, or in some other capacity cannot be allowed to give it a different effect. *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790; *Deaky v. Choquet*, 28 R. I. 338, 67 Atl. 421. See *Baumeister v. Kuntz*, 53 Fla. 340, 346, 42 So. 886, 888. Now an indorser is ordinarily entitled to demand and notice unless the instrument was made for his accommodation. See BRAN-

NAN, NEGOTIABLE INSTRUMENTS LAW, §§ 70, 80, 89, 115-3. A note indorsed before delivery by stockholders or directors of a corporation which receives the proceeds, is made, not for their accommodation, but for the accommodation of the corporation. *First National Bank v. Bickel*, *supra*; *McDonald v. Luckenbach*, 170 Fed. 434, 437. *Contra*, *Mercantile Bank v. Busby*, 120 Tenn. 652, 667, 113 S. W. 390, 394. And an accommodating indorser is discharged in the absence of demand and notice. *Mechanics' & Farmers' Savings Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071.

CARRIERS — INTERSTATE COMMERCE — CONNECTING LINES — LIABILITY OF INITIAL CARRIER FOR DELAY UNDER CARMACK AMENDMENT. — The plaintiff shipped strawberries by the defendant railroad to a point beyond the defendants' own lines. Through the negligence of a connecting carrier the shipment was delayed. The Carmack Amendment subjects the initial carrier to liability for "loss, damage, or injury to such property" caused by a connecting carrier. U. S. COMP. STAT. 1913, § 8592, cl. 11. *Held*, that the initial carrier is liable. *New York, etc. R. Co. v. Peninsula Produce Exchange*, Sup. Ct. Off., No. 137, Jan. 24, 1916.

The court declares the broad purpose of the Act to be to localize responsibility for "any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." It therefore holds that the words "loss" and "damage" mean loss or damage to the owner, not loss or damage to the property. For a discussion of this clause of the Carmack Amendment, see 29 HARV. L. REV. 217.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT TO HEARING ON TAX ASSESSMENT. — The Colorado Tax Commission and the State Board of Equalization made a forty-per-cent increase in the valuation of all the taxable property in Denver. No opportunity for a hearing was given taxpayers aside from the fact that the time of meeting of the boards was fixed by law. The plaintiff seeks to enjoin the enforcement of this order on the ground that it violates the Fourteenth Amendment. *Held*, that the injunction will not issue. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441.

Where a person may be deprived of property, the right to be heard in quasi-judicial proceedings is fundamental to the idea of due process. *Petition of Ford*, 6 Lans. (N. Y.) 92; *Stuart v. Palmer*, 74 N. Y. 183. Consequently tax assessments where no opportunity for a hearing is given, are held void. *Albany City Nat. Bank v. Maher*, 9 Fed. 884; *Central, etc. Ry. Co. v. Wright*, 207 U. S. 127; *Scott v. City of Toledo*, 36 Fed. 385, 396. See 20 HARV. L. REV. 320. However, it has been held that a horizontal increase in the valuation of a certain large class of property, as in the principal case, does not necessitate notice and an opportunity for a hearing to the individuals of the class affected. *State Ry. Tax Cases*, 92 U. S. 575, 609. On the other hand, the failure to give such notice in the assessment of a paving tax on a considerable number of people, in each case on individual grounds, has been held to be a denial of due process. *Londoner v. Denver*, 210 U. S. 373. The result seems to be that if a large number of people are equally affected no direct notice is required, while the reverse is true if the group is small or its members are unequally affected.

CONSTITUTIONAL LAW — MAKING AND CHANGING CONSTITUTIONS — CONSTITUTIONAL CONVENTION — RESTRICTION BY LEGISLATURE. — A constitutional convention was called in Louisiana by popular vote adopting a proposal of the legislature. This proposal contained restrictions on the power of the convention to revise certain matters, but gave the convention power to enact

a new constitution without submission to popular vote. *ACTS OF LA., EXTRA SESSION, 1913, 1.* Two years after it went into effect, the validity of certain clauses violating these restrictions was attacked. *Held*, that the clauses in question are invalid. *Foley v. Democratic Parish Committee*, 70 So. 104 (La.); *State v. American Sugar Refining Co.*, 68 So. 742 (La.).

For a discussion of the powers of Constitutional Conventions, see NOTES, p. 528.

CONTRACTS — DIVISIBLE CONTRACTS — REPUDIATION AFTER PART PERFORMANCE — NEED THE PARTY WHO WOULD RELY ON THE REPUDIATION ACT AT ONCE? — The defendant agreed to take the plaintiff's news service for five years at a weekly rate, to be paid each week in advance. After two years the defendant gave notice of intention to repudiate the contract. The plaintiff remonstrated and urged continuance. He continued the service five weeks more; but on getting no further payments stopped the service, and sued for the contract price of service during the five weeks and for his loss of profits for the remainder of the contract. *Held*, that he can recover for past services, but not for future profits. *United Press Association v. National Newspapers' Association*, 227 Fed. 193 (Dist. Ct., Dist. Colo.).

Repudiation of a contract after part performance commonly justifies the other party in stopping work and suing for lost profits. *Northrop v. Mercantile Trust & Deposit Co.*, 119 Fed. 969; *Cort v. Ambergate, etc. Ry. Co.*, 17 Q. B. 127. See *Parker v. Russell*, 133 Mass. 74, 76. But it is said this must be done at once, since the repudiation is an offer for a breach, which will become complete only on prompt acceptance. This doctrine is frequently laid down in cases dealing with so-called breach of contract by anticipation. *Smith v. Georgia Loan, etc. Co.*, 113 Ga. 975, 39 S. E. 410; *Dalrymple v. Scott*, 19 Ont. App. 477; *Zuck v. McClure*, 98 Pa. St. 541. See *Roehm v. Horst*, 178 U. S. 1, 11, 13; *Johnstone v. Milling*, 16 Q. B. D. 460, 467. But see 15 HARV. L. REV. 306. Whatever its sanction in that class of cases, a doctrine so foreign to the business understanding of the matter should not be extended further. Repudiation of a contract by one party justifies the other in believing that his contract is not going to be carried out. This belief reasonably lasts until the repudiation has been taken back. Therefore at any time before that, provided the repudiating party has done no act in reliance on the other party's statement of intention to go on, the latter is justified in stopping work. The contract is then broken totally in consequence of the defendant's wrongful act, and the defendant should be liable for all the profits lost. *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575. See Williston, "Repudiation of Contracts," 14 HARV. L. REV. 421; WILLISTON'S WALD'S POLLOCK, CONTRACTS, 3 ed., 347 *et seq.* The defendant's refusal to make payments is just another straw. It may be that this, standing by itself, would not justify a total refusal to go on. *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N. W. 1013. See WILLISTON, SALES, § 467, at 822. But when colored by the prior repudiation, as yet untraced, it becomes of greater import, and should be held to justify the plaintiff's conduct.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — APPORTIONMENT OF STOCK DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMAN. — Stock in a corporation was held in trust to pay the income to the life tenant with remainder over. The corporation declared a stock dividend of one hundred per cent, entirely out of earnings accrued since the stock was subjected to the trust. *Held*, that the life tenant is entitled to the dividend. *In re Heaton's Estate*, 96 Atl. 21 (Vt.).

In order to evade the difficulties involved in determining the rights of the life tenant and the remainderman to extraordinary dividends, whether in cash

or stock, two arbitrary rules of distribution have been adopted: the Massachusetts rule, giving all cash dividends to the life tenant and all stock dividends to the remainderman, and the Kentucky rule, giving all dividends, whether cash or stock, to the life tenant. *Minot v. Paine*, 99 Mass. 101; *Hile v. Hile*, 93 Ky. 257, 20 S. W. 778. Pennsylvania, however, has instituted a third rule attempting an equitable apportionment: the life tenant is accorded that portion of the dividend, regardless of whether cash or stock, that is derived from earnings accrued since the trust was imposed, and the balance is given to the remainderman. *Earp's Appeal*, 28 Pa. St. 368. Under this rule the practical difficulties in ascertaining the time at which the income actually accrued, and in accounting for enhancement in the corporation assets from other sources than accrued earnings, greatly impede satisfactory apportionment. And when the dividend is of stock, there are further objections to taking it away from the remainderman. For the intention of the settlor seems to be to give the remainderman the present ownership of the stock subject only to the right of the life tenant to its earnings. Hence, to diminish the remainderman's proportionate share in the corporation, and to give to the life tenant, by means of the new stock, an interest in the old assets of the corporation, is technically to defeat this intention. See 26 HARV. L. REV. 77. Furthermore, unless the right is taken into consideration in apportionment, this rule deprives the remainderman in substance of the right of a stock owner to subscribe to any new issue of stock. *Carter v. Crehore*, 12 Hawaii, 309. In spite of these drawbacks, in the principal case Vermont has adopted the Pennsylvania rule, and New York and Delaware have recently done likewise, though thereby reversing their former arbitrary rules. Compare *Re Osborne*, 209 N. Y. 450, 103 N. E. 723, with *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548; and *Bryan v. Aiken*, 86 Atl. 674 (Del.), with *Bryan v. Aiken*, 82 Atl. 817 (Del.). On the other hand, Ohio has recently approved the Massachusetts rule. *Wilberding v. Miller*, 90 Oh. St. 28, 106 N. E. 665.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO BUILD AND OPERATE A DEPOT. — The defendant railroad, in consideration of a grant of a right of way and depot grounds, covenanted with the plaintiffs to erect, maintain, and operate a depot thereon for the general accommodation of the public. The defendant built the depot but operated it for only a short period. The plaintiffs pray for a decree of specific performance. *Decreed*, that defendant operate the depot according to the terms of the covenant so long as such operation remains consistent with its duties to the public. *Harper v. Virginian Ry. Co.*, 86 S. E. 919 (W. Va.).

It has frequently been asserted that a court of equity has no jurisdiction to compel performance of a contract involving continuing acts. See 16 HARV. L. REV. 293. But the trend of modern cases, at least in railroad contracts, indicates a complete reversal of that position. *Murray v. Northwestern Ry. Co.*, 64 S. C. 520, 42 S. E. 617; *Schmidt v. Louisville, etc. Ry. Co.*, 19 Ky. L. Rep. 666, 41 S. W. 1015. See BISPHAM, PRINCIPLES OF EQUITY, 6 ed., § 377. The jurisdiction, however, being concurrent, is entirely lacking if the contract is void at law on grounds of public policy. In general this is the case when a railroad by covenant restricts its freedom of action. *Williamson v. Chicago, etc. Ry. Co.*, 53 Ia. 126; *St. Joseph, etc. Ry. Co. v. Ryan*, 11 Kan. 602. But contracts to operate a depot at a specified place have usually been held good. *Louisville, New Albany, etc. Ry. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404. See 21 AM. & ENG. R. R. CASES, n. s. 835. These decisions may be rested on the construction given to such contracts by many courts, that the contract, in spite of its terms, calls for performance only so long as it is in accord with public policy. *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S. 393; *Atlanta, etc. Ry. Co. v. Camp*, 130 Ga. 1, 60 S. E. 177; *Jones v. Newport News, etc. Co.*, 65 Fed.

736. Though it may be contended that this interpretation creates a new contract for the parties, yet courts have acted similarly in the somewhat analogous cases of equitable servitudes. See 29 HARV. L. REV. 106. Again, the decisions may also be supported on the ground that, though the contracts are such as might become opposed to public interest, the contingency thereof is too slight to make them void at law. But even if the law considers such contracts valid, certainly equity will refuse to grant specific performance after they have become opposed to the public interest. *Conger v. New York, West Shore, etc. Ry. Co.*, 120 N. Y. 29. The conditional decree in the principal case was framed to anticipate such a situation.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF WIFE — CONTRACTS BY WIFE TO CONVEY HER REALTY. — A statute permitted a wife to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but made any conveyance of her realty, without the written consent of her husband, and her privy examination as to her willingness to convey, invalid. 1911 N. C. PUBLIC LAWS, ch. 109. The plaintiff contracted with the defendant husband and wife for a conveyance of the wife's realty, but no privy examination was taken. On the wife's refusal to convey, the plaintiff sues to recover damages for breach of the contract. *Held*, that he may recover. *Warren v. Dail*, 87 S. E. 126 (N. C.).

Effect must be given, if possible, to every word, clause, and sentence of a statute. See *Petri v. Commercial, etc. Bank*, 142 U. S. 644, 650. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 380. Therefore the statute must be so construed as to distinguish between the right to contract and the right to convey. Specific performance of the contract will not be decreed, as this would involve the transformation of the contract into a conveyance, which is contrary to the distinction made by the statute. *Cf. Martin v. Mitchell*, 2 J. & W. 413, 425. But a suit for damages does not involve this difficulty. It is clear that, where a husband is unable to procure a release of dower, he is, nevertheless, liable for the breach of his contract to convey. *Drake v. Baker*, 34 N. J. L. 358. By similar reasoning, the wife should be liable on her contract to convey. Nor is such liability contrary to the spirit of the statute, for the purpose of the act is not to protect the wife from unfortunate contracts, but to prevent the loss of her realty. And such liability adds no extra burden to her land since it is subject to levies to satisfy judgments for breaches of her other contracts. See *Royal v. Southerland*, 168 N. C. 405, 406, 84 S. E. 708, 709. Under a similar statute such contracts have been held binding. *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; *Davis v. Watson*, 89 Mo. App. 15, 29.

INSURANCE — MARINE INSURANCE — VALUED POLICY — EXTENT OF INSURER'S RIGHT OF SUBROGATION. — The plaintiffs insured the defendant's ship, the *Helvetia*, for the full value, which in the policy was stated to be £45,000. The *Helvetia* collided with the *Empress of Britain* and was totally lost. The insurers paid for a total loss in accordance with value stated in the policy. Subsequently in an admiralty action both ships were held to blame, the *Helvetia* for $\frac{7}{12}$ of the damage and the *Empress of Britain* for $\frac{5}{12}$, and the owners of the latter paid the defendants £26,900 — $\frac{5}{12}$ of £65,000 — which the court found to be the value of the lost vessel. The insurers now demand this sum from the defendants. *Held*, that the insurers are entitled to the full amount recovered from the tortfeasors. *Thames and Mersey Marine Ins. Co. v. British and Chilean Steamship Co.*, 32 T. L. Rep. 89, [1916] 1 K. B. 30.

If the insured sues the tortfeasor after he has been indemnified, and recovers, he must hold whatever amount the insurer is entitled to in trust for him. *Gales v. Hailman*, 11 Pa. St. 515; *Randal v. Cockran*, 1 Ves. Sen. 97. How-

ever, the theory upon which the recovery of the insurer is to be rested and consequently, the extent to which it should go, are disputed. An earlier English case stated that the insurer was entitled to everything recovered from the tortfeasor, on the ground that the insurer acquired the right against the tortfeasor through an abandonment. See *North of England Ins. Co. v. Armstrong*, 5 Q. B. 244, 248; *Burnand v. Rodocanachi*, 7 App. Cas. 333, 342. But it is to-day conceded on all sides that the right against a tortfeasor is not an incident of property, and therefore does not pass by a subsequent abandonment of the property. *The Livingstone*, 130 Fed. 746; *The St. Johns*, 101 Fed. 469, 472. See *Simpson v. Thomson*, 3 App. Cas. 279, 292. See 18 HARV. L. REV. 384. A better view would seem to be that the right rests on subrogation invoked to prevent the assured from recovering more than a full indemnity. See *Preston v. Castellane*, 11 Q. B. D. 380, 386; *Liverpool, etc. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 462. Under this view the insurance company becomes entitled to anything coming into the hands of the insured which reduces the loss indemnified. Still, the insurer clearly should not recover more than he has paid. *The Livingstone*, *supra*. See *The St. Johns*, *supra*, 475; 2 ARNOULD, MARINE INSURANCE, 9 ed., § 1229. See *contra*, *Railway Co. v. Jurey*, 111 U. S. 584, 594; *North, etc. Ins. Co. v. Armstrong*, *supra*, 249. And the reason underlying the subrogation would require that the insurer's right should not begin until the insured had made up his full loss. *Contra*, *The St. Johns*, *supra*; *cf. The Livingstone*, *supra*, 749. It is submitted that a "valued" policy of the type in the principal case should effect no change in this result: in such a policy the whole vessel is insured, the clause stating the agreed value being inserted only in order to save the expense and doubt that may attend a later investigation of value in case of loss. In this respect it resembles an agreement for liquidated damages, and is to be sharply distinguished from insurance of a certain amount taken on a vessel. An inquiry as to the actual value of the vessel for the purpose of reducing the recovery or of averaging the loss is, of course, not permitted. *Insurance Co. v. Hodgson*, 6 Cranch (U. S.) 206, 221; *Providence, etc. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559; *Irving v. Manning*, 1 H. of L. Cases, 287. *Contra*, *Clark v. United, etc. Co.*, 7 Mass. 365. But the valuation is not binding for every purpose in which the value is brought into question. See *Burnand v. Rodocanachi*, *supra*, 335, 342; *Irving v. Manning*, *supra*, 305. Since in subrogation we must first see the insured made whole, and since actual value has been made the basis of recovery from the tortfeasor, that value and not the agreed value should be the basis of distributing the fund recovered. For this neither violates the contract nor protects the insured in any wrong. In the principal case, therefore, the plaintiff should have recovered only £6,900. The result reached, however, may be correct under § 79 (1) of the English Marine Ins. Act of 1906.

INSURANCE — MERGER OF PRELIMINARY AGREEMENT IN POLICY — PAROL EVIDENCE RULE. — The plaintiff's agent entered into a contract of insurance with the defendant company on terms not in accord with his principal's instructions. Before a policy was issued the property was destroyed. Subsequently the agent, not having been informed of the loss, though it was known to the plaintiff, induced the defendant to issue a policy on new terms that accorded with the latter's instructions. This policy was dated to take effect from the time of the original agreement. The defendant company sought to restrict recovery to the terms of the initial agreement, but the trial court disallowed evidence of this transaction on the ground that the policy contained the contract between the parties. *Held*, that the exclusion was proper. *El Dia Ins. Co. v. Sinclair*, C. C. A., 2d Circ. (not yet reported).

Since the agent was acting within the scope of his authority his failure to follow the plaintiff's instructions in the original transaction did not prevent a

contract arising between his principal and the defendant company. *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. But his subsequent attempt to create a different contract and to incorporate it in the policy should have been held futile, since an original contract of insurance cannot be formed when the insured knows the property has been destroyed. *Wales v. Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322. Nor does it matter that when the policy was executed the plaintiff did not know it was a new contract, or that his agent did not know of the loss of the property, for the objection is not bad faith but lack of consideration. Thus the policy was absolutely void and could not become the written understanding of the parties by merging the oral contract. *Nebraska, etc. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351. Cf. *Pratt v. Dwelling House, etc. Ins. Co.*, 130 N. Y. 206, 217, 29 N. E. 117. Hence the defendant company did not seek to traverse the parol evidence rule by showing that the parties intended to make an agreement different from that summed up in the policy; its aim was simply to prove that the latter was not a contract because of the non-existence of conditions required for the formation of a contract. *Pym v. Campbell*, 6 E. & B. 370. See 4 WIGMORE, EVIDENCE, § 2400. The resulting conclusion is that the court erred in disallowing evidence of the prior agreement to prove that the policy was an original agreement and void. *Salisbury v. Hekla Fire Ins. Co.*, 32 Minn. 458, 21 N. W. 552. *Contra, Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664. Mistaking the parol evidence rule for a rule of evidence, when in fact it is a principle of substantive law, is the source of the error. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 397.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — IMPLIED COVENANT BY LANDLORD NOT TO INTERFERE WITH TENANT'S USE OF THE PREMISES. — In a lease was a covenant of quiet enjoyment by the landlord and a covenant by the tenant to conduct a restaurant on the premises. The landlord let adjoining premises to be used for noisy auction rooms. The tenant sues the landlord. *Held*, that he may recover. *Malzy v. Eicholz*, 32 T. L. R. 152 (K. B. Div.).

In an ordinary contract it is a condition to the promisee's right to enforce the promise that he does nothing to interfere with its performance. *Peck v. United States*, 102 U. S. 64; *European, etc. Co. v. Royal, etc. Co.*, 30 L. J. C. P. 247. Some cases hold that a promise by each party not to interfere with the performance of the other is necessarily implied from the express contract of the parties. *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472; *Levy and Hipple Motor Co. v. City Motor Cab Co.*, 174 Ill. App. 20. See 17 HARV. L. REV. 46. It is true that in these latter cases the injury which the plaintiff complained of was the deprivation of the profits which he would have made, had he been able by performing his promise to put himself in a position to demand the performance of the defendant's express promise. But it cannot affect the implication of the promise, that the damages from its breach have no connection with the express contract. Some courts regard an interference by a landlord with the tenant's expected use of the premises as a breach of the landlord's covenant of quiet enjoyment. *Tebb v. Cave*, [1900] 1 Ch. 642; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. 984. *Contra, Tucker v. Du Puy*, 210 Pa. St. 461, 60 Atl. 4. And in England such an interference is also actionable as being a derogation from the grant of the landlord. *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836. But it is submitted that the principal case is best supported by implying, on the above principles of contracts, a covenant that the landlord will not interfere with the tenant's performance of his agreement to use the property in a certain way.

RENT CHARGES — ESTATE TAIL — EFFECT OF DISENTAILING ASSURANCE. — A tenant in fee simple of lands granted a rent charge issuable out of the

lands to trustees in fee to the use of successive tenants in tail with ultimate remainder to the use of the settlor and his heirs. One of the tenants in tail, while in the enjoyment of the rent charge, executed a valid disentailing assurance. *Held*, that the tenant acquired an equitable fee simple in the rent charge. *In re Frank's Estate*, [1915] 1 Ir. 387 (Ct. of Appeal).

Two tenants in tail of equitable rent charges, which had been granted to them *de novo* without remainders over, executed a disentailing deed. *Held*, that the deed created merely a base fee in each rent charge determinable on the failure of the issue in tail. *Pinkerton v. Pratt*, [1915] 1 Ir. 406 (Ct. of Appeal).

A rent charge may be entailed like any other tenement. *Smith v. Farnaby*, Carter 52; *Drew v. Barry*, 1 R. 8 Eq. 260, 283. See CHALLIS, REAL PROPERTY, 299. And, like any other tenant in tail, a tenant in tail of a rent charge can bar the succeeding estates thereof. *Smith v. Farnaby*, *supra*; *Anonymous*, 12 Mod. 513. Similarly an equitable remainder may be barred just as though the estates were legal. *Brydges v. Brydges*, 3 Ves. Jr. 120; *Boteler v. Allington*, 1 Bro. C. C. 72. See *Salvin v. Thornton*, Ambler 545, 549. It is said that an equitable tenant in tail cannot cut off a legal fee. *Brydges v. Brydges*, *supra*. However, such a tenant can bar the equitable remainder though it is vested in the person with the legal fee. *Robinson v. Cuming*, 1 Atk. 473. This has been explained by saying that the court will not allow a merger since that would prevent the barring of the equitable remainder. See LEWIN, TRUSTS, 12 ed., 12. Since this means simply that the equitable remainder can be barred regardless of merger, the analogy of equitable estates gives but feeble support for the distinction made by the court in the principal cases. However, the fact that an estate of rent charge is created only by the parties, whereas equitable estates are frequently raised by the courts, may indicate that every legal estate does not contain an incipient estate of the former sort though it does of the latter. And the text-writers and some *dicta* support the principal cases. *Chaplin v. Chaplin*, 3 P. Wm. 229, 230. See 2 JARMAN, WILLS, 6 ed., 1153; THEOBALD, WILLS, 7 ed., 500; CHALLIS, REAL PROPERTY, 2 ed., 299.

RES JUDICATA — PERSONS CONCLUDED — PERSONS ASSISTING IN THE DEFENSE. — One hundred underwriters insured a yacht by identical policies under which each was severally but not jointly liable for his proportionate share. The yacht was destroyed. In an action by the owner against one of the underwriters the defense was conducted under the direction and at the expense of all. On judgment being given against him, the owner now sues another of the underwriters. *Held*, that the matter is not *res judicata*. *Fish v. Vanderlip*, 156 N. Y. Supp. 38 (Sup. Ct.).

A judgment is conclusive only as between parties or persons in privity with parties. *Litchfield v. Goodnow's Administrator*, 123 U. S. 549; *Yorks v. Steele*, 50 Barb. (N. Y.) 397. See 2 BLACK, JUDGMENTS, 2 ed., §§ 534, 600. But a party, in this sense, need not be a party of record. Thus a person not nominally a party may subject himself to be concluded by openly and actively assuming the conduct of the defense of an action in which he is interested. *Castle v. Noyes*, 14 N. Y. 329; *Frank v. Wedderin*, 68 Fed. 818; *Empire State Nail Co. v. American Solid Leather Button Co.*, 71 Fed. 588. But the matter will not be made *res judicata* by such participation when, as in the principal case, the person assisting in the defense does so, not because of some direct interest of his own in the subject matter of the particular action or because of some responsibility to the defendant depending upon the decision, but merely because he has similar though entirely separate rights against the plaintiff. *Litchfield v. Goodnow's Administrator*, *supra*; *Rumford Chemical Works v. Hygienic Chemical Co.*, 215 U. S. 156. See *Schroeder v. Lahrman*, 26 Minn.

87, 89, 1 N. W. 801, 802. *Contra*, *Greenwich Insurance Co. v. Friedman Co.*, 142 Fed. 944. True, if such persons agree with the plaintiff to make it a test case, the judgment will bind them. *Penfield v. Potts*, 126 Fed. 475, 479. Then they are concluded not so much by the judgment as by their agreement to abide by the result. But when, as in the principal case, there is no such agreement there will be no estoppel by judgment. *Merchants' Coal Co. v. Fairmont Coal Co.*, 160 Fed. 769, 777.

RESTRAINT ON ALIENATION — SPENDTHRIFT TRUST — WHETHER AN ABSOLUTE EQUITABLE INTEREST PASSES TO ASSIGNEES IN BANKRUPTCY. — The testator devised property to trustees to pay the income to his son for life and thereafter to his son's children until the oldest reached forty, when the property was to be divided equally among them. A further provision directed that all payments of principal and income should be made directly to the beneficiaries, free of assignments and creditors' attachments. The ultimate distribution of the fund has now been made except to one beneficiary who has become bankrupt. His assignee in bankruptcy claims his portion. *Held*, that the bankrupt takes the share free from his assignee's claim. *Boston Safe Deposit and Trust Co. v. Collier*, 111 N. E. 163 (Mass.).

It is widely held in this country that the right to receive the income of a trust fund for life may be made inalienable. *Broadway National Bank v. Adams*, 133 Mass. 170; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497; *Leigh v. Harrison*, 69 Miss. 923, 11 So. 604. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 178. Consequently such interests cannot be reached by creditors and do not pass to an assignee in bankruptcy. *Munroe v. Dewey*, 176 Mass. 184, 57 N. E. 340. Moreover, in a few jurisdictions, and notably in Massachusetts, the courts have given effect to a testator's direction to withhold a legacy from the beneficiary for a designated period. *Claflin v. Claflin*, 149 Mass. 19; *Lunt v. Lunt*, 108 Ill. 307; *Stier v. Nashville Trust Co.*, 158 Fed. 601. But here the absolute equitable interest is alienable and accessible to creditors. See GRAY, *supra*, § 124 1-n. By the doctrine of the principal case, not only is the postponement valid, but meanwhile, until the trust is terminated and the property actually given to the beneficiary in fee, his absolute equitable interest is inalienable. This decision contravenes the great weight of authority. *Smith v. Moore*, 37 Ala. 327; *Turley v. Massengill*, 7 Lea (Tenn.) 353; *Gray v. Obear*, 54 Ga. 231. *Contra*, *Beck's Estate*, 133 Pa. St. 51, 19 Atl. 302; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075. In Massachusetts only two *dicta* support it. *Lathrop v. Merrill*, 207 Mass. 6, 9; *Braman v. Stiles*, 2 Pick. 460, 464. Besides lacking authoritative basis the decision works gross injustice, for after the bankrupt's discharge from his debts, he can call for a conveyance to himself of the property, which his creditors cannot then reach. See *Re Bandonine*, 96 Fed. 536, 539. Only a difference of degree, it may be urged, exists between permitting restrictions on a life income and on the principal itself; the debtor is simply allowed to enjoy more property at the expense of his creditors. Exactly this is the evil to be avoided in applying an anomaly supportable only on the policy of aiding a donor to protect his beneficiary from prodigality. See G. Clark, "Spendthrift Trusts," 9 BENCH & BAR, n. s. 6, 59, 106.

SUNDAY LAWS — NECESSITY — SUNDAY NEWSPAPER ADVERTISING. — A newspaper company sues for the contract price of advertisements inserted in both week day and Sunday issues. The usual statutory provision against Sunday labor except for purposes of necessity or charity was in force. *Held*, that the company may recover the contract price, since Sunday newspapers are a necessity. *Pulitzer Pub. Co. v. McNichols*, 181 S. W. 1 (Mo.).

"Necessity," in Sunday laws, means whatever is necessary for reasonable

Sunday convenience in the particular community. *Commonwealth v. Louisville & Nashville R. Co.*, 80 Ky. 291; *Yonoski v. State*, 79 Ind. 393, 396; *McGatrick v. Wason*, 4 Oh. St. 566, 573. Hence what may not be a necessity in one community at one time, may be consistently held a "necessity" in other communities, or in the same community at other times. Compare *Commonwealth v. Jeandell*, 2 Grant's Cases (Pa.) 506, with *Augusta, etc. R. Co. v. Renz*, 55 Ga. 126, 128; and *State v. Goff*, 20 Ark. 289, with *State v. Turner*, 67 Ind. 595. But if the full benefits of a service can be obtained by week-day activity exclusively, such activity cannot be a Sunday necessity. *Louisville & Nashville R. Co. v. Commonwealth*, 92 Ky. 114, 17 S. W. 274; *Arnheiter v. State*, 115 Ga. 572, 41 S. E. 989. As to a newspaper, however, though all the news of the week can be compressed into one issue, news a day late has lost so great a part of its value that daily news is undeniably a commercial necessity. Still a community may have a different standard of needs for Sundays as compared with week days. *State v. James*, 81 S. C. 197, 200, 62 S. E. 214. Cf. *Commonwealth v. Jeandell*, *supra*. Thus, since the law expressly forbids commercial activity on Sundays, Sunday newspapers cannot be justified on commercial grounds. And until the present case, Sunday papers have been uniformly held improper. *Smith v. Wilcox*, 24 N. Y. 353; *Handy v. Globe Pub. Co.*, 41 Minn. 188, 42 N. W. 872; *Sentinel Co. v. Meiselbach Motorwagon Co.*, 144 Wis. 224, 128 N. W. 861; *Knapp & Co. v. Culbertson*, 152 Mo. App. 147, 133 S. W. 55. However, the growth of approved Sunday activities and the increase of popular interest in world events furnish other grounds for considering them necessary. Besides, the courts in determining what is a "necessity," have considered not only differences between communities and changing conditions within a community but the general opinion of the public as to legitimate Sabbath occupations. See *State v. James*, *supra*, at 200; HARRIS, SUNDAY LAWS, § 98. Cf. *Edgerton v. State*, 67 Ind. 588. And the fact that repeated prosecution still leaves the Sunday paper a universal factor in American life indicates the approval of public opinion.

TAXATION — INHERITANCE TAX — APPLICATION TO PROPERTY HELD IN TENANCY BY THE ENTIRETY. — A wife conveyed certain realty to a third person, who conveyed forthwith to her husband and herself in fee as tenants by the entirety. The husband dies and his executors petition the probate court for instructions to determine whether his half interest of the property was taxable under the Massachusetts inheritance tax. *Held*, that the property was not taxable. *Palmer v. Mansfield*, 110 N. E. 283 (Mass.).

The New York Court of Appeals, three judges dissenting, has recently reached the opposite conclusion. *Matter of Klatzel*, 216 N. Y. 83. For a criticism of the New York decision see 29 HARV. L. REV. 201. In the present case, however, the preliminary conveyance to a third person avoids technical difficulties involved in the New York case, as to conveyance by the grantor to himself.

TAXATION — PARTICULAR FORMS OF TAXATION — THE INCOME TAX — SIXTEENTH AMENDMENT. — The Tariff Act of 1913 levied a graduated tax on all incomes over \$4,000. The plaintiff, a stockholder in the defendant corporation, brought a bill to enjoin the corporation from complying with the requirements of the act, on the ground that the tax was not authorized by Sixteenth Amendment, and was therefore void as a direct tax levied without apportionment. *Held*, that the tax is constitutional. *Brushaber v. Union Pacific R. R. Co.*, Sup. Ct. Off., No. 146.

For a discussion of the questions involved, see NOTES, p. 536.

TORTS — DEFENSES — RIGHT TO DESTROY PROPERTY AS REASONABLE PROTECTION AGAINST OWNER'S WRONG — KILLING DOG WHO HAD BITTEN

TO ASCERTAIN RABIES. — The plaintiff's dog bit the defendant's child. The defendant, fearing rabies, offered to buy the dog and have it tested by the Pasteur Institute. On the plaintiff's refusing to sell the dog, the defendant entered his house through an unlocked window, while the members of the household were absent, and killed the dog, removing the head, which he sent to the Institute, where it was found to be a healthy specimen. The plaintiff now sues for the value of the dog. *Held*, that he may recover. *Allen v. Camp*, 70 So. 290 (Ala.).

One who acts reasonably to avert harm threatened by the wrongful act of another, may recover from the latter for injury incurred while so acting. *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *La Duke v. Exeter Township*, 97 Mich. 450, 56 N. W. 851. And if he injure or destroy property as a necessary or reasonable measure of protection against danger resulting from the tort of the owner thereof, he is not liable in damages. *Haley v. Colcord*, 59 N. H. 7; *Russel v. Barrow*, 7 Port. (Ala.) 106. Thus, it is well settled that the killing of a dog in defense of person or property is justified. *Credit v. Brown*, 10 Johns. (N. Y.) 365; *Reynolds v. Phillips*, 13 Ill. App. 557. However, the killing must be strictly a defensive measure. *Morris v. Nugent*, 7 C. & P. 572; *Perry v. Phipps*, 32 N. C. 259. The same reasoning on which such a killing may be justified, it is submitted, will justify a trespass reasonably incidental thereto. Especially is this so since the owner of a dog is liable for its attack upon a trespasser. *Woolf v. Chalker*, 31 Conn. 121; *Loomis v. Terry*, 17 Wend. (N. Y.) 497. In the principal case, though the killing was not in defense against the dog's attack, it was clearly a measure of protection against the injurious effects of his bite. However, it may be questioned whether the trespass and the killing of the dog was a reasonably necessary measure of protection. See (1911) 1 HANDBUCH DER TECHNIK UND METHODIK DER IMMUNITÄT-FORSCHUNG, 442.

TORTS — UNUSUAL CASES OF TORT LIABILITY — KNOWINGLY AND UNLAWFULLY CAUSING THE PLAINTIFF TO EXPEND MONEY TO PREVENT LIABILITY UNDER AN INDEMNITY CONTRACT. — The plaintiff contracted with a surety to indemnify him for any loss incurred as surety on a bond for X.'s appearance to answer a criminal charge. The defendant, although he knew of the plaintiff's contract, persuaded X. to leave the jurisdiction, fearing that X., if he remained, might incriminate him. The plaintiff thereupon reasonably expended money to procure X.'s return, in order to avert liability under his contract. *Held*, that he may recover the sum so expended. *Wakin v. Wakin*, 180 S. W. 471 (Ark.).

In the principal case there was clearly no direct contractual relationship between X. and the plaintiff. And, although X. may have contracted with the surety not to subject the latter to liability, the plaintiff cannot be subrogated to the contractual rights of the surety, since he has not yet incurred an obligation to indemnify him. See VANCE, INSURANCE, 427. Hence the plaintiff cannot recover upon the strict principle of *Lumley v. Gye* for wrongfully inducing a breach of contract. However, that an action of tort is without precedent is in itself no bar. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584. In the principal case the defendant knew both of the plaintiff's contract, and that his act would cause the plaintiff either to suffer the loss now sued for, or to pay the indemnity — an even greater loss. Thus, since a tortfeasor intends to cause whatever harm he knows will result from his act, the defendant's injury to the plaintiff was intentional. See 28 HARV. L. REV. 511. See O. W. Holmes, "Privilege, Malice and Intent," 8 HARV. L. REV. 1. And the trend of modern law is, rightly, to the position that the intentional infliction of harm is an actionable wrong unless justified. *McNary v. Chamberlain*, 34 Conn. 384. See 27 HARV. L. REV. 394; SALMOND, TORTS, 2 ed., 497. As the carrying out of his object involved the unlawful act of aiding X. to escape

from justice, the defendant has no justification, although his motive was not to injure the plaintiff. Cf. *March v. Wilson*, Busb. (N. C.) 143; *Sparks v. McCreary*, 156 Ala. 382, 387, 47 So. 332, 334; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258.

VENDOR AND PURCHASER — RESCISSION FOR FRAUD OF THE VENDOR — EFFECT OF "BIG TALK" BY THE PURCHASER. — The plaintiff, an ex-fisherman, negotiating for a purchase of the defendant's land, stated that "he knew good land when he saw it." The defendant thereupon told him sundry lies as to its quality. The plaintiff bought the land. There is evidence that in doing so he relied upon defendant's statements. He now sues to rescind the sale and recover installments of the purchase price. The court below dismissed his suit. *Held*, that this was proper. *Hegdale v. Wade*, 153 Pac. 107 (Ore.).

The plaintiff, having challenged the defendant to fool him if he can, is denied recovery when his challenge is successfully accepted. This result, so in agreement with poetic justice, probably cannot be supported on principles that determine justice according to law. It is impossible even by express contract to waive the right to object to fraud to be committed in the future by the other party to the contract. *Industrial & General Trust v. Tod*, 180 N. Y. 215, 73 N. E. 7. See *Chism v. Schipper*, 51 N. J. L. 1, 11, 16 Atl. 316, 317. Cf. *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458; *Pearson v. Dublin Corporation*, [1907] A. C. 351. But see *Milner v. Field*, 5 Exch. 829. The implied waiver resulting from the challenge therefore cannot be effective. But the challenge has other possible effects. If taken in good faith by the seller as a true statement that the buyer is an expert, it negatives the existence of those circumstances of realized special knowledge and the like which properly lead courts to construe statements of opinion as including statements of underlying fact. Compare *Black v. Irwin*, 149 Pac. 540 (Ore.), with *White v. Sutherland*, 64 Ill. 181. See *Smith v. Land & House Property Corporation*, 28 Ch. D. 7, 15. The statements here, of the quality and probable fertility of lands not yet under cultivation, are *prima facie* statements of opinion. *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Gordon v. Buller*, 105 U. S. 553. Cf. *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107. If the seller's state of mind was as supposed, they must be taken to be nothing more. Also in the matter of reliance by the buyer, the challenge, plus the fact that he saw the land himself, is evidence that he trusted to his own judgment, or his luck, rather than defendant's statements. But the challenge of itself is not conclusive either that what the seller said was only seller's talk, or that the buyer did not act upon it.

VOLUNTARY ASSOCIATION — RELIGIOUS SOCIETIES — CONTROL BY CIVIL COURTS — LIABILITY FOR EXCLUSION OF A MEMBER. — A minister of the Episcopal Church refused to administer the Communion to the plaintiff. By the canons of the Church, a minister is given authority to refuse the rite to those whom he "deems open, notorious, evil livers, or to have done any wrong to his neighbors by word or deed." A person thus excluded is given an appeal to the bishop. The plaintiff did not pursue this appeal, but brought an action against the minister to recover damages for the exclusion, and for slander. *Held*, that she cannot recover. *Carter v. Papineau*, 53 Bk. & Tr. 287 (Mass.).

In England, the union of church and state gives the secular courts an appellate jurisdiction from the tribunals of the established church. *Rex v. Dibdin*, [1910] P. D. 57; *Thompson v. Dibdin*, [1912] A. C. 533. In America, however, when civil rights are not involved, the secular courts have no jurisdiction over ecclesiastical disputes. *Fitzgerald v. Robinson*, 112 Mass. 371. See *Shannon v. Frost*, 3 B. Mon. (Ky.) 253, 258. Since church membership affords no interest in the church property, it involves no civil rights, and therefore an expulsion is not a ground for an injunction nor an action in tort.

Dees v. Moss Point Baptist Church, 17 So. 1 (Miss.); *Waller v. Howell*, 20 Misc. 236, 45 N. Y. Supp. 790. When property rights are involved, however, the courts will inquire whether the expulsion was the act of the proper authorities. *Bouldin v. Alexander*, 15 Wall. (U. S.) 131. But if there is a right of appeal to a higher ecclesiastical authority, the courts will not give relief until that right has been exhausted. *German Reformed Church v. Commonwealth*, 3 Pa. St. 282. See *McGuire v. Trustees of St. Patrick's Cathedral*, 54 Hun 207, 220, 7 N. Y. Supp. 345, 351. Nor will the courts interfere when a member is expelled in accordance with the rules of the church, by which, on becoming a member, he agreed to be bound. *Grosvenor v. United Society of Believers*, 118 Mass. 78. On all these grounds, the court in the principal case rightly refused to give damages for the expulsion. Again, it is well settled that words spoken in the course of church discipline in the presence of the members of the church, are not actionable. *Fitzgerald v. Robinson*, 112 Mass. 371; *Farnsworth v. Storrs*, 5 Cush. (Mass.) 412, 416. By the better view, the protection arises from a conditional privilege, based on the common duty and interest of the members, and is forfeited if malice is shown. See *Jarvis v. Hatheway*, 3 Johns. (N. Y.) 180; cf. *Konkle v. Haven*, 140 Mich. 472, 478, 103 N. W. 850, 852.

WAREHOUSEMEN — UNIFORM WAREHOUSE RECEIPTS ACT — WRONGFUL PLEDGE OF WAREHOUSE RECEIPTS TO INNOCENT PLEDGEE. — In a state where the Uniform Warehouse Receipts Act was in force, X. pledged bills of lading to the A. bank, withdrew the bills on trust receipts, and obtained the goods, which he stored, taking negotiable warehouse receipts. These receipts X. pledged to the B. bank, and later withdrew them on trust receipts. X. became bankrupt. The B. bank petitioned for the recovery of the goods from the trustee in bankruptcy, and the A. bank put in a cross claim, urging that the act should be construed in the light of the former law of the state, by which it was entitled to the property. *Held*, that the B. bank is entitled to the goods, the Uniform Act being construed liberally to secure uniformity of law. *Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, Sup. Ct. Off., No. 117.

For a discussion of the construction of Uniform Acts, see NOTES, p. 541.

BOOK REVIEWS

GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN. By Thomas W. Palmer, Jr. Washington: Government Printing Office. 1915. pp. 174.

This book deals with an important part of one of the most important movements now current. The movement is the attempt to teach the people of one country something about the views and institutions of other countries; and the part of that movement with which this book has to do is the attempt to enable the lawyers of the United States to learn something about the system lying at the basis of the law of Latin America.

Several years ago the Library of Congress began to publish a series of handbooks on foreign law. The plan was elaborated by Mr. Edwin M. Borchard, Librarian of the Supreme Court, and the volume on German law was prepared by him. The present volume follows Mr. Borchard's plan and was prepared under his supervision. The author, Mr. Thomas W. Palmer, Jr., a graduate of the Harvard Law School in the class of 1913, held a Sheldon fellowship from Harvard University in 1913-1914; and this is the fruit of his work while holding the fellowship. The details were collected and arranged by Mr. Palmer in the Supreme Court Library and at the University of Madrid.

The chief purpose is not to state doctrines of law but to guide the reader to the books where the doctrines are stated and discussed. From this point of view there is a description of many sources, including statutes, court reports, encyclopedias, the ancient and modern codes, the constitutions and treatises. The several sorts of subjects with which law deals are conveniently subdivided, and thus the reader can rapidly find what he wishes as to the literature and history of any specific topic, such as eminent domain, succession, commercial associations, public service companies, insurance, bills and notes, criminal law, military criminal law, mines, labor legislation, conflict of laws, colonial law, canon law, and many other subjects.

Moreover, although the purpose is chiefly bibliographical, there is much matter here and there on legal history and on present doctrines. See, for example, the brief sketches of legal history (pp. 9, 12-13, 26-42, 63-64, 92, 97, 100, 106, 109, 120), of the use of decisions as precedents (p. 12), of the development of a philosophy of law (pp. 19-26), of criminal procedure (pp. 101-102), of workmen's insurance and employers' liability and other labor laws (pp. 123-130), and of colonial law (pp. 136-139). The passages cited, and the short allusions to the codes which were extended to Cuba, Porto Rico, and the Philippines (pp. 47-48, 50, 65, 138-139), are of interest to any American lawyer.

Yet, as has been indicated, the author's main purpose is to enable the reader to learn more than is contained within the covers of this book, and hence the greater part of his care has been expended in describing the treatises, periodicals, and other sources to which the reader should go for full information. To facilitate the use of the sources, the author gives a liberal glossary of Spanish law terms (pp. 143-163).

In short, here is an intelligent plan, well executed, dealing with interesting subjects and facilitating a movement of importance to the American lawyer and to the whole world.

EUGENE WAMBAUGH.

THE LAW OF SALES OF STOCKS AND BONDS. By Milford J. Thompson. Chicago: Barnard and Miller. 1915. pp. xxv, 208.

The thesis of this book is thus expressed in the opening paragraphs of the introduction:

"There is a universal violation of the law of sales in the present methods of delivering shares of stock, as they are always delivered to deliver the rights they represent in the issuing corporation's profits, business, and property.

"There is also a universal violation of the law of sale contracts in the present method of selling both shares of stock and bonds, in their legal representative sense, in or against certain property, when both the securities and the corporation profits, business and property are described."

The author's language is often difficult to understand, but the basis of his contention seems to be that a sale of stocks or bonds "in their legal representative sense" is substantially an agreement to sell certain intangible rights against corporate property. Further, that something in the nature of delivery is necessary to a sale, and that this requirement is not met unless the buyer is afforded an opportunity to inspect what is bought; and that, therefore, there is no adequate delivery of stocks or bonds unless the buyer is afforded an opportunity to examine the corporate property which is the ultimate security for them. As the author deems it unnecessary to cite authorities, and as he admits the violation of law is universal, and that the sales or contracts ordinarily made are enforced by law, it is evident that he labors under a mis-

conception of what the law is. He assumes not only that an intangible *chose in action* cannot be sold without delivery and inspection, but also that what gives the *chose in action* value (the property of the debtor) must also be open to inspection. He further assumes that if delivery is necessary, it may not be made by means of a symbol such as a stock certificate. These assumptions of the author vitiate his reasoning throughout the book.

SAMUEL WILLISTON.

PROBLEMS IN THE LAW OF CONTRACTS. By Henry Winthrop Ballantine. Rochester, N. Y.: The Lawyers Co-operative Publishing Company. 1915. pp. 1, 363.

The merits of the system of studying and teaching law from decided cases are mainly due to two circumstances: 1. The cases are the primary sources of the law; and the advantage of seeking law from its primary sources is analogous to the advantage of seeking history from its primary sources. It is the only way to be sure of accurate results. 2. The cases present concrete states of fact which illustrate the application of a rule of law. The interest and attention of the student is attracted by the story of the case, especially if the facts present an interesting situation, or one of common occurrence. He also acquires skill in the ordinary business of a lawyer, by endeavoring to apply rules which he has learned, or is learning, to a particular situation.

Professor Langdell's primary idea in introducing the Case system was probably to gain the first of these advantages; but it may be questioned whether the second has not had quite as much to do with the success of the system.

The suggestion has sometimes been made of making a Case book which should consist wholly of brief statements of facts and that the teacher, giving orally such aid as might be necessary to the students, should set these problems before them without any suggested answer, such as is found in judicial opinions. So far as we know this has not been attempted, and Professor Ballantine does not suggest that his book be used exclusively by students of his subject, but rather in connection either with selected cases or a treatise.

Every good teacher constantly uses problems in his classroom work. This book will suggest some new ones even to an experienced teacher, and an inexperienced one should be greatly helped. Most of the problems are followed by citations of authorities which suggest proper answers or arguments.

In his preface the author states a variety of ways in which his book may be used by teacher or students, and we believe that, rightly used, it will afford help to both.

SAMUEL WILLISTON.

THE LAW OF UNINCORPORATED ASSOCIATIONS. By Sydney R. Wrightington. Boston: Little, Brown, and Company. 1916. pp. xxvi, 486.

This is a valuable book. In Massachusetts many business undertakings have been organized by vesting property and powers of management in trustees who issue transferable certificates of beneficial interest. Outside of Massachusetts this form of organization is but little used. But recently interest in such form of organization seems to have greatly increased; corporation laws are often thought to be unduly burdensome, — particularly those which fix the terms on which foreign corporations may do business within the jurisdiction; and the inquiry as to how far, without incorporation, facilities and protection may be obtained, approximating in substance corporate facilities and protection, has become of increased practical importance. Any contribu-

tion on this subject is welcome. Mr. Wrightington's book is the work of a thoughtful, accurate lawyer.

The text of the book also covers a variety of other topics falling appropriately under the title of "Unincorporated Associations." The appendix of forms covers over 150 pages.

EDWARD H. WARREN.

LES TRAITÉS FÉDÉRAUX ET AL LÉGISLATION DES ÉTATS AUX ÉTATS-UNIS.
Par Lindell T. Bates. Paris: Librairie Générale de Droit et de Jurisprudence. 1915. pp. 228.

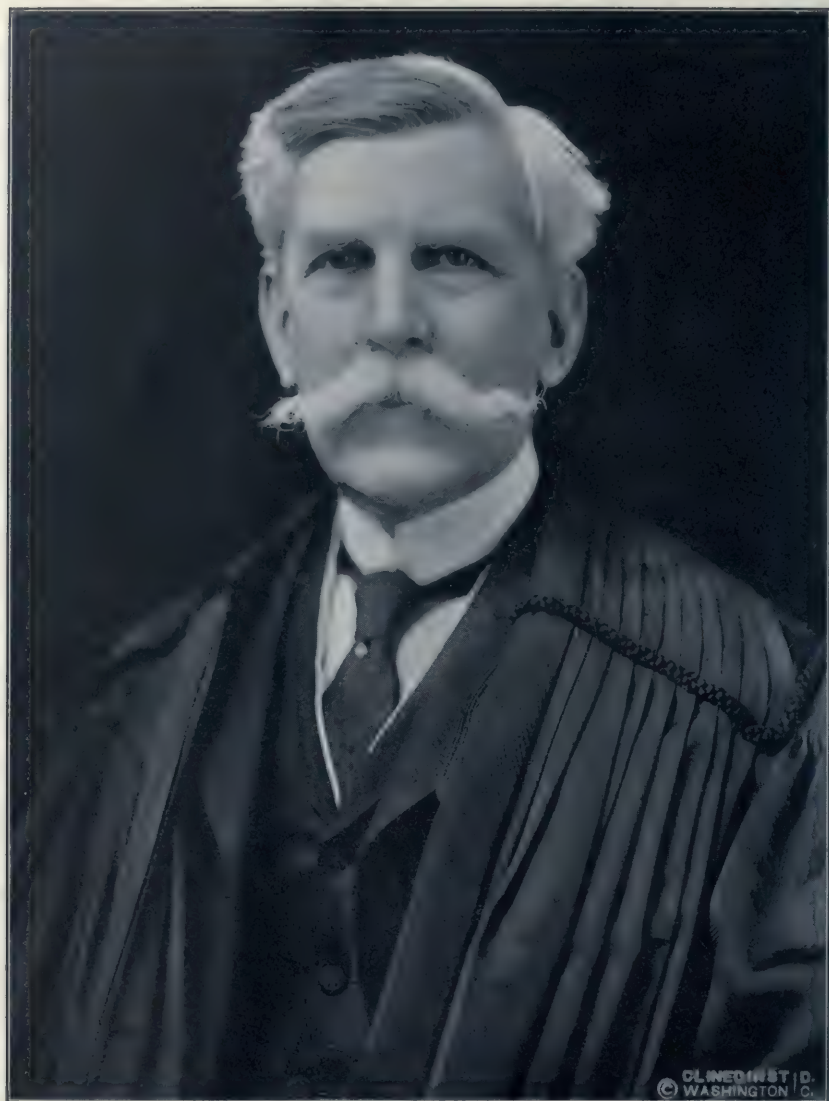
CASES ON THE LAW OF PUBLIC SERVICE. By Charles K. Burdick. Boston: Little, Brown, and Company. 1916. pp. xiii, 544.

RIGHTS AND DUTIES OF NEUTRALS: A DISCUSSION OF PRINCIPLES AND PRACTICES. By Daniel Chauncey Brewer. New York and London: G. P. Putnam's Sons. 1916. pp. ix, 260.

COMMENTARIES ON THE LAWS OF ENGLAND. Volumes I and II. By Sir William Blackstone. Edited by William Carey Jones. San Francisco: Bancroft-Whitney Company. 1915. pp. cxxiii, 1486; lxxxii, 2770.

PRINCIPLES AND METHODS OF MUNICIPAL ADMINISTRATION. By William Bennett Munro. New York: The Macmillan Company. 1916. pp. xi, 491.

THE ANCIENT HEBREW LAW OF HOMICIDE. By Mayer Sulzberger. Philadelphia: Julius H. Greenstone. 1915. pp. 160.



MR. JUSTICE HOLMES

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COSMOPOLITAN CUSTOM AND INTERNATIONAL LAW

So on a time walking with me along the Thames' side at Chelsea, in talking of other things he said unto me, "Now, would to our Lord, son Roper, upon condition that three things were well established in Christendom, I were put in a sack and here presently cast into the Thames." "What great things be those, Sir," quoth I, "that should move you so to wish?" . . . "In faith, son, they be these," said he, "the first is that, whereas the most part of Christian princes be at mortal war, they were all at universal peace." ROPER, *Life of Sir Thomas More*.

FROM the Middle Ages onwards there have been schemes without number for securing perpetual peace to the civilized world, from Dante's magnificent vision of universal monarchy to the pleasing but unsubstantial imaginations of pacific anarchists, and from elaborate plans of confederation with complete executive, judicial and legislative powers to proposals which reject military compulsion altogether and allow, at most, some exercise of economic pressure against a contumacious member. We have also seen established in our own time a considerable machinery for the reference of national disputes to good offices or arbitration, and it has worked well on several occasions. The too familiar evils of war have been denounced with unwearied vigor, and new and ingenious arguments brought forward to prove that under modern conditions war can end in no real profit even to the successful party. Notwithstanding all this, we see the greater part of Europe involved in a war which broke out with unexampled suddenness and violence. All European Powers of the first rank are now bel-

ligerents; and the one neutral Great Power, the United States, has been hard put to it to steer an even course between the perils of intervention and the scandal of failing to protect its own citizens' lives and goods. Thus the war is of an extent to which no parallel can be found except in the final coalition against Napoleon.

Less than a fortnight elapsed between the opening and the closing events of the preliminary stage, the Austrian note to Serbia and the British declaration of war. In those fatal days all the known methods of averting an irreparable breach of the peace were tried, and all failed. An offer of a reference to The Hague tribunal was twice made, by the Serbian Government and by the Emperor of Russia, and twice ignored. The British suggestion of a conference found no favor at Berlin. Informal mediation and good offices never had a chance, and the supreme expedient of urgent personal messages between some of the Sovereigns concerned fared no better.

We are driven to the conclusion, which indeed is not novel, that the means hitherto in use for preserving peace are effective only when the parties have already made up their minds not to fight, or desire to be fortified with good reasons for not fighting. Let us clear the ground by stating shortly what they are, and observing their strong and weak points.

Arbitration, formally conducted in the manner of judicial procedure by argument and reasoned decision, is good for the settlement of such disputes as are reducible to definite issues. Questions of boundaries and other territorial rights, whether depending on the interpretation of treaties or on claims of continuous occupation, are eminently fitted for this treatment; and, since the constitution of The Hague tribunal, it may be said that a court is provided and always open to those who will use it. But, as matters stand, resort to this tribunal, or to any other which may be arranged between the parties by treaty or otherwise, can be had only by consent. There is no way of compelling an independent state to go to arbitration, or to admit that arbitration is the right procedure in any particular case. Moreover, there are many differences which are not suitable for judicial arbitration by reason of the difficulty in framing issuable questions for the tribunal, or of the facts pointing not to the need for a clear decision, but on the contrary to a compromise without any positive decision being the

more acceptable solution. More harm than good has been done, I venture to think, by enthusiastic advocates for arbitration who have not only pressed its merits beyond what they will bear, but in their eagerness to prescribe it as a panacea have wilfully belittled the older arts of diplomacy.

Mediation, that is, the intervention of one or more third Powers for the purpose of conciliation and persuasion, but without reference of any defined question or authority to decide anything, is a more elastic method than arbitration, but in operation it is one degree weaker. For it supposes, in addition to a previous willingness to agree, that the same will continue throughout. Either party can break off at any time without being exposed to a charge of bad faith, which in the case of arbitration is not so. On the whole, mediation, and the less formal equivalent known as "good offices," are more useful for smoothing the way towards a settlement than for conducting the matter to an end. So it was when the good offices of the French Government were employed with complete success in the matter of the Dogger Bank incident of 1904. The "democratic control" extolled by some people would, in my judgment, almost certainly have led to war between Great Britain and Russia if it had been applied on that occasion.

Conferences of ambassadors or special delegates have often been useful in effecting a settlement after war, and in confining local wars within their original limits. But they are seldom called together until great mischief has already been done, and no case is known where a formal conference has wholly averted impending war. The most favorable example in our time is that of the Congress of Berlin held in 1878, which did indeed keep the peace in Western Europe, but achieved at best a precarious compromise in the real seat of danger, the Balkan peninsula. Not that compromise is in itself a bad thing, but when, being in its nature unanimous or nothing, it has to be made between several parties having divergent interests and ambitions, the merits of which bear no necessary proportion to the force they can exert, the result is less likely to be a genuine voice of collective reason than to be such as will give the least dissatisfaction to the most powerful. And that kind of compromise lasts just as long as the more ambitious and the less contented parties continue to think the possible advantage of breaking it not worth the risk. Direct negotiation, when it can be applied,

is obviously the best way of all in national as well as in private affairs. But, even more than other methods, it assumes the existence and continuance of a genuine will to agree. Moreover, it can easily be misused by any Power which is really bent on war, failing complete satisfaction of its demands, but wants to gain time for military reasons.

Such being the manifest defects of the remedies available without actual force of arms, it was no wonder that the title of the law of nations to be law in any proper sense was often disputed. Nevertheless it appeared to many thinking men, before the outbreak of this war, that, if the formation of an international procedure was very slow, some hope of security was given by the increase of other deterrent motives. The very magnitude of modern armaments and warlike preparations, the cost of hostile operations on an answerable scale, and the complication of modern economic interests, all increased the risk that must be incurred by any government breaking the peace, and seemed to make deliberate aggression less and less probable as time went on. All such expectations, held indeed for the most part with knowledge that they were precarious, are now bitterly disappointed.

The commonwealth of nations has relapsed into a state like that of medieval kingdoms at the time when private war was still a common mode of redressing real or supposed injuries, limited in practice only by the attacking party's estimate of his chances.

Municipal law had completed its emergence from that state in western Europe about the time when Grotius began to show how the law and usage of nations could be reduced to rules which, although not formally sanctioned, might be expected to be received in common opinion and tolerably well observed in practice. We shall not inquire in this place how far that expectation also has been disappointed in the present war. But it may be useful to observe by what steps respect for ordinary law was brought about within the limits of municipal jurisdictions, and to see whether in the relations of independent states we can trace analogous tendencies. As regards England at any rate, it may be worth while to remember that down to the beginning of the eighteenth century, if not later, the actual coercive power at the disposal of the Government was far less in proportion to possible means of resistance than it is now, so far that one is easily tempted to call it insignificant. Neverthe-

less, as national governments took the place of merely personal lordships and overlordships, they were not only obeyed but on the whole better obeyed than their predecessors. Rebellions and revolutions have taken place, and in various countries at various times there has been an abeyance of regular government, or a series of abrupt transitions from one claimant of authority to another. But it may be observed that in the restoration of settled authority after any such period the new government has generally proved more efficient than the old. Even if it claimed less power, it was in fact able to exercise more. This was notably the case in the sequel of the French Revolution.

Two principles appear standing out in the Common Law as it begins to come to its strength in the twelfth and thirteenth centuries: the stern condemnation of self-help, and the duty of every man to give aid in keeping the peace. Applied to the law of nations, those principles would go far to prevent war. It will be time to talk of absolute prevention when we can point to any municipal code or judicial system that has succeeded in abolishing homicidal crime and making riot impossible. We avoid a rather favorite word of some publicists, "unthinkable," for it may be noted that when a man cries aloud that something unpleasant is unthinkable, his real meaning is apt to be that he is very much afraid of it. Let us see how far, as between nations, we have hitherto failed to satisfy the requirements of even medieval law.

It is now the common learning of historical students that the King's Court, in the days of Bracton and later, set its face most firmly against every taking of the law into a man's own hands. Even the necessity of corporal self-defence was in strictness an excuse for the breach of the peace rather than a justification. In matters of property the recaptor made himself a wrong-doer though he might be in a position, if he came as a suitor, to show a perfectly good claim. His act was unlawful because it lacked the proper sanction of the King's justice, and the words *sine iudicio* were so constantly associated with the word *iniuste* as to become all but indistinguishable in meaning. Possession once established had to be recognized as part of an existing order of things with which no merely private judgment could be allowed to meddle. The later medieval law, while it allowed a wrongfully lost possession to be resumed in a peaceable manner if opportunity could be found,

enacted statutory penalties to strengthen the prohibition of forcible entry. We are not concerned here to measure the varying degrees of approximate observance conceded to the rule as the King's hands were stronger or weaker, the country more or less settled. The recrudescence of private war at the very end of the Middle Ages, under such partisan pretexts as the Wars of the Roses afforded, or without any pretext at all, is notorious. But nobody would have dared to deny the existence of the rule as a rule of law. So long as the law makes her continual claim in the face of passing outbreaks of anarchy, she stands a good chance of coming into her own again; and the reign of law has been practically complete for two centuries or more in the whole of western Europe. It is well to remember that, although it may not be a fact of the most compelling kind, the existence of an admitted positive rule is as much a fact as anything else, and cannot safely be neglected; as is shown by the anxiety of aggressors, however powerful, to make out that some kind of rule is on their side.

If, therefore, we could find any similar rule in the custom of nations, anything like a collective reprobation of self-redress by arms without proved failure of peaceable means, we might be content to believe that there is, or was before the present catastrophe, a movement on right and promising lines towards the hardening of a vague moral sense into more or less effective legality. But so far all who have set their faces in this direction have been confronted with an extremely stubborn obstacle. This obstacle is the doctrine of indefeasible state rights, now grown to a dogma from which some publicists and even diplomats have not hesitated to develop absurd consequences. I do not here allude to that form of modern German philosophy which makes the state a kind of Absolute, and not only denies the individual citizen any rights against it, but leaves no measure of right applicable as between sovereign states, and does not so much as admit the natural bond of good faith. What I mean is the political doctrine which asserts that any delegation of real authority outside the state's own jurisdiction is a derogation from its independence. That doctrine has been asserted with disastrous effect at The Hague Conferences, not only by Germany but by the delegates of some South American states who thought it, seemingly, a good way of advertising their claim to stand on an equal footing with any European Power. This con-

fusion of equality before public law with having an equal voice for all purposes appears to me no more reasonable than if the smaller shareholders in a company should demand not only an equal right to be heard but equal voting power for every shareholder even if he had only one share. Manifestly no business corporation could work on such terms; and until princes and rulers take up the preservation of peace among nations as a matter of real business and not of pious wishes expressed by non-committal resolutions, they will not get the business done. The most ingeniously framed international tribunal will not serve so long as the submission of disputes to its award is merely voluntary; and as regards the commonwealth of nations arbitration treaties whose obligation is confined to the particular contracting parties are merely private arrangements. It seemed possible some years ago that a network of treaties framed on a substantially uniform plan might embrace all the civilized nations and create a custom of referring disputes to arbitration or conference which would become a recognized part of public law. But now the obligation of treaties itself is in jeopardy, and is openly treated by the military school of publicists as being no stronger than that kind of promise which, as a Roman jurist said, "*ex voluntate promittentis statum capit.*" So far are we, at present, from any general or settled opinion that states no more than citizens within a state should take on themselves to be sole judges in their own cause. All forms and methods of pacific adjustment are still subject to dangerous exceptions. We have made treaties and renewed them, to be catalogued with innocent exultation by the secretaries of peace and arbitration societies; it costs nothing to yearn for perpetual peace with Siam or Ecuador. We have established a court, accepted the gift of a palace to house it in, and appointed learned and discreet persons of divers nations as a judicial rota, who have even decided cases of considerable importance; but all this under the reservation — unless we really want to fight. After the present war we must break down that reservation, or relapse into the state of armed mutual suspicion, or buy peace by submitting to the virtual dictation of a triumphant military Power which openly declares its will to be above law.

Now one of these alternatives is repugnant to the nature of free and civilized men and shown by the history of the last two centuries to be chimerical; at least most people west of the Rhine, east of

the Vistula, and south of the Alps think so. The collective efforts of Europe towards rational policy have been halting enough, but as to one thing there has been general agreement, namely, that an overbearing supremacy of any one Power is not to be tolerated, and that war undertaken to frustrate that kind of dynastic or national ambition is just.

According to Professor Ostwald of Leipzig, Germany wants to organize Europe.¹ As that learned person is a chemist and not a historian, he may not be aware that Europe has already thrice refused to be organized at the bidding of any one dictator.

When Philip II of Spain sought a crown of universal dominion as the temporal reward of his zeal for the counter-Reformation, he failed even without being opposed by a formal coalition. A century later Louis XIV claimed to be the arbiter of Europe, and Europe turned upon him in such sort that the best informed Frenchmen accepted the Treaty of Utrecht as a providential deliverance from utter ruin impending on his kingdom. Another century passed, and a greater captain than any who had faced Eugene and Marlborough commanded, for a time, triumphs beyond any of Louis XIV's aspirations. After ten years of predominance he was cast down with a yet heavier fall. All these mighty men fell: "*graviter magni magno cecidere ibi casu.*" Shall any stand where they could not stand? Can the Hohenzollerns overcome Europe's fourth refusal? The answer to that question, a century after Napoleon's final defeat, will be plain before long. Our point here, however, is only to call to mind that underlying all these dramatic failures is a constant principle, not so much a rule as a collective instinct of national self-preservation; working, hitherto, clumsily and with many drawbacks, but still discernible in the background

¹ So too August Julius Langbehn as reported in the *Times* Literary Supplement, Sept. 9, 1915: Germany "by its very position must either dominate the political life of Europe or be dominated."

We have our Chauvinists in Great Britain, but I have not heard of any of them going so far as this, nor of any country other than Germany where the swagger of a common bully is uttered and received in sober earnest by learned and official persons. The heterogeneous composition of the British Empire is perhaps of itself a sufficient security against the dream (if any one should ever dream it) of organizing the world on any British pattern. Our Dominions have made their own constitutions, and made them each in its own way. Whenever India makes hers, which will hardly be in my time, it must be in an Indian and not a merely second-hand European way if it is not to be a failure.

of all schemes and combinations, and always perilous to those who neglect it. This principle is compendiously named the Balance of Power. Vituperation and ridicule have been showered on it by superficial politicians, foolishly taking it for a cause of the evil for which it was an imperfect remedy. Call it what you will, maxim, rule of policy, or mere tendency, it is rooted in the human nature of men who will not renounce the liberty of living in the fashion of their own countries. If statesmen are to be censured herein, it is not for recognizing that fundamental right, but for failing to give it better effect and to be impartial in their recognition. The conception of the Balance of Power is sound enough; the problem is to lift it out of the region of undefined and unordered usage and to clothe it with assured sanction in the future commonwealth of nations. It must also be protected from being made to serve as a stalking-horse for restless ambition and dynastic jealousy: such abuse is not unknown in modern history. Being really in the nature of homage from vice to virtue, this does not justify, though it partly explains, the denunciation of the principle itself by well-meaning advocates of lax and shallow liberalism, who must now be surprised to find themselves on the side of the anarchist military school. So did the English ultra-royalists after the Restoration find themselves, as to the fundamentals of secular polity, in the same boat with Hobbes, whose ecclesiastical doctrine they abhorred.

Besides the various accidents to which the want of defined authority must expose the Balance of Power doctrine, it suffers from a graver inherent defect. It becomes operative only when the mischief has already reached an acute stage and the time for milder remedies is past. Rulers who aim at domineering over their neighbors do not begin by talking about it even in their own official counsels. One quarrel at a time, and with the weaker adversaries first, is the modern way.² More or less plausible reasons are seldom wanting; and, though the weaker state thus attacked will appeal for help in any quarter that seems at all promising, few cases are so simple that the grounds of such an appeal will evidently carry conviction if judged on the particular merits. There is no admitted duty to come to the aid of the weaker, nothing equivalent to the legal force of the medieval hue and cry. Nevertheless traces of a

² Not that it is always politic. Certainly Polyphemus made the worst mistake of his life when he left Odysseus to be eaten last. But why be a cannibal at all?

wholesome usage, which seemed about to become a true custom of nations, were noted by an acute student of affairs half a century ago. W. A. Kinglake, the historian of the Crimean War, went so far as to speak of a "Supreme law or usage which forms the safeguard of Europe" in a chapter which, so far as I know, has been wholly neglected by professed writers on the law of nations.³ He suggests that "perhaps under a system ideally framed for the safety of nations and for the peace of the world a wrong done to one state would be instantly treated as a wrong done to all," but regrets that "in the actual state of the world there is no such bond between nations." Nevertheless there is not complete impunity for aggressors. Under certain conditions interference is possible and may even be called usual. When wrong is done to any state, when it is attended with consequences injurious to any of the Great Powers, and when that Power is in a position to exert its force with a fair prospect of success, then Europe is "accustomed to expect" that the Great Power so affected will either take arms or labor for an effective combination of neutral states. Kinglake proceeds to point the moral from the history of the Napoleonic wars, instancing the disastrous failure of Prussia to fulfil this expectation in 1805. His immediate object was to lead up to the contention that the Crimean War might and ought to have been prevented by a more firm and patient European diplomacy, had the Powers interested only taken a course of combined action betimes and adhered to it: a contention now of diminished interest, though I believe Kinglake's opinion is pretty generally accepted. It is too manifest that, so far as the recognition or efficacy of any such usage is concerned, whatever change has taken place since he wrote has been for the worse.

In the generation preceding the War of 1914 we lived under a roughly approximate and, as it has proved, unstable equilibrium formed by groups of Powers — a constitution, if one may so call it, with two opposing parties and no government. The smaller states were for the most part either nominally protected by express treaties or attached to one or the other group by some such ties (not necessarily or exclusively of a material kind) as made it that group's interest to protect them at need; and it was commonly supposed

³ *INVASION OF THE CRIMEA*, vol. 1, ch. 2.

that they might thus count on a tolerable degree of security. But the Swiss made up their mind long ago to take no risk by putting their trust in either princes or treaties, and the event has shown that they were well advised. There was nothing in the nature of this rough equilibrium, nor in any of the international conventions made for various purposes, useful as these were in their sphere, to prevent indefinite increase of armaments under the stress of mutual fear and jealousy. Those passions were fruitful, and waxed stronger from year to year on the noxious growth of their own fruit. Certain well-meaning publicists darkened counsel and committed themselves to denying manifest facts by maintaining that such fears had no foundation at all. Events have sufficiently rebuked them, but it is not material to attempt any nice measure of their delusion. The mischief, at any rate, was there and obvious. A remedy was hardly less obvious, but obvious remedies are not always easy to put in practice. Overgrown armaments, it was said, might be checked by a general convention, if not for an actual proportional reduction, yet for arresting the process of growth; or if this was too cumbrous and complicated, much could still be done if one or two leading Powers in each group could come to an understanding and begin to set an example. It was no mere affair of discussion among publicists or in semi-official utterances. Limitation of armaments was the object aimed at, in the first instance, by the Emperor of Russia in convening the first Peace Conference held at The Hague in 1899. And yet nothing came of a proposal on the face of it so reasonable. All men, or almost all, spoke well of it in principle, but none were found to venture on a first step in execution. Great Britain alone among the European Powers was prepared to give any substantial support. Germany flatly refused to consider the subject at all at the Second Peace Conference of 1907. It must be admitted that effectual discussion would have called for disclosure of matters which could not well be put on the table of a cosmopolitan conference; but it is not so clear that, given a general will to reach a practical conclusion, the technical problems could not have been entrusted to a select and secret committee which would have reported results without entering on the details of its reasons. Official or demi-official proposals, of a less ambitious kind and confined to naval armament, were publicly made at later dates by the British to the German Government; but Germany, for whatever

reason, did not see the way to fall in with them to any considerable extent. The negotiations of 1912, now laid open to the world, did not in terms make any provision about armaments; they rather aimed at avoiding the technical difficulties by making war between the contracting Powers so unlikely that armaments might be safely reduced, or not further developed. It would take us too far to dwell on them here. But it may be observed that a treaty of conditional neutrality with no means of interpreting the conditions in case the parties differ, or a promise of "benevolent neutrality" in certain events, a term unknown or at least undefined in the law of nations, is not exactly the most hopeful instrument of peace one could desire.

For the sake of completeness it is well to mention one more conceivable check to military ambition which has been invoked by lovers of peace any time the last thousand years: the authority of the Church, or rather, since the Reformation, the influence of the many churches and congregations of modern Christendom. It is notorious that religious motives have never been effectual on a large scale to restrain war even between states professing exactly the same religion, to say nothing of the specially ferocious wars of which theological and ecclesiastical controversies were the cause or pretext. Between the Reformation and the French Revolution the Most Catholic King of Spain, the Most Christian King of France, the Holy Roman Empire, and the Holy See itself in respect of its temporal possessions, were repeatedly at strife among themselves, one or more of them being as often as not in alliance with Protestant rulers against fellow Catholics. The ultimate historical reason lies far back and is plain enough. Christianity in its primitive form was the rule of a religious order which left secular government, war, peace, and politics altogether outside, and obeyed the temporal power without question in everything short of acknowledging its false gods. There is no knowing what a free and independent Christian Church might have done. But the conversion of Constantine, as it came about, entangled the Church in the existing system of the Roman Empire, committed it, after a brief glimpse of universal toleration, to persecution of dissidents, and made it impossible for officialized Christianity to take up any firm position against militarism. The voice of the Society of Friends may be not far from the mind of the really primitive Church, but it is a voice crying in

the wilderness. At the beginning of the official elementary manual of Christianized Roman law, the Institutes of the orthodox Emperor Justinian, war and slavery are alike recognized as lamentable but unavoidable evils which must be tolerated in the actual condition of human society. If all men were virtuous and reasonable there would be no crime and no war. Justinian knew that as well as any modern pacifist.

The sum of the matter is that good intentions have been manifested in various ways, and with partial good effects, but that in the field of the larger European ambitions and rivalries they have been baffled for want of appropriate or adequate organs. Thomas Hobbes said: "Covenants without the sword are but words, and of no strength to secure a man at all." But we have not as yet even covenants that are sufficient on the face of them to cover such a case as that of the War of 1914. Every commonwealth has its own internal peace, and breach of that peace is a substantive offence. Private force is indeed excused or justified on certain occasions, but the law and not the party must judge whether there was real and sufficient occasion. The commonwealth of nations must have its own peace too, a peace established with justice and judgment and with means of enforcing the far-reaching rule "*iniuste quia sine iudicio*." Otherwise we must despair of having any real commonwealth of nations at all. We have now had our lesson that nothing short of this will serve. Another word of Hobbes is to the purpose: "a common power to keep them in awe." Such a power has to be devised, as being no less proper and necessary for nations than for natural persons. Not that states are, in one sense, any less natural than individuals; for they are certainly in a state of nature with regard to one another at present, whether individuals ever were so or not. There is no novelty whatever about the ends to be sought, and the principal aim of the foregoing survey has been to enforce this elementary truth. Nor is there any doubt as to their importance, except in the philosophy of the militarist school who would throw back the society of nations not only to a pre-Grotian but to a prehistoric stage. But we must proceed warily. A real federation of the sovereign states which have been parties to the Postal Union, the Conventions of The Hague, and so forth, is at best a counsel of perfection too remote to be considered with any profit. Even if we could suppose the Powers consenting to establish a federal ex-

ecutive machine independent of any component state, the difficulties, first of making it strong enough to be effective, and then of securing a really impartial command, would be enormous. Europe might become a polyglot federal commonwealth like Switzerland if we were threatened with an invasion from Mars. We must look in the direction of a quasi-federal alliance, a league of peace and international jurisdiction guaranteed by the joint and several force of all the allies. It is not necessary, though desirable, that such a league should include all the considerable civilized Powers. The league, as regards all states outside it, would have to be a defensive alliance; and this would be a drawback so far as the allies were compelled to remain in the position of the strong man armed. But the refusal of one or two Powers⁴ to come in, even if they were great ones, would by no means be fatal to the scheme. In any case the league would warrant its members against attacks from without; the amount of standing expense and preparation to be undertaken for that purpose is a matter of degree. The members would on the other hand be strictly forbidden to commit hostile acts against one another, and bound to be assisting to the common authority both against external aggression and against any recalcitrant member.

Need I repeat that in the broad lines of such a plan there is nothing unknown or unfamiliar to publicists? Readers of the *HARVARD LAW REVIEW*, at any rate, are not likely to want any such reminder. Many projects intended to carry out these ideas are in existence. A large proportion of them, unhappily, are on the face of them unsatisfactory. They commit themselves to overmuch detail and lose themselves in anticipating imaginary friction while they neglect substantial difficulties; or they treat sovereign states as if they were litigants before an assize court, and expect them to take over a servile imitation of municipal justice with all its formalities and other imperfections; or they are framed by speculative writers who have no experience in the conduct even of ordinary business. This last fault, perhaps, is the commonest; but the real knot of the problem is in the framing of a judicial system which shall not be merely

⁴ Or possibly one leading discontented Power, and satellites formed out of the more kindred fractions of an ally not only defeated but broken up into several states, together with such minor states as had shared its misfortunes. It is idle, however, to speculate on contingencies which would make no great difference to the general situation.

forensic. Unrelieved forensic method has already broken down in many kinds of municipal affairs. It will not work for the settlement of trade disputes, or for many branches of local government. Common law pleading sought to drive the parties to an issue. The strict form of it which prevailed down to the middle of the nineteenth century and now survives in only a few jurisdictions pursued this false logical ideal to the detriment of substantial justice. That is what we specially want to avoid for a group of juridically equal states who are anxious to submit their differences to equitable settlement. Peace and contentment are more important than logic. The more one considers this point, the more vital it appears. Only one published plan has come to my notice which handles it quite frankly and, in my humble opinion, effectually. This is not to deny the merit or, within bounds, the utility of many other contributions to so large and difficult a theme; but critical discussion or analysis of even a selected number would not be appropriate here. I may as well dismiss at this point a suggestion made in some quarters that seems to me wholly misconceived. Any one who imagines that the settlement of terms of peace between the belligerents in the present war can be mixed up with revision of The Hague Conventions, or of any other general rules in the law of nations, not to speak of reforms or innovations of wider scope, is living in a world of dreams, and the dreams of a sleeper who has never known anything of public business in his waking hours. Reconstruction of public law must come, but as a distinct undertaking and as of common interest to the world.

The plan I venture to single out as eminently practical is that put forward by Mr. Taft in an address delivered at Cleveland, Ohio, in May, 1915, and published by the American Society for Judicial Settlement of International Disputes. It is founded on a careful consideration of the interstate jurisdiction and functions of the Supreme Court of the United States. It brings out more clearly than any other statement I have seen, though it is not the only one which takes the point,⁵ the need of providing for such questions as in that court have been held not "justiciable": questions which

⁵ The distinction between "justiciable" and "non-justiciable" disputes has been in the air of English discussion for several months, and one scheme generally like Mr. Taft's, and apparently conceived about the same time, is in print, but as it is not published I must say no more of it.

nevertheless, when they arise between independent nations, may well be as troublesome and dangerous as any others, though not capable of a strictly judicial solution. Mr. Taft's League of Peace would have a judicial court for justiciable matters, with authority to decide whether any question referred to it is justiciable or not. Such authority is in fact exercised by the Supreme Court at Washington, only in the case of a negative answer the means of federal justice are exhausted. For non-justiciable cases Mr. Taft would have a Commission of Conciliation with power to mediate and recommend. It would seem desirable that the two bodies should have at least some of their members in common, a point of detail on which Mr. Taft says nothing. There appears to be no reason why the parties should not go before the Commission of Conciliation in the first instance if they are so minded, or before a mixed Committee of Selection which might sift out the justiciable and non-justiciable questions in any case of unusual complexity.

International law should be developed by means of conferences whose formulated results would be laid before the Governments of the League for a certain time, and accepted as binding if no objection were made. This method of legislation in technical matters has been quite familiar for some time to English lawyers and public men. We live under a host of Orders in Council and departmental orders which have acquired statutory force by being laid before Parliament for a specified time and not opposed, and the system works quite smoothly. To an English legal mind, therefore, Mr. Taft's way out of the various pitfalls of The Hague Conference appears as practical as it is elegant.

There would be no need for a direct process of execution to enforce the judgments of the Court or the recommendations of the Commission. Any attempt either to resist a decision or to gather its fruits by violence would be an offence against the League, to be met by prompt repression. Mr. Taft has not explicitly considered the case of a defeated party trying to evade the consequences by vexatious delay. That case does not seem very likely, but I submit that it could be dealt with by commercial restraint or other forms of pressure which would be quite as effective as military coercion and free from its dangers.

We cannot ignore the contingency of some Power of the first rank refusing to join a League of this kind. Any such Power

would, as I have hinted, be simply left outside, and confronted with such military precautions as the League judged necessary. This would be consistent with diplomatically correct relations, though not with cordial friendship. I do not believe that an attitude of dissent would be permanent, for the simple reason that there would be nothing to gain by it. If any Power could afford to stand out better than another it would be the United States, but I do not think any American Government would be likely to take that course, or American public opinion to sanction it. On the contrary, the United States is the one Great Power whose initiative in convening the preliminary Conference ⁶ would be most natural, most free from suspicion, and most welcome.

For the first time in history the civilized world stands in face of an undisguised claim, backed by enormous military power let loose after many years of preparation, to conduct war on the principle of subordinating all natural and conventional rights to military necessity, which means the convenience of army commanders judged by themselves without appeal. Such a claim asserting itself in arms can be repelled, in the first instance, only by superior force of arms, for the claimant owns no other argument. When that is done, the broken and flouted law of nations must be strictly revised by a general agreement of civilized Powers, and better sanctions provided for it; and the aim of those sanctions must be not only to regulate warfare but to prevent wars of surprise in future. Let us hope that to that end such fitting measures may be ordained by the wisdom of the nations as will carry with them a just, effective and universal authority.

Frederick Pollock.

LONDON, ENGLAND.

⁶ The existing mechanism of the Hague Peace Conferences might perhaps be utilized for this purpose to some extent, but I doubt it. At all events the procedure would have to be radically different. I am inclined to think that the preparation of agenda for anything like a cosmopolitan Congress should be in the hands of a much smaller body.

MONTESQUIEU AND SOCIOLOGICAL JURISPRUDENCE

IN a highly flattering letter Mr. Justice Holmes has suggested a criticism of my book on the sociology of law (*Grundlegung der Soziologie des Rechts*) in that he finds therein no reference to Montesquieu. I accept the criticism, but beg that no inference may be drawn therefrom, since in my eagerness to explain my own views on the sociology of law I neglected to give a full account of the history of the subject. But my reverence for the author of *L'Esprit des Lois* is very great. Hence in this paper, seeking to pay due honor to the illustrious American jurisconsult, I shall endeavor to make amends for the omission and to render justice to one of the first sociologists of the past in the only way worthy of his genius, namely, by telling the whole truth about him, as I see it, not sparing necessary criticisms.

When Montesquieu began to write, the doctrine of the law of nature, as it had been laid down chiefly by Hugo Grotius and Pufendorf, was at the height of its influence. Its followers assumed that human society had been established by a social contract, express or implied, and that law was only a corollary of this original contract, wherefrom it might be deduced by scientific ratiocination. As the social contract was the same in every part of the earth, its logical consequence, the law of nature, must also be the same everywhere and at every time; but as it was not always clear, it must be unveiled by science. It formed the basis of and the standard for the municipal law, which miscarried whenever it deviated from the principles thereof.

Montesquieu, too, talks of the law of nature, but in a different sense. He uses it to mean the natural instincts of mankind which must not be overridden by law; the desire to live in peace with one's fellows, the sexual impulse, self-defense, the necessity of search for food, the modesty of woman. A natural law of this description is obviously too barren and of too little import to serve as a pattern for the law of a society.

His own views on the science of law are expressed in the prelimi-

nary chapter of his book in words which must be quoted in the original:

[Les lois] doivent être relatives au physique du pays; au climat glacé, brûlant ou tempéré; à la qualité du terrain, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs, ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir; à la religion des habitants, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs mœurs, à leurs manières. Enfin elles ont des rapports entre elles, elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies. C'est dans toutes ces vues qu'il faut les considérer.

Thus in strict contradiction to the law-of-nature school, which assumes a uniform, everlasting law to be inferred once for all from a supposed contract which is essentially identical throughout the whole world, Montesquieu teaches that law depends on multifarious conditions and varies at once with these conditions. This idea of the correspondence of law with outward circumstances perhaps marks the greatest progress effected by a single man in legal science. But here we must denounce a certain vagueness which appears in the very wording of the text. The French term *devoir*, used by Montesquieu, signifies both what ought to be and what must be. In the passage quoted above and generally throughout the whole book, Montesquieu takes it in the first meaning. In the main, therefore, his book deals with legislative politics. But he was so far influenced by the law-of-nature school as not to draw a sharp line between the law that ought to be and the law that actually exists. "The law," he says, "is but human reason governing all peoples, and the public and private laws ought to be (*doivent*) only particular cases to which human reason is applied." Moreover he is aware that we may succeed in mastering legislation only by understanding the real causes of the existence of law. Therefore his point of issue shifts slowly. With him the two questions, how law is to be constituted to fit its outward conditions, and how it is necessarily shaped by those conditions, often flow into one another. But in this way, along with a critical discussion of the ends of law, we get a sociological explanation of law by its causes. In fact *L'Esprit des Loix* must be considered the first attempt to fashion a sociology of law.

Though in the mind of their author secondary and incidental only, the sociological parts of the book are to-day of the greatest scientific interest and before all attract the attention of a modern sociologist. Let us begin with them. The idea of a sociological science of law, while generally loose and wavering, is on some occasions perceived by Montesquieu very distinctly. In the preface he asserts that he does not write in order to criticise what exists, but to give the reasons and principles thereof. In another passage, fearing that the reader might be shocked by his examination of the principles of monarchy, he emphatically protests that he does not speak of what should be, but of what really is. In speaking of polygamy, he exclaims: "I do not justify customs, I give the reasons thereof." Numerous purely sociological disquisitions, free from any views on legislative politics, are scattered through the book.

As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces. The natural circumstances brought forward by Montesquieu, geographical configuration or climate, cannot have any influence on law except by operating on society, which in turn acts on law. Thus in order to discover the social foundation of law we must seek the very form in which it is engendered by society. It is not the rule of law as we find it in the codes, the textbooks, and the law tracts. The rule of law does not proceed directly from society, it is devised by legislators and jurists. Society itself fashions only the legal order of the fundamental social institutions, the order of clan, family, village community, property, contract, inheritance. The ruling of this legal order, without any trace of the rule of law properly so called, constitutes the only law which may be found in primitive tribes or lower stages of civilization, and even in our own time a great deal of law still consists only in the legal order of social institutions. From this primary legal order the rule of law is derived by jurists and legislators by very intricate processes which I endeavored to expound in the *Sociology of Law*. The rule of law cannot be understood sociologically without considering the legal order from which it arises. Nevertheless, the great majority of sociologists have attended only to the rule of law, not the primary legal order. As in this way they miss all the intermediate links, formed by legal institutions, between the rule of law and society, the whole treatment of the subject becomes unsatisfactory.

To Montesquieu, also, law presents itself as a body of rules. Yet he looks behind and guesses, though in a very indefinite way, at some of the outlines of society in the background. The term "society," which he often employs, does not mean for him society in the modern sense; it signifies only the state, as in the terminology of the law-of-nature school, which he adopts. But even society taken as state is in his meaning more than the artificial thing imagined by the law-of-nature school, shaped by a contract supposed but never settled. It is a living body, begotten by natural forces and in a certain degree existent independently of state government. In the *Lettres Persanes* he derides the inquiries into the origin of society as they had been made by contemporary followers of the law-of-nature school: If men did not form societies, if they lived asunder and ran away upon seeing their mates, we might ask for the reason; but as they keep together, the son remaining at his father's, this is society and the real cause of society. Some passages hinting at the natural foundation of the state are also to be found in *L'Esprit des Lois*, especially in the chapter dealing with the law of conquest.

The modern conception of society in contrast to the state presents itself to the mind of Montesquieu under various disguises, the most important of which is what he calls the "general spirit." "Several things govern men," he says, "climate, religion, laws, principles of government, precedents, customs, manners; in these the general spirit has its origin, being the offshoot thereof." We may substitute the term "society" here for "general spirit" without any difficulty, and we shall get a much more definite and precise notion of the relations of law and society than through the teaching of the German historical school, where the "general spirit" reappears, very obscure, under the name of popular consciousness (*Volksbewusstsein*).

The "things governing men," to which we may add, quite in the sense of Montesquieu, the economic situation, play their part in modern sociology as elements of social life. There is a remarkable difference between the passage last quoted and the parallel passage quoted in French from the first book at the outset. In the former, law is mentioned along with climate, religion, principles of government, precedents, customs, manners, among the constituents of the "general spirit," whereas in the latter only the correspond-

ence of law with these things is emphasized. If the difference is not an accident, we must see therein a perception that law is a component of social life along with the other "things governing men" and that each of them determines the others. It is an admirable early suggestion of the social consensus imagined by Auguste Comte and Herbert Spencer. We find it again in an observation as to the English people: "I do not pretend that climate has not produced a great part of the laws and manners of this nation, but I say that the customs and manners of this nation may have a great relation to its laws." There too the interdependence of all the elements of social life is assumed. Thus, in the opinion of Montesquieu law is shaped by society and shapes it at the same time. This is in strict contradiction with the general opinion of his age, namely, that law was imposed on society from the outside by a legislator, an idea, however, which has left many traces in his book.

Again some twenty years before Blackstone, who, however, learned much from him, and half a century before Buckle and Savigny, he perceived that the history of law was much more than a serial relation of curiosities, he saw that it was a means to explain the structure of a society by showing the progress of its institutions, and he guessed already the importance of historical continuity for understanding the present by the past. To that end he devotes learned discussions to the Roman law of inheritance, to early French procedure, and to the feudal law of the Middle Ages. Eighty years before Roscher and Knies he frames a history of economics and inserts in his book the admirable chapters on the economic bearing of the conquests of Alexander the Great and others on the progress of the world's commerce. A century before Karl Marx he insists on the intimate connection of the economic situation and its "legal superstructure," and he is probably the first to deal with economic problems — exchange, agriculture, money, population, colonization — in a juridical book. About a hundred and twenty years before Ratzel and Brunhes he foreshadows political geography and anthropogeography in the chapters on the influence of climate on law, slavery, domestic relations and government, and in the chapters on the influence of geographical configuration upon law. We may find there, along with many desultory and superficial observations, such ingenious reflections as this: "There are different requirements of different climates which have shaped different manners

of life, and out of the different manners of life result different laws." That is a clear conception of a society, especially in economic relation, formed by geographical circumstances and forming the law in accord with its exigencies. Almost a century and a half before comparative and ethnological jurisprudence commenced to collect stones and bricks for the building which is still to be erected, he started to compile data as to the laws and customs of China, Japan, India, Persia, and even of savage tribes. Moreover, there are in his works treasures of hints and observations as yet untouched. Perhaps there is no topic of sociology of law for which *L'Esprit des Lois* does not contain a valuable suggestion.

In his youth Montesquieu applied himself to natural history and probably yielding to the turn of mind acquired in this occupation, he employs largely the inductive method of scientific research even in matters of law, being thus in this direction also a precursor of modern tendencies. This is a somewhat striking point. In the preface he seems to give quite a different account of the way in which he arrived at his leading ideas:

"I began my work again and again; I have a thousand times thrown away the pages I have written. I felt every day my paternal hands fall. I followed my subject without any preconceived aim; I knew neither rules nor exceptions; I did not find truth but to lose it. But as soon as I discovered my principles, all I sought came to me, and I saw my work begin, grow, advance, come to an end."

And again:

"I laid down my principles and I saw the particular cases yield to them of themselves; that the history of all nations was only the consequence therefrom."

That is seemingly the genuine scholastic method, beginning with principles and progressing to particular cases by logical ratiocination. But in reality the principles Montesquieu starts with are not contrived *a priori*. They are all derived from facts he collected, scrutinized, and turned over in his mind during the twenty years he was engaged in his work. Indeed the preface gives a very impressive view of the laboratory of a genius and of his self-deceptions. Great thinkers often believe they have drawn their fundamental ideas from a sort of sudden enlightenment, whereas they are grown subconsciously in the long course of years, and what appears to be the

intuition of a moment is only the discharge of a mind filled with priming powder at the expense of a life.

His statement of the principles of the three forms of government, virtue in the republic, honor in the monarchy, fear in the despotism, certainly looks like a genuine *a priori* proposition. Yet it is inferred from innumerable facts. In his mind, republics are the small city commonwealths of antiquity and later of Italy and the Netherlands; monarchies are the feudal and half feudal realms of France and England in the Middle Ages and in his time; despotisms are the great empires of the Orient, the Roman Empire in decay, and Russia. What he calls principles are the moving forces of these states. His true teaching is that the three forms of government which appear in history are each of them directed and determined by forces of a certain description, depending upon size, geographical configuration, climate, customs, manners, and the other "things governing men." The "principles" are but a terse and striking characterization of the forces resulting from the social structure of the states with which the three forms of government have been connected in history; and only his profound knowledge of history and his close observation of the events of his time enabled him to put it as he did. Here his superiority to his predecessors who had treated this subject, Aristotle included, becomes apparent; for he does not think of the forms of government as empty schematic formulas and of their effects as consequences of purposely-framed ordinances, but conceives them, rather, as the upshot of the working of natural forces in society.

In consequence perhaps no legal author has ever been more anxious to amass facts. His works, and above all his *L'Esprit des Lois*, are literally crowded with facts — social, historical, economic, ethnological. He was helped in accumulating these facts by his amazing scholarship in ancient history and literature. Also he had read thoroughly the relations of travelers in foreign countries, and he utilized his own observations, which he was admirably equipped to make. Then, too, his long journeys in England, Germany, Austria, and Italy, his frequent periods of residence in Paris, and his brief career as a courtier at Versailles, gave him an excellent opportunity.

It is true we find in *L'Esprit des Lois* rather hints, suggestions, and materials for a sociology of law than in any way an investiga-

tion thereof. But from among these scattered bones there springs up already the nucleus of the future science, the perception of some natural accord with law in social life. Certainly the adherents of the law-of-nature school used to write of the accord of nature with law and the legal and moral standard as varieties of the same species; and Montesquieu, too, expresses this view in his preliminary chapter. But that is an idea of quite a different order. It does not mean that law and morals are subject to some natural conformity to law, but only that they are a form of natural law taken as a natural phenomenon. On the other hand, the mercantilists and physiocrats, both predecessors and contemporaries of Montesquieu, were already investigating economic laws. But although to-day we may consider the laws of exchange and production which they dealt with as in some sort social laws, in their opinion these were more laws of things exchanged and produced than laws of human action with respect to them. The sociological law realizes the law of causality in application to human action in society. In the sociology of law it would stand for the notion that the arising of legal standards and their effects are subject to a causality of the same description as other phenomena of nature. That is exactly the idea which underlies the sociological and political investigations of Montesquieu — in identical circumstances human beings will behave in an identical way. His inferences for legal science are that under the same conditions the same law will arise, that under the same conditions the same law will have the same effect, and that under different conditions it will have a different effect. In this connection several heads of the chapters of the twenty-ninth book, which deals with the composing of statutes, are very instructive, as, for instance: "That rules which seem to be the same have not always the same effect"; "That rules which seem to be the same have not always the same motives"; "That rules which seem to differ may originate from the same spirit"; "That rules which appear identical may sometimes be very different."

Therefore the facts accumulated by Montesquieu do not play the rôle of mere collectanea. They are illustrations of general laws, implied by them but not always expressly determined by the writer. For, in his own words, "it is not important to cause people to read, but to cause them to think." His true meaning is this: I give you the facts, consider them thoroughly. You will then perceive that

certain causes have produced an effect. Thence you may infer the general law that everywhere under the same conditions the same things will happen. If you will take notice of the conformity to law shown by the facts I have adduced, you will see the future in the present and you will be able to arrange your activities accordingly. This train of thought obviously goes back to Bacon and is much more British than French; it is much nearer kin to Locke and Hume than to Cujacius, Donellus, Voltaire, and Rousseau.

A chapter entitled "How Law may Contribute to Fashion, Customs, Manners and the Character of a Nation" furnishes a striking example of his turn of mind. In this chapter he aims to show that certain features of national character are necessarily developed by a free constitution. We perceive at once that he is speaking of the English people, and the chapter is perhaps the most subtle, refined, and accurate analysis of English national character which has ever been written. Yet there is no express mention of Great Britain or England or the English at all. The chapter is conceived in general terms. All the features of the English national character, including peculiarities in comparison with France of his time, such as the modesty and isolation of women, the luxury and extravagance of the gentry in the eighteenth century, and even such historical events as the conquest and oppression of Ireland, which, of course, is only hinted at and not mentioned expressly, are explained by the working of a free constitution, and it is supposed that, given the same conditions, these phenomena would be met with everywhere. No doubt the effects of constitutional law are highly exaggerated. The national character is the result of innumerable circumstances, most of which it is impossible even for the modern sociologist to discover. The constitution is much more the effect than the cause of national character. But we may overlook this. The most noteworthy point is the anxiousness of the author of *L'Esprit des Lois* to hold only to the general bearing of a special case so that he does not in form speak of the case at all.

This tendency appears also in those parts of his book which treat of legislative politics. We must not, however, lay too much stress upon his projects of reform. They are born of practical sense and a deep sentiment of justice and morals. They are usually excellent in style, marked by keenness and penetration, and some of them, such as the deadly sarcasms on negro traffic or the famous letter of a

Jew to the Holy Inquisition upon the *auto-da-fé* of a Jewess nineteen years old, a letter overwhelming by its bitter irony, will rank with the masterpieces of literature. But after all, they are not above the average political wisdom current in his time. The reforms of constitutional law, criminal law, and civil law for which he strived have mostly become matters of course and his subtle arguments and fervent attacks against despotism, slavery, and torture, and his pleadings for some restriction upon the prosecution of heresy, although very bold when written and very impressive to his contemporaries, now appear commonplace. But they may still be recommended to those who are prone to excuse their indolence with respect to public affairs by the assumed impossibility of achieving any progress. The progress is evident if two centuries ago a genius like Montesquieu was required to urge as improvements what to-day are matters of course.

In all these things Montesquieu is only a child of his age: humane, philanthropic, rationalistic, daring, ingenious, witty; but after all in these respects he does not mark any substantial progress. Yet he is infinitely superior to the publicists of the eighteenth century in his leading idea that legislation must be put on a scientific basis. That is exactly what he proposes in the preface of *L'Esprit des Lois*. He teaches that the people must be enlightened. When plunged in ignorance men have no doubts even while committing the most fatal blunders. When sufficiently instructed they tremble even while doing good. They see the disadvantages of reforms; they suffer from the bad, being afraid of the worse; they allow the merely good, hesitating to better it; they consider the parts in order to understand the whole; they examine the causes to determine the effects. In order to arrive at the knowledge he desires, man must be instructed in human nature. (*De connaître sa propre nature lors qu'on lui montre.*) What he calls human nature, in the language of our times may be expressed by the phrase "human society." By enlarging the insight into society and its forces for which knowledge of human nature is the condition, we may realize the control of society by legislation just as an engineer who directs a steam engine controls it with the help of his knowledge of the mechanism. Montesquieu neglects administration and judicature, which give still greater opportunity to control society than does legislation.

We can trace the impress of this thought in many parts of the book dealing with legislative politics, especially in those parts treating of criminal law. But it may be preferable to give merely some comments on his views on liberty. Liberty, as he uses the word, is nothing but the life of society in contrast to the government of the state. In contrast with Hobbes and the law-of-nature school, he perceives distinctly the claim of society to a life independent of the state and the chief object of his inquiry is to protect it from the encroachments of state power. And now we come to the chapter of *L'Esprit des Lois*, entitled "*De la Constitution d'Angleterre*," a chapter which is one of his chief titles to glory and perhaps more than any other is destined to immortality.

The arrangement of this chapter is very like that of the chapter spoken of above in which he treats of the influence of the political constitution upon the character of a nation. There is no doubt that it is founded entirely on observation of the working of the British constitution. Yet there is still no mention of Great Britain except in the title and in a few words at the end of the chapter. The question with which he is concerned is not the frame of the British constitution, but how the constitution of a free people must be framed. And he examines the principles of this constitution "where liberty will appear as in a mirror" only because, to quote his words in the preceding chapter, "there exists a nation in the world which has political liberty for the direct object of its constitution." Here, too, he intends a general law embodied in a special case.

The chapter in question sets forth the famous doctrine of the balance of powers. The three branches of government—legislation, administration, and judicature—must be intrusted by the constitution to different bodies and must be kept in perfect equilibrium in order to make impossible any arbitrary discretion on the part of an officer of state; the legislative power being confined to the settlement of general rules and to control of the executive power on general lines without regard to any special case; the executive power being limited to foreign politics and military affairs; and the judicial power having for its only task the decision of lawsuits and criminal prosecutions on the basis of statutory law. In this way each power is checked by the two others and all oppression and extortion is obviated. And as the person who wields military force

might not care too much for constitutional checks when planning an assault upon liberty, Montesquieu imagines a military organization which makes the army quite inefficient at home without paying much respect to its efficiency abroad.

Accordingly liberty, in the opinion of Montesquieu, means the condition of society in which it is not restricted by government beyond limits determined by legislation, which in turn, in accordance with the views on representative government which he entertains, is in functional connection with society. The judicial power also, though in a different way, is intrusted to delegates of society. This doctrine has been thoroughly disputed, and in fact it is in part vague and incomplete and it does not avoid contradictions. In the first place, we are told that the legislative power merely states general rules, enacts statutes, and settles the budget, but it does not interfere with special cases. As the executive power is concerned only with affairs of international law, and the judicial power with affairs of civil law, we might assume that the executive power had nothing to do with domestic affairs. But there is plenty of domestic business which cannot be provided for by general rules and cannot be dispatched by judges. We must inquire for the department which is to manage it. Subsequently Montesquieu seems to suppose that the executive power has for its function the execution of statutes and ordinances made by the legislature. And he says that the ministers charged by the king with this duty of executing them are accountable to the legislative power therefor. But the executive power goes beyond the boundaries of its competency described in the first instance. Finally there is a great deal of governmental business which does not consist in the execution of statutes, and as it is not connected with any expense independent of the budget, there is no hint in Montesquieu which power has to do with it. These are the most striking inconsistencies in Montesquieu's exposition, but we may easily find much more of the same description.

There are two inaccuracies in point of fact. The balance of power imagined by Montesquieu really never existed either in Great Britain or elsewhere. The English Parliament was at first only a court of justice. It never became an exclusively legislative and controlling body. It has still at present executive and judicial work to perform and it had much more of this work in the time of Montesquieu. Much of the authority of the king and consequently

of the Cabinet in Great Britain, and moreover the authority of some boards may with good reason be considered legislative; the king in the past was a judge also and has never been deprived by law of this function, some judicial power being still exercised by his officers. Courts in Great Britain and elsewhere are not restricted to the application of statutes as Montesquieu maintains in consequence of his misconception of the judicial function. British judges find law themselves and settle rules of judicial law. Thus in the sense of Montesquieu they are legislating.

Because of these and some other deficiencies which have been pointed out, especially by German scholars, the theory of Montesquieu does not hold ground in the scientific world. But after all, Montesquieu saw more and deeper than his learned critics. It is precisely the merit of Montesquieu that from the embarrassing perplexity of state institutions he disentangled the elements of the fundamental functions they subserved, and singled out the concrete bodies by which those fundamental functions were exercised in Great Britain in his time. State authorities, magistrates, officers, boards, may arise for governmental purposes, may appropriate and usurp in the long run very disparate jurisdictions, and still there are the needs of governmental business, the tendencies of social life, which determine them in their growth, and the insight of a genius will distinguish in their intricacy the great lines of development and point out the forces driving in a certain direction.

That is exactly what Montesquieu did. He observed the three branches of governmental power which must necessarily exist in any state, be they actually allotted as they may. He saw the general tendency to separate them and attribute them to different boards or bodies. He perceived the importance of disconnecting and balancing them for the individual welfare and the freedom of the people. He understood the very meaning of parliamentary control and of the responsibility of the Cabinet. In all this he cared much more to delineate the essential traits than to accurately set forth the details. In order to bring out the true direction of the movement he neglected the secondary forces which might produce accidental deviations. In this turn of his mind he is essentially French. What is not plain is not French. (*Ce qui n'est pas clair n'est pas français.*) Certainly he had a great predecessor in Locke, but it is just his additions and omissions which give general bearing to

his teachings, whereas Locke's statements apply only to the British constitution. In this part of his book, which we must recognize as a masterpiece, Montesquieu proved himself a profound and keen observer, capable not only of seeing what had grown, but of foreseeing what was growing. Palpably the British constitution has since followed in the way at which he hinted. At present it corresponds to his description much more than it did at the time when he wrote. The framers of the constitution of the United States adopted a great part of his teaching, especially with respect to the balance of powers. The constitution of the first French republic and that of the Restoration were largely influenced by his doctrine. But most of all the constitution of Belgium, the model of written constitutions in Europe and other parts of the world in the nineteenth century, shows the same influence. Thus the eleventh chapter of the eleventh book of *L'Esprit des Lois* became an event in the world's history.

In still another part of his work, namely, in that part which deals with federal republics, he proved to be not only a learned scholar and an observer of wonderful acuteness, but a guide and a prophet in constitutional politics. He saw that the only kind of republican government which he knew by experience, namely, the city commonwealths in antiquity and later in Italy, prospered when small and weak but were exposed to the danger of conquest, and as soon as they grew in size and force became subject to corruption of all kinds. Therefore he imagined that the best line for them was federative government. He had before his eye the federation of republics in Switzerland, the federation of the Netherlands and the Holy Roman Empire of Germany, which he conceived to be a federation of monarchies and republics. He inferred therefrom that a federation of small monarchies was wholly impossible, as it was not to be found in history, and that a federation of monarchies and republics was necessarily deficient, as the German Empire then obviously was, because the spirit of monarchy, requiring war and enlargement, was incompatible with the spirit of a republic, which demands peace and moderation. But a federation of small republics would thrive, as was proved by Switzerland and the Netherlands. By association they would gain military force to resist conquest and they would preserve the advantage of a pure republican government within. The marvelous prosperity of federal republics in

America and Australia has since demonstrated the correctness of his views.

But it is a dangerous thing to be a pioneer. The idea of building a sociology of law with the means and materials of the eighteenth century is one of astonishing grandeur, but here, as elsewhere, grandeur is separated from the ridiculous only by a pace. The efficiency of mental effort is conditioned not only by the merits of the originator but also by the whole condition of the country. Even a genius running before his time cannot entirely get away from the atmosphere wherein he breathes. He is checked at every step by the prejudices and shortcomings he shares with his contemporaries. On the other hand, he is deprived of the support which science could afford, since it has not yet gathered the materials for the solution of the questions which he agitates, and he does not exercise a real influence on his contemporaries who can only grasp what is within the reach of the understanding of their time. The fate of the great achievements of Montesquieu resembles in a certain measure the fate of the steam engine constructed by Denys Papin in the seventeenth century which, imperfect as it then necessarily was, remained unnoticed at the time in order to be discovered some centuries thereafter. Montesquieu was admired in his age chiefly for that part of his work which was perishable and has passed away. His most important scientific labors have not been attended to. Now they are forgotten, superseded by the scientific progress accomplished in later times, and have to be dug out from the dust by his biographers.

In the first place, the foundation of his work is extremely unreliable in point of fact. He was indeed a great scholar in ancient history and in the history of the early Middle Ages, but of course the history which was at hand for him was not the critical history which we have to-day. He accepts every word of the miracles related by Livy and Dionysius for truth. He believes in Lycurgus as well as in Romulus and Remus. He knows all about the constitution of Rome in the period of the kings and immediately thereafter with respect to which modern historians most unhappily confess they know nothing at all. He is much better informed as to the Franks in the sixth and seventh centuries than Sohm and Brunner. So with the sources to which he had access with reference to savage tribes, to China, to Japan, to Persia, to Turkey, to the

Tartars, and to the Muscovites. We must highly respect his zeal to know about these distant peoples and realms. But we cannot overlook the fact that the relations of travelers, reports of missionaries, and historical works of his day have ceased to have any scientific value.

Moreover, the task he essays exceeds even what modern sociologists would be able to perform. In order to explain law by society we must have a thorough knowledge of the economic and social situation of the society in question. To the extent that we are not sufficiently helped by ancient authors we must seek supplementary information in the remains of past ages, in monuments, in furniture, in instruments, in vase pictures, in inscriptions, which give us in some directions much more light than the written sources. The scientific utilization of antiquities (*Allertümer*), indispensable for the knowledge of social and economic relations, is even now in embryo. When Montesquieu was at work, the compilation and scrutiny of such data had just begun. Unfortunately, Montesquieu did not take account of what existed in his time. The same must be said of the parts of the book dealing with actual relations of law and society. He lacked throughout the statistical, geographical, ethnological, ethological data, the shortcomings of which even now make a scientific foundation of sociology impossible in many directions. With respect to distant realms and peoples, savage tribes, Chinese, Japanese, Muscovites, Persians, and Turks, the only thing we can assert is that the relations of travelers and reports of missionaries, and even the historical works from which he endeavored to get some information, have been shown to have no scientific value. Consequently the only thing which he could really utilize was his own observation. In fact the most notable paragraphs which we read still with greatest interest rest simply upon that. In this category are the chapters on the British constitution and on the English national character heretofore spoken of; also the chapter on honor as the principle of monarchy, on (French) education in the monarchy, on the character of Spaniards, on court and courtiers, and the hints on the Holy Roman Empire and on Poland. From this point of view the *Lettres Persanes*, founded exclusively on observation, may pass for the best of his works. Another deficiency of the work of Montesquieu, which, however, he shares with modern sociologists, is the identification

of law and the rule of law which he found in the codes, textbooks, and law tracts. Hence, as he does not see the legal ruling of social institutions forming the intermediate link between the rule of law and the society, he fails to establish any interdependence between them. Where he tries to set forth the causes of some law he can but give conjectures, usually unsustained from a scientific point of view, mostly desultory and fallacious, often absurd and even ridiculous. The chapters on climate, geographical configuration, and religion are full of this. The reason is that practically he did not sufficiently take into account what he perceived theoretically, namely, that they must shape social institutions before they can produce rules of law. Again, when he enters into the inquiry as to the social and economical situation he is not capable of pointing out their consequences in law because he misses the social institutions through which they operate. The history of the world's commerce, and the treatise on feudal law, admirable as they are, appear in some measure suspended in the air. We may ask what they have to do in a book on the spirit of laws. It would be different if he took care to show how landed interest in the Middle Ages was influenced by the feudal military organization, and how the successive enlargements of commerce must necessarily have occasioned transformations and improvements in the law of contract.

In the legislative parts of the book his political views do not agree with modern ideas. His opinions are very liberal, but his tendencies are rather feudal. He was very proud of his descent from an ancient race, and his propositions are constantly influenced by this affection. He aims to reserve to the nobility as much as possible of the prerogatives of past ages. In this constitution the first chamber is reserved for the nobility, and is also the privileged court of noblemen, who, being exposed to the jealousy of the people, cannot be indicted before the popular tribunal. Trade is prohibited to the *noblesse*. Great trading companies ought not to be licensed, since they would be able to check the influence of other classes. Honor in its feudal conception is said to be the principle of monarchy. An ancient French law is recommended which fines a nobleman more heavily than a villain, but with respect to other punishments is more severe toward the people. On the other hand, his classical studies often led him to feel some attachment to the republics of antiquity, to their austere virtue, their patriotism, and their frugal-

ity. This old-fashioned bias in both directions has greatly injured the legislative parts of his book.

Finally Montesquieu does not realize the modern conception of development and evolution. Causality in society and in law, in his understanding, means only changes produced by outward circumstances. This is not yet the development imagined by Buckle and Savigny, which supposes changes coming from the nature of the subject changed, and therefore conditioned by the very structure of society. Only in some historical passages may we find traces of this notion. Causality in the mind of Montesquieu is still less evolution in the sense of modern natural philosophy, which implies a slow adaptation of the subject evolved to outward circumstances, and contains the idea of perfectibility, as every posterior stage is understood to present a higher degree of existence than those which preceded it. Montesquieu lacks this notion entirely. He does not know anything about the degrees of structural development. He compares the character of the Chinese and of the Spaniard (*Du caractère des Espagnols et celui des Chinois*). He puts on the same line the republic of Lycia and the Netherlands. In his opinion the expediency of law depends mainly on the intelligence and the good nature of the legislator who intends to meet the circumstance. If the emperors of China had been wise enough and kind enough to their people they would have been able to impart to it as perfect a constitution as that of England.

Montesquieu has suffered in full the tragedy of a genius anticipating his age. His contemporaries understood him only in what was relatively trifling and transient in his work; all that was qualified for immortality passed without an echo. Coming generations preferred to build up a new work from the basement instead of taking advantage of the foundations erected rather hastily by Montesquieu. Thus the effect of *L'Esprit des Lois* does not correspond with the mental force which it demonstrates. In view of modern scientific exigencies it is a capricious, dilettante, fragmentary work of a *grand seigneur* rather than of a scholar. Nevertheless it is a splendid work embracing immeasurable treasures of thought from which generations of scientists may derive ideas and suggestions. If it should fall to one's lot to reach the years of Methuselah one might try perhaps in the last century of his age, provided with the entire scientific armor of the next millennium, to carry out a work

such as Montesquieu intended. I do not think he would be obliged to make any fundamental alterations. I suppose he could keep the trestle and the framework, the leading ideas, the arrangement, and much of the details. In the main it would suffice to put a new argument under the heads of the chapters which could remain unchanged. Then certainly it would be one of the best books which could be written on the philosophy and the politics of law.

Eugen Ehrlich.

VIENNA.

JUSTICE HOLMES AND THE LAW OF TORTS

AS I look over the long list of judges of American Supreme Courts, and even over the much shorter one of those who achieved eminence or possessed originality (and these two are not always the same), Justice Holmes seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed. His opinions present themselves as instances naturally serving to exhibit this general body of principles in application. The framework is his own, and not some orthodox commentator's. Shaw, Bronson, Tilghman, Lumpkin senior, Gaston, Ryan, Field (of Massachusetts), Doe, Gibson, Walworth, Blackford, Nelson, Mitchell, Beasley, Napton, Selden, Daly, Appleton, Goldthwaite, — none of these (not to mention living ones) give the impression of having worked out, themselves, and for their own use, an harmonious construction of general principles. I suppose that Kent came the nearest to doing it.

Another trait of his opinions, and one that adds to their fascination, is the epigram instinct, which will not be suppressed. Wise maxims, sententious summaries, and pithy brocards strew the pages. Only Lord Bowen can be compared with him in this: "A horsecar cannot be handled like a rapier."¹ — "Nowadays we do not require pleadings to be guarded against all the possible distortions of perverse ingenuity."² — "A man cannot shift his misfortunes to his neighbor's shoulders."³ — "A man cannot justify a libel by proving that he had contracted to libel."⁴ — "Most differences are merely differences of degree, when nicely analyzed."⁵ — "The taste of any public is not to be treated with contempt."⁶ — "No falsehood is thought about or even known by all the world; no conduct is hated by all."⁷ — "Every calling is great when

¹ *Hamilton v. West End St. R. Co.*, 163 Mass. 199, 39 N. E. 1010 (1895).

² *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398 (1897).

³ *Spade v. Lynn & Boston R. Co.*, 172 Mass. 488, 52 N. E. 747 (1899).

⁴ *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619 (1900).

⁵ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1889).

⁶ *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239 (1903).

⁷ *Peck v. Tribune Co.*, 214 U. S. 185 (1909).

greatly pursued.”⁸ — “The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug.”⁹ — “The law constantly is tending towards consistency of theory.”¹⁰ — “A trespasser is not *caput lupinum*.”¹¹ — “There is no general policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.”¹²

No doubt, as a stylist, he is unique and unapproached. There have been others — Doe, Mansfield, Jessel, Camden, to name a few — but none in his *genre*, except Bowen.

Another commanding thing is the philosophy of life at large which decorates and dignifies his technical lore of the law. Truth in general is invoked for the decision of legal truth: “The moment you leave the path of merely logical deduction, you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless.”¹³ — “One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society disguised under the name of capital to get his services for the least possible return.”¹⁴ — “Free competition is worth more to society than it costs.”¹⁵ — “Nature has but one judgment on wrong conduct, . . . the judgment of death. If you waste too much food, you starve; too much fuel, you freeze; too much nerve tissue, you collapse.”¹⁶ — “If a man is adequate in native force, he probably will be happy in the deepest sense, whatever his fate.”¹⁷ — “If education could make men realize that you cannot produce something out of nothing, and make them promptly detect the pretense of doing so with which at present the talk of every day is filled, I should think it had more than paid for itself.”¹⁸ — “We have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her

⁸ Suffolk Bar Dinner, 1885.

⁹ “Ideals and Doubts,” 10 ILL. L. REV. 1.

¹⁰ *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462 (1893).

¹¹ *Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909 (1899).

¹² 8 HARV. L. REV. 6.

¹³ *Ibid.*, at p. 9. This piece of wisdom is a favorite and reappears in all sorts of quarters.

¹⁴ *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896).

¹⁵ *Ibid.*

¹⁶ Address at Northwestern University, 1902.

¹⁷ *Ibid.* /

¹⁸ *Ibid.*

axe and cord, and will scale the ice, the one and only success which it is his to command is to bring to his work a mighty heart.”¹⁹ — “All that life offers any man from which to start his thinking or his striving is a fact. . . . And it does not very much matter what that fact is; for every fact leads to every other by the path of the air.”²⁰ — “The main part of intellectual education is not the acquisition of facts, but learning how to make facts live.”²¹ — “The man of action has the present, but the thinker controls the future.”²² — “The labor of lawyers is an endless organic process; the organism whose being is recorded and protected by the law is the undying body of society.”²³ — “I do not believe that the justification of science and philosophy is to be found in improved machinery and good conduct. Science and philosophy are themselves necessities of life. By producing them, civilization sufficiently accounts for itself.”²⁴ — “Our ideal is repose, perhaps because our destiny is effort, just as the eyes see green after gazing at the sun.”²⁵ — “Although one believes in what commonly (with some equivocation) is called necessity — that phenomena are always found to stand in quantitatively fixed relations to earlier phenomena — it does not follow that without such absolute ideals we have nothing to do but sit still and let Time run over us. The mode in which the inevitable comes to pass is through effort. Consciously or unconsciously, we all strive to make the kind of a world that we like.”²⁶

The tendencies of humanity are seen to flow through and about and behind the myriad instances of the law’s precedents. His philosophy of life appears in his judgments.

And yet the Bar does not, after all, see the whole of it, nor the greatest part of it, in those opinions. To find it, one must consult the little volume (privately printed) of “Speeches.” This is not the place to descant upon its varied treasures. But two of its most recurrent principles are these: Life, as a fact, is a stern, endless

¹⁹ Memorial Day Address, 1884.

²⁰ Lecture on the Profession of the Law, 1886.

²¹ Oration before the Harvard Law School Association, 1886.

²² Eulogy on Sidney Bartlett, 1889.

²³ Eulogy on Daniel S. Richardson, 1890.

²⁴ Speech at the Yale University Alumni Dinner, 1891.

²⁵ Eulogy on William Allen, 1891.

²⁶ “Ideals and Doubts,” 10 ILL. L. REV. 1.

struggle of interests, and government can merely mitigate and regulate its conditions; and, Life, as a purpose and a career, is an effort to reach an unattainable ideal; the ideal (not the actual) *must* be the aim, we *must* strive, yet it is *never* attainable.

"We accept our destiny to work, to fight, to die for ideal aims. At the grave of a hero who has done these things we end not with sorrow at the inevitable loss, but with the contagion of his courage; and with a kind of desperate joy we go back to the fight."

"The rule of joy and the law of duty seem to me all one. . . . From the point of view of the world, the end of life is life. Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself."

"Life is a roar of bargain and battle; but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole, and transmutes the dull details into romance."

"Man is born to act. To act is to persist in affirming the worth of an end. And to persist in affirming the worth of an end is to make an ideal."²⁷

"A teacher of law should send men forth with a pennon as well as with a sword, to keep before their eyes in the long battle the little flutter that means ideals, honor, yes, even romance, in all the dull details."²⁸

Still another notable trait of his opinions, of course, is the instinct for the history of the law. He cannot employ and apply a principle without thinking of it as having a history. How few judges really possess the historical sense! — the sense that everything now in the world has had a "becoming" (in old Heraclitus' phrase) and that therefore its past is always worth examining, to explain its present. And, in Justice Holmes' case, his constant resort to the landmark sources of our legal history has had a special flavor, in our judicial annals, because of its rarity. It is a constant ensample — and may we say reproach? — to the scores of industrious and accurate contemporaries who never reveal the slightest interest in the law's history; or, if an interest, then no respectable acquaintance with the proper sources. "I have done my share of quotation from the Year Books," he admitted at the Langdell Dinner in 1895.

²⁷ Speech at the 50th Anniversary of Graduation, 1911.

²⁸ Speech at Northwestern University, 1902.

But it is not only by the "Y. B." citations that you will identify his opinions from those of other judges. The correct sources, whatever their range, you may expect to find that he has consulted and pillaged aptly for his need. On a chance page, for example, dealing with repayment of a dishonored draft,²⁹ appear quotations from the Selden Society's Publications, Brunner's "*Forschungen*," and Heusler's "*Deutsches Privatrecht*," to testify to a point in the history of commercial paper. And the general postulate which precedes, "Our law of negotiable paper, like the rest of our law, has had a strictly European origin and history, which are *tolerably well known*,"—was it slyly given that suggestive whip-snap at the end? For, among the judges, who else knows it? Who else, indeed, cares? One must mourn (and a public lament has elsewhere been uttered) the obstinate indifference of our judges to the history of their own law. Justice Holmes' opinions shine with an historical light, which in its luster of distinction ought to be even as the Penang Diamond,³⁰ a lure to the avid ambition of the judicial world.

And who shall say that his concise and crystallized style of historical allusion may not have been deliberately chosen as the most pointed way of preaching the propriety of history while avoiding the prosy prolixity of exegetic elaboration? May we not suppose him to be convinced that, when some reference to history is necessary in a judicial opinion, a light indication of what everyone knows, or ought to know who has studied such things, is better than something more solemn and long-winded?³¹ I believe that would be his point of view.

The best thing about Justice Holmes' taste and learning in history is that it has not dulled his sense for the practical needs in the

²⁹ *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845 (1899).

³⁰ Have you ever read Lincoln Colcord's romance, "*The Drifting Diamond*"? If not, it is worth while.

³¹ There is a good example in *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133 (1915), where the question was whether the Fourteenth Amendment was encountered fatally by a Louisiana statute forbidding a petitory action for property to be brought by a defendant in a possessory action until after judgment in the latter. The opinion continues: "From the *exceptio spolii* of the Pseudo-Isidore, the Canon Law, and Bracton, to the assize of novel disseisin, the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to. . . . And from Kant to Ihering there has been much philosophizing as to the grounds" (p. 134). And thus it sketches ten centuries in a sentence.

law of to-day. He is neither enchained by his respect for the past, as Blackstone was, nor deluded by a philosophy of historic continuity, as Savigny was. That too strong an emphasis on our continuity with the past will lead us astray, he has often warned us:—"The present has a right to govern itself, so far as it can. And it ought always to be remembered that historical continuity with the past is not a duty, it is only a necessity."³²—"Questions of here and now occupy nine hundred and ninety-nine thousandths of the ability of the world."³³—"To rest upon a formula is a slumber that, prolonged, means death."³⁴—"The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."³⁵ No other ever better exemplified the proper use of history as John Morley defined it:

"I want to know what men did in the thirteenth century, not out of antiquarian curiosity, but because the thirteenth century is at the root of what men think and do in the nineteenth. It is the Present that we seek to understand and to explain."

And yet his contentedness with the prospect of progress never rose to a too fervid faith in the virtues of reform. His most recent public utterance, "Ideals and Doubts,"³⁶ is devoted to this theme, and its closing sentence, in sounding the note of the Doubter, vouchsafes us also one of his neatest epigrams:

"It is a pleasure to see more faith and enthusiasm in the young men; and I thought that one of them made a good answer to some of my skeptical talk when he said, 'You would base legislation upon regrets rather than upon hopes.'"

But Justice Holmes' familiarity with legal history is only a phase of his broader interest in all literatures of life. I wonder whether any other man now pronouncing upon the complexities of humanity in law possesses so rich an acquaintance with all the recorded aspects of humanity? A man's private library, large or small, is not always a fair index of his range of knowledge; but in this instance it is. Putting my hand casually on one of his book-

³² Speech at the Langdell Dinner, 1895.

³³ Eulogy on Shattuck, 1897.

³⁴ "Ideals and Doubts," 10 ILL. L. REV. 1.

³⁵ Speech at the 250th Anniversary of Harvard University, 1886.

³⁶ 10 ILL. L. REV. 1 (1915).

shelves, not long ago, it touched a row of Gabriel Tarde's works on psychology, longer than any I have ever seen outside of a bibliographical list. And I have sometimes wondered how many judges or lawyers were sufficiently down to date in the fine arts to identify the Dégas who was casually mentioned to illustrate a point in a brilliant opinion on the copyright of a circus poster.³⁷ When he was recommending a friend, some three or four years ago, to enter into the fascination of Fabre's studies of bee life, the philistine friend did not then appreciate that he himself would later be seeking the hitherto unopened Fabre in the strictly technical quest of materials on the evolution of legal order in insect life. No man's methods of his own, perhaps, can be advised unconditionally for others to imitate; but Justice Holmes' generality of absorption is certainly something that the young lawyers of to-day can afford to take notice of. For it is a time when the growing lawyer must realize that law too is growing and that our profession must be amply prepared to understand the cosmic range of facts which go to shape it.

The short and the long of it is that these opinions are literature, not merely law; classics, not merely technics.

But why do I linger and digress at the threshold of my subject, — the Law of Torts? Perhaps because I cannot say what I want to say without revealing an undue egoistic bias.

For the truth is that I admire supremely Justice Holmes' Law of Torts because—he is the only writer who has (publicly) agreed with me as to the fundamentals of that subject! It cannot be proved from the records (and indeed the records would suggest the contrary), but it is a fact, that before his pioneer article ("Privilege, Malice, and Intent") appeared in the 1894 May number of this REVIEW,³⁸ I had hit upon the same general analysis, which was set forth ("The Tripartite Division of Torts") in the 1894 November number.³⁹ Until his article appeared, I had not ventured to promulgate so radical a discovery; but his printed corroboration gave me courage. What was before but subjective truth now became objective truth. Confirmed by him, I have never since doubted. And I am also convinced that the scientific discussion and harmon-

³⁷ *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239 (1903). Or Goya or Manet, for that matter. These figure in the opinion; likewise Ruskin's "Elements of Drawing."

³⁸ 8 HARV. L. REV. 1.

³⁹ *Ibid.*, p. 200.

ization of our torts system will never be possible until that basic scheme is carried out into all details by some qualified person.

What, then, was Justice Holmes' system? It expressed the doctrines of torts in three postulates:

I. "Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress."

II. "When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen. . . . If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance."

III. "But . . . in some cases, a man may even intend to do the harm and yet not have to answer for it, *i. e.* . . . the commonplace . . . that the damage is actionable if done without just cause. . . . There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of. But whether, and how far, a privilege shall be allowed, is a question of policy. . . . Not only the existence but the extent or degree of the privilege will vary with the case. . . . In all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."⁴⁰

Such is Justice Holmes' tripartite division of tort principles. Throughout nearly a hundred and fifty opinions, his system can be seen in consistent application, aided by some of the other general philosophical and social truths already alluded to. Naturally, not all, nor most, of these opinions have any concern with the general theory. But at any rate one could nearly write a treatise on torts out of this body of opinions. And it will perhaps serve as a tribute (though sadly inadequate) to this achievement of his if we now survey briefly the array of decisions, noting here and there some of the more remarkable.⁴¹

⁴⁰ 8 HARV. L. REV. pp. 1-9.

⁴¹ The writer has taken the liberty to arrange the cases in his own order of details, which is not inherent in Justice Holmes' theory.

I. THE ELEMENT OF TEMPORAL DAMAGE TO THE PLAINTIFF.

Under Corporal Damage, a principal question of course concerns the doctrine of the first Spade case,⁴² involving illness caused through fright. Here he sagely emphasizes the limitation defined in that case as purely "an arbitrary exception based upon a notion of what is practicable."⁴³ Under the Death Statute, his principal opinion dealt with the problem of an infant injured *en ventre sa mère* and dying after birth.⁴⁴

Under Societary Damage, in Defamation, the high lights are represented in the doctrine that to say of a nurse that she uses whisky is actionable if it will lead "even an appreciable fraction" of readers to regard the plaintiff with contempt;⁴⁵ and that to call a married woman a whore is defamatory, even though the acts of adultery proved were with one and the same person only.⁴⁶ In Unfair Trade, the Zither case⁴⁷ was as neat as possible an illustration of the distinction between actionable deception of the customer by imitation of the authorship, and non-actionable imitation of the mechanism without deception as to the authorship. In Copyright, the Circus-Poster case⁴⁸ must be deemed a permanent classic of the law; it is better reading than an essay of Landor or DeQuincey. But personally I feel the greater gratitude for his

⁴² 168 Mass. 285, 47 N. E. 88 (1897).

⁴³ *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N. E. 380 (1899); *Homans v. Boston Elev. R. Co.*, 180 Mass. 456, 62 N. E. 737 (1902); *Cameron v. New England T. & T. Co.*, 182 Mass. 310, 65 N. E. 385 (1902).

⁴⁴ *Dietrich v. Northampton*, 138 Mass. 14 (1884). In *Slater v. Mexican National R. Co.*, 194 U. S. 120 (1904) the question was whether the amount and time of payment for death was part of the remedy or of the right.

⁴⁵ *Peck v. Tribune Co.*, 214 U. S. 185 (1909).

⁴⁶ *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381 (1902). Here belong also: *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 65 N. E. 32 (1902) (special damage in slander of title); *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275 (1897) ("words of mere suspicion" suffice); *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144 (1886) (multifold copies as separate libels).

⁴⁷ *Flagg Manufacturing Co. v. Holway*, 178 Mass. 83, 59 N. E. 667 (1901). Here also belongs: *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068 (1890) (gift of secret formulas by the intestate and, later a sale of them by his administrator; a very pretty case, which could be argued for an afternoon, touching its fundamentals). In *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46 (1890), may we not regret that he lost a chance to dissent from the scientifically misguided doctrine (now laid to rest by quite unscientifically motivated legislators) that a trade-union label may be pirated *ad lib.*?

⁴⁸ *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239 (1903).

dissent (for that is what it is *en principe*) in the Music Record case.⁴⁹ That decision has always seemed to me truly shocking in the blow it struck at the rights of composers; and it let loose a tumultuous and needless struggle in the halls of Congress, when legislation to correct it was opposed by the ruthless ones who desired to grow rich on the unrewarded genius of others. And to the philistine and unimaginative assertion in the majority opinion: "These musical tones are not a copy which appeals to the eye" (!), it was sufficient for him to answer irrefragably:

"The result is to give to copyright less scope than its rational significance and the ground on which it is granted seems to me to demand. . . . The ground of copyright is that the person to whom it is given has invented some new collocation of visible or audible points, — of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation. . . . One would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence, *i. e.* . . . not only the invention, . . . but the result which gives to the invention its meaning and worth. . . . On principle, anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose."⁵⁰

In Proprietary Damage, one of his earliest opinions⁵¹ gave an interesting opportunity to bring to bear some of that historical learning which he had just given to the world in "The Common Law" — here on the question how far a bailee can recover for injury to the bailed chattel; and the opinion shows that history was never allowed by him to enslave modernity. Two great cases in trover — whether title is transferred by judgment alone,⁵² and whether the Statute of Limitations not merely bars an action but also transfers title⁵³ — concern rather the law of transfer of rights.

⁴⁹ White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1 (1908).

⁵⁰ *Ibid.*, pp. 19-20.

⁵¹ Brewster v. Warner, 136 Mass. 57 (1883). This was his first year on the Bench.

⁵² Miller v. Hyde, 161 Mass. 472, 37 N. E. 760 (1894). His (dissenting) opinion contains a courteous tribute (of course he was the first judge to discover them) to "the learned researches" of Mr. Ames and Mr. Maitland. I must say that I have always preferred the doctrine of the majority.

⁵³ Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128 (1886). Here also I have had to believe that the best practical solution is squarely to hold, as Field, J., did, that these statutes are really statutes of prescription.

II. THE ELEMENT OF CULPABLE CAUSATION BY THE DEFENDANT

The exposition of this principle — “whether fraudulent, malicious, intentional, and negligent wrongs can be brought into a philosophically continuous series” — was already (before he went on the Bench) given currency in “The Common Law.” It was a great discovery, which has ever since lightened and relieved the pains of scientific fever in this *locus*. There are, however, few opinions in which the nicest questions of principle come to be dissected.

In the Coal-Hole case⁵⁴ (which was indeed his very first opinion in a tort case), the difference was emphasized between that active causation which is generally required for liability and that inaction which can make liable only by exception and, here, by statute. Passing over some related topics,⁵⁵ the most interesting opinions are found in the field of Remoteness of Consequence and Acting at Peril.

Remoteness. The Lessor-and-Lessee opinions⁵⁶ are a most enlightening series; they give him good illustration for a favorite doctrine, that “the general tendency has been to look no further back than the last wrongdoer”; and they adjust some very sensible and consistent distinctions. The application of the principle to personalty, in the Itinerant Freight-Car case,⁵⁷ completed the illumination of the principle. In the field of defamation, I have

⁵⁴ *Fisher v. Cushing*, 134 Mass. 374 (1883) (injury at a coal-hole in the sidewalk; a statute required notice of injury to be served before suit began upon the “person obliged by law to repair”; held, that the statute did not apply to defects of the sort here concerned).

⁵⁵ *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375 (1902) (ice-creating spout on a house); *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253 (1887) (grantee’s responsibility for nuisance originating before acquisition of title).

There is, of course, a long list of opinions passing upon questions of negligence for the jury — some twenty-five in all; need I cite them? I will send the list to any one who would care for it. They are full of shrewdness and good style.

There is also a half-score of opinions solving questions of municipal and other statutory liabilities, just the kind of cases that are true meat for lawyers, — that is, for the lawyers who argue them, but not entertaining to later students.

⁵⁶ *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84 (1888) (lessor’s liability for injury to traveler by snow falling from roof); *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92 (1896) (lessor’s liability for injury on a defective platform); *Quinn v. Crimings*, 171 Mass. 255, 50 N. E. 624 (1898) (injury by fall of defective fence); *O’Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387 (1901) (lessor’s liability for injury by a defective hoisting-hook).

⁵⁷ *Glynn v. Central R. Co.*, 175 Mass. 510, 56 N. E. 698 (1900).

never forgiven *Hastings v. Stetson*⁵⁸ for being so perversely wrong; and so I do not see why I should be reconciled to the Arsenic-in-Silk case,⁵⁹ which instead of paring down *Hastings v. Stetson* gave it a new application; in these days of more widespread touchiness on public sanitation, it would be worth while to raise the question again.

Acting at Peril. For damage by Buildings, the Division Fence case⁶⁰ gave us a most restorative survey of the principle, remedying the confusion caused by the unfortunate opinion of a prior judge in the Chimney case,⁶¹ and epitomizing the doctrine of "The Common Law." For Defamation, we owe him a perpetual debt for the dissenting opinion in the case of the Wrong Initials;⁶² and the sure hand of one who is merely fitting a new instance into a general system is here seen in striking contrast to the juristic helplessness of the English opinions in the later case of the Imaginary British Tripper's case.⁶³

III. THE EXCUSE ELEMENT

In this large field one must be content only to note here and there some of the opinions in which the general maxims of life and the doctrines of "Privilege, Malice, and Intent" were most individually illustrated.

⁵⁸ 126 Mass. 329 (1879) (Gray, C. J.: "One who utters a slander is [as a matter of law] not responsible . . . for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control"). This is just as perverse to human nature as Lord Ellenborough's well-known horse-pond illustration in *Vicars v. Wilcocks*, 8 East 1 (1806).

⁵⁹ *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208 (1890) (defendant physician made a false statement that there was arsenic in the silk used in the plaintiff's factory; some of the plaintiff's workmen left him, acting on a repetition of the rumor; held, no recovery, at least unless the repetition was privileged, as to which, no decision).

⁶⁰ *Quinn v. Crimings*, 171 Mass. 255, 50 N. E. 624 (1898) (injury by fall of a division fence between land of A. and the defendant; the plaintiff was on A.'s land, and the part that fell was for A. to repair). I wonder what other judge would have considered and cited the latest editions of CLERK & LINDSELL, POLLOCK, and JAGGARD, thus paying homage to scientific discussion of the law.

⁶¹ *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495 (1894).

⁶² *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462 (1893) (the defendant chronicled the arrest and fining of "H. P. Hanson, a real estate and insurance broker of South Boston"; this described the plaintiff; but the person fined was A. P. H. Hanson, another real estate and insurance broker of South Boston; the majority opinion exonerated the defendant).

⁶³ *Jones v. Hulton*, L. R. [1909] 2 K. B. 444.

In Contributory Negligence, the Closed Hatchway case⁶⁴ gave a concise demonstration of one limit of that doctrine. In the Mud-hole case the opinion pointed out the fundamental principle of election of dangers.⁶⁵ In its application to trespassers and licensees, the limitations of the principle were worked out, as to defects of the premises⁶⁶ and as to ruthless conduct of the proprietor;⁶⁷ and in the Railroad Crossing case the whole law of that part of the subject is almost codified.⁶⁸

Under Necessities for Protection from Calamities, a commonplace incident of city life, in the Drunken Passenger case,⁶⁹ is made the text for propounding one of the greatest and least developed doctrines of our law, that "a man cannot shift his misfortunes to his neighbor's shoulders," and the possible limits of it are outlined. The contrary principle has of late been put forward — "*Not kennt kein Gebot*" — by government-appointed German professors attempting to justify the Prussian Government's foul and egoistic sacrifice of innocent Belgium as a measure of self-protection against alleged would-be aggressors. Morality, chivalry, sociology, and (let us hope) Anglo-American law⁷⁰ do not sanction an insidious

⁶⁴ *Pierce v. Cunard S. S. Co.*, 153 Mass. 87, 26 N. E. 415 (1891) (a workman between decks was smothered by a fire; the defendant's agent had later closed the hatches, preventing egress). In a dozen other opinions, the questions were of only passing interest.

⁶⁵ *Pomeroy v. Westfield*, 154 Mass. 462, 28 N. E. 899 (1891) (the plaintiff drove home at night over a known dangerous road, "and allowed his horse in the darkness to go unguided around the mud-holes and past the culvert").

⁶⁶ *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369 (1889) ("No doubt a bare licensee has *some* rights; the landowner cannot shoot him"). *Sheehan v. Boston*, 171 Mass. 296, 50 N. E. 543 (1898) (walking on the grass in a park).

⁶⁷ *Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909 (1899) (the defendant's cook dashed hot water on some annoying boys who would not leave his kitchen); *Riley v. Harris*, 177 Mass. 163, 58 N. E. 584 (1900) (licensee bit by a dog).

⁶⁸ *Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 35 N. E. 554 (1893); foreshadowed by *June v. Boston & Albany R. Co.*, 153 Mass. 79, 26 N. E. 238 (1891).

I need not here notice the numerous opinions applying the principle (usually confined to the facts of each case) to employees; there are some forty of them. The most notable is *Schlemmer v. Buffalo, Rochester & Pittsburg R. Co.*, 205 U. S. 1, 11 (1906), where a brief but unique passage points out the relation between assumption of risk and contributory negligence. For lack of such juristic analysis, our present law is here in a pottering condition.

⁶⁹ *Spade v. Lynn & Boston R. Co.* (second appeal), 172 Mass. 488, 52 N. E. 747 (1899) (the plaintiff, a woman passenger, was injured by the jostling caused by the defendant's conductor forcibly removing a drunken man from the car).

⁷⁰ *Gilbert v. Stone*, Aleyn 35 (1648); *Scott v. Shepherd*, 2 W. Bl. 892 (1773) (Black-

doctrine whose abominable consequences are thus illustrated on an international scale.

Under Necessities of Industrial Livelihood, we come to some of his most distinctive opinions.⁷¹ They deserve an essay or a treatise by themselves; for they invoke and expound a whole philosophy of the economic struggle, with careful shaping of particular distinctions for the several typical situations. No man can consider himself to have a respectable conviction on this subject unless he has faced and settled with the dissenting opinion in *Vegetahn v. Guntner*. The only opinions (that I know of) to be even mentioned with it in their breadth of thinking are those of Stevenson, V. C., in *Booth v. Burgess*⁷² and of Baker, J., in *Iron Molders' Union v. Allis-Chalmers Co.*⁷³

Under Necessities of Fair Trade, the Watch case⁷⁴ furnished a notable opinion defining limitations on thievery of business good will by dwellers in a common locality; and the Pill case,⁷⁵ by users of a common process.

Under Necessities of Landed Improvements, a series of opin-

stone, J.: "Not even menaces from others are sufficient to justify a trespass against a third person"); *Queen v. Dudley & Stephens*, L. R. 14 Q. B. D. 273 (1884) (Coleridge, C. J., p. 287: "It is not needful to point out the awful danger of admitting the principle which has been contended for"); *Campbell v. Race*, 7 Cush. (Mass.) 408 (1851); *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N. W. 221 (1910); Notes in HARV. L. REV. VII, 302; VIII, 414; XIII, 599; XXIII, 490; 10 COL. L. REV. 372; John H. Wigmore and Henry C. Hall, "Compensation for Property Destroyed to stop the Spread of a Conflagration," 1 ILL. L. REV. 501.

In *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85 (1893), another instance of the Anglo-American principle had already been dealt with in an opinion of Justice Holmes.

⁷¹ *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896) (dissenting); *May v. Wood*, 172 Mass. 11, 51 N. E. 191 (1898) (dissenting); *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619 (1900); *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900) (dissenting); *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125 (1901); *Aikens v. Wisconsin*, 195 U. S. 194 (1904). I regard the majority opinion in *May v. Wood* as one of the most repulsive ever written on the subject by any court.

⁷² 72 N. J. Eq. 181, 65 Atl. 226 (1906).

⁷³ 166 Fed. 45 (1908).

⁷⁴ *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N. E. 141 (1899). In his later opinion in the *Waterman Pen* case (235 U. S. 88 (1914)), the variance from earlier doctrine was more apparent than real; but because of the general needs to-day of greater strictness of legal protection, I ventured to call public attention to the unfortunate trend of modern cases ("Justice, Commercial Morality, and the Federal Supreme Court: the *Waterman Pen* Case," 10 ILL. L. REV. 178).

⁷⁵ *Jacobs v. Beecham*, 221 U. S. 263 (1911).

ions⁷⁶ shrewdly works out sensible rules, exemplifying a favorite maxim, calculated to exhibit the dominance of life over logic, that "most differences are only differences of degree, when nicely analyzed."

Under *Necessities of Free Discussion (Defamation)*, two great opinions are recorded. The *Disbarment* case⁷⁷ is a concise treatise on the privilege for publishing a report of judicial proceedings. The *New York Custom-House* case⁷⁸ is an equally concise but adequate summary of the principle of fair criticism, as distinguished from assertion of fact.

Under *Necessities for Independence of Public Officers*, we reach, in the *Glanders* case,⁷⁹ opposing opinions which twenty-five years ago made a landmark for the development of a principle now second to none in its importance to future governmental conditions — the principle of a public officer's immunity for private harm done by him in good faith, but by error of fact or opinion, in exercising his office. Modern officialized sanitation and the like makes this one of the great questions of the coming century. National traits and traditions are involved. Germany and France, starting at opposite extremes, have both shifted somewhat. American conditions (*pace* some of our younger Ph.D. political scientists) still pretty much fit the frank description of older British conditions by the genial De Grey, C. J.:⁸⁰

⁷⁶ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1889) (the spitefence); *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393 (1889) (same); *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1889) (silting up of a pond by cultivation of a hillside); *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995 (1891) (discharge of sewage into a brook); *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201 (1891) (overflow of sewage).

⁷⁷ *Cowley v. Pulsifer*, 137 Mass. 392 (1884).

⁷⁸ *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1 (1891).

Under *Necessities for Freedom of Parties' Resort to Courts (Malicious Prosecution)*, no case seems to have given him special inspiration to a creative opinion. *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537 (1885) (advice of counsel as to probable cause); *Krulevitz v. Eastern R. Co.*, 143 Mass. 228, 9 N. E. 613 (1887) (unlawful mode of arrest); *Gray v. Parke*, 162 Mass. 582, 39 N. E. 191 (1895) (probable cause, on the facts); *Connery v. Manning*, 163 Mass. 44, 39 N. E. 558 (1895) (similar); *Burt v. Smith*, 203 U. S. 129 (1906) (preliminary injunction as evidence of probable cause).

⁷⁹ *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100 (1891) (officers were by law authorized to kill diseased horses; they killed the plaintiff's horse, but it was not diseased; the majority opinion, by Holmes, J., held that the officers were not protected from liability).

⁸⁰ *Miller v. Seare*, 2 W. Bl. 1141, 1144 (1777).

"The defendant we personally know to be a gentleman of the utmost integrity and honour; but in the country very low and obscure men often creep into the commission, and to arm them with such arbitrary powers would be of the most terrible consequence."

And so it is a satisfaction to find that our Justice has left his impress here also to guide the future.

And after all it is perhaps these trifling cases of a yeoman's plow-horse in the obscure village of Rehoboth, Massachusetts, that have given the greatest zest to our Justice, amidst the lucubration of tedious records and the balancing of acute arguments. Himself has somewhere said it (and it is a passage which confers a perdurable doctorate of dignity upon the daily judicial task):

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind. . . . This day marks the [fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power."

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THE SPEECH OF JUSTICE

CONSERVATIVE political opinion in America cleaves to the tradition of the judge as passive interpreter, believing that his absolute loyalty to authoritative law is the price of his immunity from political pressure and of the security of his tenure. Therefore, since he should have no aim but to understand the law as he finds it, conservative opinion finds it monstrous to require of him results which shall suit the changing popular aspirations, which, being unformulated, must be vague, undifferentiated, and fragmentary. His is the rôle of a faithful administrator whose success depends upon his interpretation of the written word, not of the full heart. In its passionate adherence to this tradition such opinion is not disinterested; it would as eagerly encourage judicial initiative, if the laws were framed by labor unions, as it insists upon rigid obedience in a system framed for the most part for the protection of property and for the prevention of thoroughgoing social regulation. Under such a system nothing seems to it more subversive of ordered liberty than to permit the judge to make a personal interpretation of the uncertain and distracted yearnings of a supposititious public opinion.

This attitude is in part right and in part wrong. Much of the law is indeed written in formal shape, the authoritative emanation of the state through agencies to which the judge is confessedly inferior. Beyond the limits of such ambiguity as the words may honestly carry the judge surely has no duty but to understand, and to bring to his understanding good faith and dutiful acquiescence. For the results he may not justly be held accountable; to hold him is to disregard the social will, which has imposed upon him that very quiescence that prevents the effectuation of his personal notions. There is a hierarchy of power in which the judge stands low; he has no right to divinations of public opinion which run counter to its last formal expressions. Nevertheless, the judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the

half-framed purposes of his time, it misconceives the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part is charged with the articulation and final incidence of the successive efforts towards justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member.

When Plato tried to define justice, he found he could not stop short of building a commonwealth. No concept would answer which did not comprise the sum of the citizen's relations to the state at large. Yet we know that such a definition does not define until it be filled with purposes which the people feel and the state sets out to realize. Ulpian might take as the constitutive principle of justice the steady and eternal purpose to give each man his own, but no *a priori* concepts can determine in advance what each man's own shall be, and the form of justice will be without content till we fill it with the ardor of life. It can from time to time become realized in fragmentary compromises, the ingenious expedients of those who can penetrate and satisfy the cravings of the time, but it will submit to no eternal rationalistic, any more than any other manifestation of the human soul.

Two conditions are essential to the realization of justice according to law. The law must have an authority supreme over the will of the individual, and such an authority can arise only from a background of social acquiescence, which gives it the voice of indefinitely greater numbers than those of its expositors. Thus, the law surpasses the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual and reconciles him to his subserviency. The pious traditionalism of the law has its roots in a sound conviction of this necessity; it must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation. Yet with this piety must go a taste for courageous experiment, by which alone the law has been built as we have it, an indubitable structure, organic and living. It is in this aspect that the profession of the law is in danger of failing in times like our own when deep changes are taking place in the convictions of men. It is not as the priests of a completed

revelation that the living successors of past lawmakers can most truly show their reverence or continue the traditions which they affect to regard. If they forget their pragmatic origin, they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants. Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can they continue in the course of the ancestors whom they revere.

Yet the conditions of the enterprise have changed. Until within a very few decades the American bench and bar could utter justice without misgiving or constraint. Differences of course there were, but the self-conscious elements of society were homogeneous and the divergences not fundamentally distracting. At least, such genuine distraction as there was was latent, class grievances were inaudible, justice might be vague but it was consistent. Lawyers got by a kind of natural right the authority to interpret justice, since they were in a broad sense genuine representatives of all that could achieve representation. Nor was it different in Great Britain. When Lord Mansfield made the modern commercial law of England, he had no need to force his native convictions; he spoke with authority because the resultant of values in his mind substantially accorded with that of all other men who ever conceived that their scale of values could gain any effective recognition.

All this has changed; the profession is still drawn, and so far as we can see, will always be drawn, from the propertied class, but other classes have awakened to conscious control of their fate, their demands are vocal which before were dumb, and they will no longer be disregarded. If justice be a passable accommodation between the vital and self-conscious interests of society, it has taken on a meaning not known before. But the profession has not yet learned to adapt itself to the change; that most difficult of adjustments has not been made, an understanding of and sympathy with the purposes and ideals of those parts of the common society whose interests are discordant with its own. Yet nothing can be more certain than that its authority as interpreter of customary law must in the end depend upon its power to

learn precisely that adaptation. As mediator it must grasp from within the meaning of each phase of social will; it must divine the form of what lies confused and unexpressed and must bring to light the substance of what is half surmised. To adjust and to compromise, to balance and to value, one must first of all learn to know, not from the outside, but as the will knows. This is the condition of the continued high position of the lawyer; without this he must degenerate to a mere rational automaton, expounding a barren scholasticism which his society will quickly learn to value at its true worth.

It may be said that this fate is in any event inevitable, that the obvious purport of the present is towards an increasing body of minute formularies which leave no option and permit no latitude. Yet one must not be too hasty to confuse cause with effect. A large part of the tendency towards such meticulous prolixity rests in the very inability of the profession to show a more enlightened sympathy with the deeper aspirations of the time. Moreover, as we are coming now to learn, no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice.

In so far as we have realized that definition must follow application, the movement has been to intrust broad powers to administrative commissions, which thus become charged with the execution of wide legislative purposes, and which establish upon them a customary law through the slow accretion of their own precedents. Such functions should more properly lie with courts, who by training and experience ought to be better fitted for their discharge. The movement reflects a suspicion of courts in the end resting upon that very scrupulousness to the written word which has been their undoing. Yet they stand in a dilemma, because, while no ritualistic piety can save them from the necessity of an active partisanship

amid the contests of their time, their partiality must endure the final test of a genuine social ideal which shall be free from class prejudice. Like every public functionary, in the end they are charged with the responsibility of choosing but of choosing well. Courage and insight alone can in the end win confidence and power. Democracy must learn to value and to trust such qualities or democracy cannot disentangle its true purposes and realize its vaguely formed ideals; but democracy is quick to understand those who respond to its fundamental feelings, and is ruthless in casting aside those who seek cover behind the protection of the written word, for which it may, and even in the same breath, itself profess reverence.

The profession of the law has its fate in its own hands; it may continue to represent a larger, more varied social will by a broader, more comprehensive interpretation. The change must come from within; the profession must satisfy its community by becoming itself satisfied with the community. It must assimilate society before society will assimilate it; it must become organic to remain a living organ. No political mechanism designed to accomplish this by fear will succeed, if the inward disloyalty of purpose remain. The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more important than a minor administrator, confined to a monotonous round of record and routine, without dignity, inspiration, or respect. There can be no ambiguity in the answer of those who are worthy of the traditions and the power of a noble calling.

Learned Hand.

NEW YORK.

THE PLACE OF LOGIC IN THE LAW

IT is a curious fact that while critics and reformers of the law formerly used to take their stand on self-evident truths, and eternal principles of justice and reason, their appeal now is predominantly to vital needs, social welfare, the real or practical need of the times, etc. Those who believe law to be not an isolated island *in vacuo* but a province of the life we call civilization, occupying similar soil and subject to the same change of intellectual season as the other provinces, will see in the fact noted above nothing but an indication of the general passing out of fashion of the old rationalism or intellectualism.

The seed of the protest against the over-emphasis of the logical element in the law was planted by Von Jhering and Justice Holmes over a generation ago.¹ But legal science in this country was then so far behind that of Germany that the logical elaboration and systematization of the law embodied in the work of Langdell and Ames proved the more pressing need and obtained the right of way. But there are many indications that the forces of anti-intellectualism are now rising in American legal thought, and they are sure to find powerful support in the public impatience with legal technicalities.

Imitators or followers seldom possess the many-sided catholicity of the pioneer or master. Thus Von Jhering and Justice Holmes, while emphasizing other factors, by no means deny all importance to legal logic. A large part of Von Jhering's "Geist"² is devoted to a logical analysis of the method and general ideas of the law; and Justice Holmes is careful to emphasize the function of general ideas in the development of the law (*e. g.*, the idea of identity in succession after death and *inter vivos*),³ and his book abounds in illustrations of how difficult legal problems can be cleared up by just logical analyses.⁴ But the new, more zealous crusaders against

¹ VON JHERING, *GEIST D. RÖM. RECHT*, iii, § 69. SCHERZ U. ERNST, ch. I and pts. iii and iv. HOLMES, *COMMON LAW*, ch. I.

² §§ 44-46, 59-68, and esp. §§ 45, 64, 65.

³ *THE COMMON LAW*, ch. x. Note the quotation at the end of the preface, and the important place of "reasons" in the development of the law, pp. 5, 36.

⁴ See especially pp. 214, 219, 220, 239, 289.

legal ideology are less cautious, and are inclined to deny all value to logic and general principles.⁵ Now it is a rather simple task to show the inadequacies of the proposed substitutes for the traditional principles of legal science. Sound common sense, the lessons of experience, the unspoiled sense of justice, the teachings of the as yet to be established science of sociology, or the somewhat elusive and perhaps altogether mythical will of the dominant class, cannot, without the aid of a logical legal technique, help us elaborate the laws of gifts, sales, mortgages, or determine the precise liability of a railroad company to those who use its sleeping car service. It is also easy enough to refute these new crusaders out of their own mouths and show that they themselves attach great value to a clear and logically consistent elaboration of the law.⁶ But such easy refutations, while they may be just, are seldom illuminating, unless we examine the situation with some thoroughness. This may lead us into the supposedly foreign fields of logic and metaphysics. But at the time when the foundations of our legal system are questioned both inside and outside of the legal fraternity, it would be only the wisdom of the ostrich which would counsel us to refrain from entering into these fields because, forsooth, the old tradition says that law is law, and has nothing to do with any other field of human inquiry. It may be reassuring to orthodox legal scholarship to note that the foremost representatives of the exact and natural sciences have now outgrown the childish fear of metaphysics as the intellectual boggy — witness the writings of Russell, Poincaré, Duhem, Ostwald, and Driesch.

I

A suggestive parallel can be drawn between the functions of the law and of natural science. Both facilitate transactions by increasing our reliance on the future. We build our modern houses, bridges, and machinery because science makes us more certain that these structures will withstand the variations of pressure, etc. We enter into business because we expect that people will continue to

⁵ WÜSTENDORFER, *DIE DEUTSCHE RECHTSPRECHUNG*, 223; FUCHS, *DIE GEMEINSCHÄDLICHKEIT DER KONSTRUKTIVEN JURISPRUDENZ*, chs. i and ii; BENTLEY, *THE PROCESS OF GOVERNMENT*, ch. i, and BROOKS ADAMS, *CENTRALIZATION AND THE LAW*, lectures i and ii.

⁶ *CENTRALIZATION AND THE LAW*, 39, 41, 43; WÜSTENDORFER, 219-222.

desire certain commodities, and we count on the state to continue to protect us against robbery. We sell on credit not only because we expect that most people will be moved (by habit or conscience) to pay, but also because the law provides us with a machinery for collecting what is due. If our debtors also know that this machinery exists, they will pay more readily and the expense of using this legal machinery will be accordingly reduced. That the law should be readily knowable is, thus, essential to its usefulness. So far is this true that there are many inconveniences or injustices in the law which men would rather suffer than be paralyzed in their action by uncertainty. Primitive law, *i. e.*, all legal systems uninfluenced by Greek science, try to achieve this certainty by fixed rules or dooms enumerating specific actions and their consequences, just as they store up wisdom in isolated saws or proverbs. Clearly the multitudinous and complicated relations of modern life could not possibly be regulated by such a method. Like the classical Romans, we utilize, instead, that most wonderful discovery, or invention, of the Greeks—rational deductive system. We try to reduce the law to the smallest number of general principles from which all possible cases can be reached, just as we try to reduce our knowledge of nature to a deductive mathematical system. This rational form also gives the law the appearance of complete freedom from arbitrary will and thus satisfies the modern demand for equality in the enforcement of law.⁷

The law, of course, never succeeds in becoming a completely deductive system. It does not even succeed in becoming completely consistent. But the effort to assume the form of a deductive system underlies all constructive legal scholarship. In our own day, for instance, Thayer's general views on evidence and Wigmore's classical treatise on the subject have transformed a conglomeration of disconnected rules into something like a system. Ames' doctrine of unjust enrichment has brought together a number of artificially tacked on appendages to the law of contract into the somewhat coherent body of law known as quasi-contract. Forty years ago we had so little of a general theory of torts that if anyone had thought of writing a treatise on the subject he might simply have treated of a number of torts in alphabetic order. To-day we have

⁷ "Arbitrary discretion is excluded by the certainty resulting from a strict scientific method." SAVIGNY, *VOCATION OF OUR AGE*, p. 151.

not only a general theory of liability, but there is a marked tendency to make the law of torts and the law of contracts branches of the law of obligations. This effort at generalization and system has always been the task of the jurist. We use the notions of property, contract, or obligation so often now that we are apt to think that they are "as old as the law itself." But legal history shows clearly enough that the notion of property came as a result of a long process of unification of diverse laws against robbery. A great deal of material had to be eliminated before the abstract idea of property could be extracted. The idea of contract is so late that even as developed a legal system as the Roman had no general law of contract, but merely laws of *stipulatio*, *depositum*, *pignus*, *locatio conductio*, etc. The notion of possession seems to the classical jurists simply one of fact. But the possessory remedies did not originate in the principle of possession but rather in a number of diverse situations.⁸

In thus endeavoring to make the law systematic, jurists are not merely pursuing their own purely theoretic or scientific interest. They are performing a duty to the community by thus transforming the law. A legal system that works with general principles has powerful instruments. Just as the generalized arithmetic which we call advanced mathematics has increased manifold our power of solving physical problems, so a generalized jurisprudence enlarges the law's control over the diversity of legal situations. It is like fishing with large nets instead of with single lines.

As nature has other cares besides letting us paint her deductive charm, she constantly reveals aspects that hamper or complicate our beautiful analytic equations. So, also, the affairs of practical life generate situations which mock our well-intentioned efforts to reduce the law to a rational system. In the presence of these, as of other seemingly insurmountable obstacles, human frailty is tempted to blink at the difficulties. So urgent is the need for assured first principles that most people resent the service which the skeptical-minded — the stray dogs of the intellectual world — render by showing the uninhabitableness of our hastily constructed legal or philosophic kennels. In the legal field, the blinking at the practical difficulties is facilitated by the ready assurance that if our principles are just it is none of our fault if any inconvenience re-

⁸ DERNBURG, RÖM. RECHT, § 220.

sults. *Fiat justitia pereat mundus*, is a very edifying excuse for refusing to reëxamine our principles in the light of the harsh results to which they lead.

According to the prevailing popular theory — a theory for which popular philosophy is largely indebted to a famous lawyer, Francis Bacon — facts are “out there” in nature and absolutely rigid, while principles are somewhere “in the mind” under our scalps and changeable at will. According to this view scientific theories are made to fit preëxisting facts somewhat as clothes are made to fit people. A single inconsistent fact, and the whole theory is abandoned. Actually, however, facts are not so rigid and theories not so flexible; and when the two do not fit, the process of adaptation is a bilateral one. When new facts come up inconsistent with previous theories, we do not give up the latter, but modify both the facts and the theory by the introduction of new distinctions or of hypothetical elements. If the facts of radiation do not fit in with the theory of the conservation of energy, an ether is invented and endowed with just as many properties as are necessary to effect a reconciliation, though in the end this results in inordinate complexity. Similarly legal theories, attempting to assimilate new facts by stretching old rules and introducing distinctions and fictions, become so complex and full of arbitrary elements that the very end of legal system is thereby defeated. It is artificial complexity rather than inconsistency with facts that caused the abandonment of the Ptolemaic astronomy and is causing the abandonment of the physics of the ether to-day. The classical system of common-law pleading, based on a few self-evident principles, was just such a system. It fell precisely because, as the forms of actions expanded to include the new industrial order, the system became so choked with artificial distinctions and fictions that a conservative and long-suffering people had to sweep it all away. Similarly has the law of employers' liability, based on a simple principle — no responsibility without fault — grown to such monstrous complexity (witness Labat's voluminous book) that legislation is sweeping it away.

The above parallel between natural science and legal system should, of course, be corrected by noting the important differences between the two. Legal principles are not so simple or so readily applicable to single cases as are the principles of physics; nor are the facts of the legal order so definite and so rigid as those of the

physical order. Crucial experiments are possible in science. Single experiments have sometimes caused such difficulties to reigning theories as to lead to their ultimate abandonment. The facts of physics admit of description in terms of number and can be indefinitely repeated, whereas the facts of the legal order, "practices," or decisions, can always be condemned and disregarded as wrong in principle. Nevertheless, enough has been said above to indicate that the rôle of deduction is not an accidental incident in law and natural science but is rather an essential part of their life.

II

In modern times the widespread opinion has grown up that deduction is incapable of genuinely extending our knowledge and can serve at best only as an ornament of exposition. It is sometimes thought that the introduction of the "case method" in law teaching marks the entrance of inductive scientific methods in law. The latter view is, however, obviously a misapprehension. Both Langdell and Ames regarded the case method as a sound pedagogic device, but in no way doubted the existence of legal principles according to which cases should be decided. Langdell even asserted that the number of such principles is very small.⁹ It is from an entirely different quarter that the whole of traditional legal science has, because of this very belief in principles, been attacked as scholastic and out of harmony with the methods of modern science.¹⁰ Whatever may be these critics' knowledge of modern science, they certainly have a very vague idea of Scholasticism, and use the term as a *locus* for all that is intellectually undesirable, a sort of inferno for all ideas to which they are opposed. Now there is one virtue which no one who has ever read Aquinas or Duns Scotus denies them, and that is clarity and consistency — a virtue which, if not sufficient for admission into the modern juristic heaven, is at least not to be altogether despised. Moreover, every student of the history of thought knows that the contrast between modern science and medieval philosophy is not to be dismissed by the mere shibboleth of induction or deduction. The founders of modern science — Copernicus, Kepler, Galileo, Huygens, Descartes, and Newton — cer-

⁹ Preface to the first case book on Contracts.

¹⁰ Bozi, *DIE WELTANSCHAUUNG DER JURISPRUDENZ*, and Brooks Adams and Bentley, *op. cit.* See also note in Jung, *DAS PROBLEM DES NATÜRLICHEN RECHTS*, p. 172.

tainly did not despise deduction. The history of science completely belies the dogma as to the fruitlessness of deduction, and shows many important physical discoveries, such as Maxwell's discovery of the electro-magnetic character of light, brought about by deductive or mathematical procedure. The great apostle of induction was Bacon — a good lawyer, trained in the handling of cases in the Inns of Court, but one who made no contribution at all to any natural science.¹¹ The present apotheosis of induction arose in the middle of the nineteenth century as a result of a violent reaction against the frenzied excesses brought about by the classical German philosophies of Fichte, Hegel, and Schelling. It became a dogma of popular philosophy through the popularity of Mill's "Logic". Now Mill was not himself a scientist. He was an administrator — an official of the East India Company — and his acquaintance with natural science was gathered from such second-hand sources as Whewell's "History of the Inductive Sciences". But so strong has become the hold of Mill's simple formulæ on popular thought that even men of science have accepted his account of scientific method — which is not surprising if we remember that healthy men or athletes are not necessarily good physiologists or trainers. The actual procedure, however, of natural as well as of legal science involves constant reliance on principles, and is incompatible with Mill's nominalism, *i. e.*, the assumption that only particulars exist in nature.

It may seem a bold and reckless statement to assert that an adequate discussion of cases like *Berry v. Donovan*,¹² *Adair v. United States*¹³ or *Commonwealth v. Boston and Maine R.*,¹⁴ involves the whole medieval controversy over the reality of universals. And yet, the confident assertion of "immutable principles of justice inhering in the very idea of free government" made by the writers of these decisions,¹⁵ and the equally confident assertion of their critics that there are no such principles,¹⁶ show how impossible it is to

¹¹ Harvey, the discoverer of the circulation of the blood, said of Bacon: "He writes science like a Lord Chancellor."

¹² 188 Mass. 353, 74 N. E. 603 (1905).

¹³ 208 U. S. 161 (1907).

¹⁴ 222 Mass. 206, 110 N. E. 264 (1915).

¹⁵ *Twining v. N. J.*, 211 U. S. 102 (1908).

¹⁶ CENTRALIZATION AND THE LAW, pp. 20 ff. Dean Lewis in 61 U. OF PA. L. REV., 531, 533. 1913.

keep out of metaphysics. Can we dodge the question by saying that while legal principles are unchanging the law is a practical or progressive science?¹⁷ How can a principle or undisputed formula remain the same if all the cases to which it is to be applied are constantly changing?¹⁸ You may decide to enter the realm of metaphysics or not, just as you may decide to go to church or not; but you cannot deny that an intelligent decision in either case demands considerable thought.

The matter is not very difficult if we refuse to be browbeaten by a word like "reality," which perhaps represents nothing definite except a certain emotional afflatus. It ought to be quite clear that abstractions and universals exist in every sense in which individual things can be said to exist, and by the same evidence. If any statement like, "Smith is white and an honest man" is true, whiteness, honesty, and manhood must exist as truly as Smith. Similarly, if it is true that one body is equal to, greater than, or less than another, the relations of equality, greater than, or less than, exist just as truly as the bodies between which they hold. If the results of logical and mathematical reasoning are observed to hold true of nature, it seems more proper to say that nature is logical and mathematical than to suppose that logical and mathematical principles are just words having no meaning in nature, or that they have a dubious existence "in the mind only" (the "mind" being conceived as outside of nature). The difficulty which most people have in conceiving of the existence of universals is due to the tendency to *reify* all relations, *i. e.*, to think of these relations or universals as if they were themselves additional *things*, instead of what they are defined to be, *viz.*, qualities or relations of things. This shows itself in the naïve question, "*Where* do these universals exist?" as if universals were particular entities occupying space. In brief, it seems that the actual procedure of natural and legal science demands the doctrine that universals do exist, but that they exist as universals, not as additional individual things. Surely a barren if somewhat truistic doctrine, you may say. But the following may show that it offers us a clew whereby to distinguish the use from the abuse of logic in the law.

¹⁷ National Protection Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 (1902).

¹⁸ Professor Frankfurter in 29 HARV. L. REV. 369.

III

Every science must use logic to test whether certain conclusions do follow from given premises. But that which distinguishes one science from another, *e. g.*, law from physical chemistry, is the subject-matter, the axioms and postulates from which conclusions are drawn. The subject-matter of the law is the regulation of the conduct of individuals living in those more or less permanent relations which we call society. Now, from the point of view of logic the existence of men in society or their desire to regulate their mutual relations is just as brute an empirical fact as that water expands when cooled near the freezing point. All metaphysical philosophies of law, like Stammler's, which pretend to have no empirical elements at their basis, thus really attempt the logically impossible. You cannot construct a building merely out of the rules of architecture. As a matter of fact, all metaphysical philosophies of law do smuggle in, in more or less disguised form, the main material facts of the social order. In this they are assisted by a fact that empiricists — especially those intoxicated with the doctrine of evolution — do not fully realize, *viz.*, the large fund of common humanity possessed by all peoples whose history we can study. Private law especially deals with those traits of human nature that have changed least in the comparatively short period that is covered by the whole of legal history. Our history "starts with man full grown. It may be assumed that the earliest barbarian whose practices are to be considered had a good many of the same feelings and passions as ourselves."¹⁹ Thus is explained the paradoxical fact that metaphysical philosophers of law, who try to ignore or rise high above the factual order, are frequently more productive of genuine social insight than those who are lost in the multitudinous but unimportant details of historic or ethnologic jurisprudence.

The law, at any given time, is administered and expounded by men who cannot help taking for granted the prevalent ideas and attitudes of the community in which they live. Even if it were logically, it would certainly not be psychically, possible for any man to think out an absolutely new system of jural relations. The law reformer who urges the most radical change, can justify his pro-

¹⁹ HOLMES, COMMON LAW, p. 2.

posal only by appealing to some actually prevailing idea as to what is desirable; and the history of the law shows how comparatively small is the addition or subtraction to the system of jural concepts and ideas that the most creative judges and jurists have been able to bring about. There are, therefore, first or fundamental principles of the law which may be regarded as practically or *quasi a priori*. But though we cannot avoid relying on principles, the complex and constantly changing subject-matter requires continuous caution and a humbly open mind to the dangers of the eternal tendency of all intellectual effort in the direction of oversimplification.

Among the first principles of the law there are at least two kinds: (1) axioms or fundamental assumptions (*a*) as to fact, *e. g.*, that men desire their economic advantage, and are deterred from actions to which penalties are attached, and (*b*) as to the aim of the law, *e. g.*, that property should be protected, that men should be equal before the law, etc.; and (2) postulates which are really ways of procedure or methods of analysis and construction, *e. g.*, the distinction between rights and duties, or between law and equity, the principle that no man can be his own agent, or that no man can convey more or a greater estate than that which in law he has. The abuse of first principles of the first class consists in setting up economic or political maxims of public policy, which are at best applicable only to a given period or historical economic system, as eternal principles for all times. Examples of this may be found in the use of the principle that the public interest always demands competition, a free market, and an open shop, and the maxim that only by the separation of powers, checks and balances, and judicial control over legislation can liberty be maintained. The fallacy of regarding these as eternal first principles is readily detected and has been frequently pointed out in recent times. The fallacy, however, of setting up what I have called above postulates, as eternal necessities of all legal system, is less easily detected. These postulates have the appearance of self-evident truths. But physics has learnt to regret accepting such seemingly self-evident propositions as that a thing cannot act where it is not, and modern mathematics has learned that such seemingly self-evident assertions as that the whole is greater than a part, or Euclid's parallel postulate, are not necessarily true. The theoretical sciences now select their funda-

mental propositions not because of self-evidence, but because of the system of consequences that follows from them, and a practical science like the law ought not to despise that procedure.

The abuse of self-evident principles is at the basis of what the Germans call *Begriffsjurisprudenz*, which Professor Pound calls "mechanical jurisprudence",²⁰ and also of that which is unsatisfactory in the old natural law. The analysis of a few additional examples may perhaps make my point clearer.

In discussing creditors' bills in equity, Langdell says:²¹ "Indeed, when a debtor dies, his debts would all die with him, did not positive law *interpose* to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is *impossible* that an obligation should continue to exist after the obligor had ceased to exist." I have italicized the words "interpose" and "impossible" because these and the later expression that the question is "as old as the law itself" bring into relief the underlying view that the law itself is a logical system in which it is forever impossible for a debt to survive the debtor. But if that were so, how could positive law bring about the impossible? Could positive law change the rules of arithmetic, or make the diagonal and the side of a square commensurate? In point of fact the principle in question is not logically necessary at all. It arose at a time when the creditor could dispose of the actual body and life of the defaulting debtor, hence the relation between debtor and creditor could have been entered only by people who personally trusted each other. If the law of the XII Tables had allowed an assignment of a debt, it would have been socially as serious as if our law allowed an assignment of marital rights. Later on, when the rigor of the old law was softened, the practical reason why the creditor might not be replaced by another person disappeared, and the debtor-creditor relation became depersonalized at one end. The difficulties in the way of depersonalization at the other end were not the logical but the practical ones of harmonizing the security of credit and the maintenance of family continuity on the basis of inheritance. But habits of legal thought in regard to the personal character of the debtor-creditor relation still produce the familiar difficulties of subrogation, etc.

²⁰ Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605, KORKUNOV, *THE GENERAL THEORY OF LAW*, § 15, and BEKKER, *ERNST UND SCHERZ*, ch. vii.

²¹ *BRIEF SURVEY OF EQUITY JURISPRUDENCE*, p. 126.

Another illuminating instance of the confusion between actually existent and logically necessary rules of law is to be found in that most sagacious of the great practical Roman jurists, Papinian. The *post-liminium*, as is well known, was instituted to the end that citizens might not have their civil rights diminished because of unavoidable absence due to state service. Now, if one, before acquiring title by *usus*, is captured by the enemy, should possession be restored to him? No, says Ulpian,²² "for possession is for the most part a matter of fact, and matter of fact is not included in the scope of *post-liminio*." The reasoning here seems conclusive. The law can restore old rights, it cannot restore past states of fact. Reflection, however, shows that while this limitation on the right of *post-liminio* may have been practically wise, it was by no means logically necessary. An affirmative answer to the question would not have attempted to restore the past but would merely have terminated or wiped out rights acquired by others through the applicant's capture. "Nor ought the applicant," continues Papinian,²³ "to be allowed an *utilis actio*, as it is very unjust to take a thing away from an owner where there was no *usus* that took it away; a thing *cannot* be regarded as lost where it was not taken out of the hands of the party who is said to have lost it." This *cannot*, however, is not at all convincing when we remember that in the same book it is laid down²⁴ that "soldiers being quartered in Rome are treated as being absent on state service."

Shall we, then, give up all reliance on principles? That would be as wise as giving up the use of our eyes because they are, as a matter of fact, poor optical instruments. Just as a scientific optics aims at correcting our vision through the determination of the natural error of myopia or astigmatism, so a scientific jurisprudence makes such natural principles as "one cannot convey more than in law he has," or "no rights can be acquired by the commission of wrong," more useful by showing their necessary limitations.

Closely connected with the use and abuse of first principles is the use of artificial concepts or abstractions in the law. Von Jhering has long ago pointed out²⁵ that juristic technique is able to reconstruct and simplify the law by a process of analysis similar to the

²² DIGEST IV 6, 19.

²³ *Ibid.*, IV 6, 20.

²⁴ *Ibid.*, IV, 6, 7.

²⁵ GEIST D. RÖM. RECHT, § 44.

process whereby, in the course of history, language becomes represented by a more or less phonetic alphabet. The natural unit of language is the sentence, represented in primitive form by pictures. By a process of abstraction we pass from that stage in which thousands of signs are needed to the stage where a few simple phonetic elements suffice to reproduce all the possible combinations of language. Just so, scientific jurisprudence endeavors to analyze all laws as combinations of a few recurrent simple elements. From this point of view, the artificiality of legal concepts is not an objection to their employment. Indeed, there is an advantage in purely artificial symbols. They carry with them only the amount of meaning contained in their definition, without the intellectual and emotional penumbra that more familiar terms always drag with them. The most dangerous concepts of the law are those like direct tax, republican form of government, interstate commerce, restraint of trade, and the like. They seem to be definite in themselves, but when we come to apply them, they prove most illusive. The law, for instance, says, "no taxation except for public purposes." What are public purposes? The courts have ruled that municipalities may give bounties to grist mills and railroads, but not to factories. Communities may sell gas and electricity, but not coal; may abate a dam for the relief of privately owned meadows, but may not lend money for rebuilding a burnt district.²⁶ The lines of distinction seem quite arbitrary; and when judges try to defend them by such distinctions as that between direct and incidental benefits to the community, a logician cannot help feeling that the decisions may be good but the reasons certainly bad. It is the pernicious fiction that judges never make the law but only declare "the will of the legislator" that makes people blink at the essential indefiniteness of concepts like "due process of law" or "interstate commerce," and pretend to believe that all the constitutional law on these subjects is deduced from the few words of the constitutional enactments. The real work of judicial interpretation is precisely that of *making* these concepts definite by fixing their limits as questions about them come up.

Underlying the logical use of concepts are, of course, the logical

²⁶ *Rogers v. Burlington*, 3 Wall. (U. S.) 654 (1865). *Parkersbury v. Brown*, 106 U. S. 487 (1882). Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084 (1890). *Lowell v. Boston*, 111 Mass. 454 (1873).

rules of division, such as the one which demands that subdivisions shall be mutually exclusive. As the law has its excuse for being in the need to regulate future conduct, it must express itself in terms which will exclude the possibility of a case falling in both or neither of two classes which it may set up. Jurists, however, have not paid attention to the difference between logical division and natural classification. The naturalist who studies vertebrates finds that the multitudinous and widely different species may be grouped into fishes, reptiles, etc. If each of these groups has some important trait, the classification will be satisfactory to the naturalist, even though it does not rule out the possibility of species being discovered on the borderland, betwixt and between the groups distinguished. The distinction between plants and animals is a useful one even though there are many species to which either term may be applied. The law oscillates between natural classification and logical division and readily throws the incautious jurist into confusion. In enforcing constitutional provision for "the equal protection of the laws," courts soon realize that an abstract equality, regardless of all differences such as age, sex, occupation, mode of life, etc., would render the law absurd. The courts, then, are forced to recognize the existence of natural classes. But having recognized these natural classes, the prevailing logic of the law compels courts to view them as if they were absolutely logical divisions. The consequent difficulties are amply illustrated in the chapters of Professor Freund's book on the "Police Power."

The difficulty of foisting an absolutely logical division upon the facts (or pretending to find them in nature) is illustrated in the usual classification of rights and wrongs. Let us take Langdell's as an illustration. His classification presupposes an absolute distinction between rights and duties. This distinction is not defended. It seems to be based simply on the idea of advantage and disadvantage. May there not be legal relations which can just as well be called rights as duties? Some of the very onerous rights of trustees come very near being of that type. Further Langdell says:²⁷ "Absolute rights are either personal rights or rights of property. Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce,

²⁷ *Op. cit.*, 220.

nor have they any pecuniary value." But though "we can neither number them nor define them," there is one that is specifically mentioned, *viz.*, "the equal right of all persons to use public highways, navigable waters, and the high seas." Shall we, however, say that an expressman or shipowner cannot sell his right to do business on a given route or river? How does the right to use a navigable river differ from the right to buy and sell liquor or to serve people as an innkeeper? I have no doubt that Langdell's classification of rights and wrongs is useful in helping us to analyze many actual situations, and the difficulties I am raising can probably be met by introducing additional subtle distinctions. But the above considerations indicate that we are not dealing here with an absolutely accurate description. The difference between a useful approximation and an absolutely accurate description is of practical as well as of logical importance. If our classification is only approximate, we must apply it cautiously, expecting some day to come across actual cases which it will not fit, and where practical injustice will result from the attempt to *make* the facts fit our preconceived account.

The various instances of the abuse of legal logic adduced by writers like Von Jhering, Korkunov, Demogue, and Pound, are all cases of an overhasty application of logic to a complex material and do not, of course, show the breakdown of logic itself. Nevertheless, it is fair to add that a great many of the difficulties are due to the inadequacies of the Aristotelian account of logic, which up to recently was the only one in the field. The Aristotelian logic, with its subject-predicate doctrine, is primarily a logic of subsumption and applies best to a system like the biology of which Aristotle was a master, *viz.*, a system of fixed classes. It is only modern logic that can deal adequately with a changing system, since modern logic, like modern mathematics, deals with the invariant rules governing possible transformations.

The limitation which underlies the old Aristotelian logic shows itself in the familiar difficulty as to the presence of discretion in the law. The law is primarily directed toward certainty, which, according to the classical view, can be produced only by definite rules that leave no room for individual discretion. Individual discretion, whether of judge or of legislator acting under constitutionally limited powers, appears to this view synonymous with the absence of law. Thus in the criminal law the old maxim is, *fix the offense*

definitely and the definite penalty. To individualize punishment seems to the old view to abandon legal security and to open the floodgates of judicial arbitrariness. This view, however, is based on an inadequate logic which fails to appreciate the necessarily provisional character of all legal classification and the consequent necessity of discretion to make definite that which would otherwise be really indefinite. Logically the task of the law is similar to that of the wholesale manufacturer of shoes or any similar commodity. Human feet vary in size, and perhaps there is truth in the saying that no two are exactly alike. On the assumption that the shoe should fit the foot, the theoretical consequence would be that no two shoes should be made exactly alike. Experience, however, without contradicting these postulates of the perfect art of shoemaking, finds that a limited number of classes of "sizes" will satisfy all normal demands. How is the number of these "sizes" determined? Obviously by striking a balance between the (very slight) inconvenience of having a shoe that may be one sixteenth of an inch too long and the inconvenience of doubling or tripling the number of sizes. The same method is at the basis of the criminal law. The number of ways and circumstances, for instance, in which the life of one person can be destroyed by another is endless. What the law does is to group them into a small number of classes, *viz.*, murder, homicide, manslaughter, etc., attempting to define the characteristics of each type in such a way that no one can take the life of a fellow-being in a way that society disapproves without falling in one or other of these groups. There is, of course, no logical reason why the division into groups should be so rough, and it is abstractly possible to carry the classification to any degree of fineness and discrimination, — except that the difficulty of making juries understand the difference between murder in the second degree and manslaughter is already sufficiently great. It is foolish to attempt results more delicate than the instruments at your disposal will permit. Would we attempt to carve a delicately featured wooden statue with an ax? Judicial discretion in the individualization of punishment is simply an attempt to bring into the penal machinery a greater degree of discrimination than is practically possible by the prescription of hard and fast general rules.

The same argument applies to legislative discretion. "If the legislature has power to fix the maximum number of hours in an

industry to ten, then why not nine, etc.? Where are you going to draw the line?" The answer is that no such line can be drawn *a priori*, since we are dealing with a line that must necessarily vary in different industries and at different times.

Jurists, like other men, are in their attitude to the employment of logic either intellectualists or mystics. The intellectualist not only trusts implicitly all the results of reasoning, but believes that no safe result can be obtained in any other way. Hence in law he emphasizes the rule rather than the decision. This, however, leads to an ignoring of the absurd consequences to which the logical application of rules frequently leads. *Summa jus summa injuria*. The mystics distrust reasoning. They have faith in intuition, sense, or feeling. "Men are wiser than they know," says Emerson, and the Autocrat of the Breakfast Table, who was not a stranger to the study of the law, adds, "You can hire logic, in the shape of a lawyer, to prove anything that you want to prove." But shall we subscribe to the primitive superstition that only the frenzied and the mentally beclouded are divinely inspired? Like other useful instruments, logic is very dangerous, and it requires great wisdom to use it properly. A logical science of law can help us digest our legal material, but we must get our food before we can digest it. The law draws its sap from feelings of justice and social need. It has grown and been improved by sensitively minded judges attending to the conflicting claims of the various interests before them, and leaving it to subsequent developments to demonstrate the full wisdom or unwisdom of the decision. The intellectualist would have the judge certain of everything before deciding, but this is impossible. Like other human efforts, the law must experiment, which always involves a leap into the dark future. But for that very reason the judge's *feelings* as to right and wrong must be logically and scientifically trained. The trained mind sees in a flash of intuition that which the untrained mind can succeed in seeing only after painfully treading many steps. They who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice. But the judge who realizes that all men are biased before listening to a case, is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.

A good deal of the wisdom of life is apt to appear foolishness to a narrow logic. We urge our horse down hill and yet put the brake on the wheel — clearly a contradictory process to a logic too proud to learn from experience. But a genuinely scientific logic would see in this humble illustration a symbol of that measured straining in opposite directions which is the essence of that homely wisdom which makes life livable.

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EQUITABLE RELIEF AGAINST DEFAMATION AND
INJURIES TO PERSONALITY

THE hesitation, if not downright refusal, of American law to allow preventive remedies in order to secure interests of personality, where redress by way of damages is often obviously inadequate or even wholly inapplicable, has frequently been criticised.¹ Reading the American cases on this point, one may recall the words of Mr. Justice Holmes upon the subject of trespass *ab initio*:

"It is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."²

As he says, in the same address:

"It does not follow because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. . . . A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."³

If the legal remedy for breach of a contract is inadequate to secure to the promisee his interest in a promised advantage which the law recognizes, he may have specific reparation in equity. If a tort results in injury to property for which the legal remedy of damages is wholly inadequate and the equitable remedy is practicable, the owner may have specific redress by restoration of the *status quo*. If a threatened tort involves injury to property for which the legal remedy is inadequate, making some allowance for difficulties as to

¹ See, e. g., ABBOT, JUSTICE AND THE MODERN LAW, 32.

² The Path of the Law, 10 HARV. L. REV. 457, 469.

³ *Id.*, 468.

establishment of title at law, growing largely out of the unsatisfactory character of the old mode of trial in equity, we may say fairly that preventive relief is now normally available. But if an injury to personality is threatened, wholly destructive of plaintiff's dearest interests, we are told that his only recourse is the legal remedy of damages although no pecuniary measure can possibly be applied to the interest and no pecuniary standard to the wrong. May we give any reasons other than purely historical for a doctrine which at first blush is so arbitrary and unjust? Do the rules which our books still announce upon this subject rest upon any basis more legitimate than unintelligent adherence to the *dicta* of a great judge in the pioneer case? May we put this corner of the law in the order of reason by making the rules thereof conform to the general principle of concurrent jurisdiction where the legal remedy for a legal right is inadequate or by showing sound reason why, in this one spot, that general principle should not obtain?

Three classes of cases have raised these questions recently: (1) Cases where injunctions were sought against defamation or disparagement of property, (2) cases where equity jurisdiction was invoked against injuries to privacy or to the domestic relations, and (3) cases of unlawful interference with social and political relations where the significant wrong was injury to feelings, sensibilities, and honor. Each of these classes involves peculiar difficulties. Hence it will be convenient to take them up separately.

I

DEFAMATION AND DISPARAGEMENT OF PROPERTY

Defamation has a two-fold aspect. On the one hand it may be an injury to personality affecting the feelings, the sensibilities, the honor of the person defamed. On the other hand it may be an injury to substance, since credit plays so large a part in society that the confidence of one's fellows may be a valuable asset. Elsewhere I have tried to show the importance of distinguishing the two interests which are secured by the legal right of reputation.⁴ Such a distinction, strictly pursued, would preclude consideration of equitable relief against disparagement of property⁵ in the present

⁴ Interests of Personality, 28 HARV. L. REV. 445, 447.

⁵ This is Bower's phrase for what we have been wont to call "slander of title." CODE OF ACTIONABLE DEFAMATION, 240, 241. It is to be preferred, since without disparaging

connection. But difficulties with respect to equitable relief against writing and publishing apply equally to each, and in the actual development of the subject in the cases other points have been of such controlling importance as to justify if not to compel departure from the logical scheme.

Using defamation, for the moment, to include disparagement of property, five questions have arisen with respect to the powers of a court of equity: (1) Has a court of equity jurisdiction to protect rights of personality or is its jurisdiction confined to securing rights of property? (2) If only rights of property may be protected, what is meant by property in this connection? Is the term used in a broad sense to signify interests of substance as distinguished from interests of personality? (3) Is relief by injunction against libel or published disparagement of property precluded by common-law policy or constitutional provision as to freedom of the press? (4) Does common-law policy as to jury trial or Fox's Libel Act as declaratory thereof require an issue as to the truth of a publication to be tried to a jury? (5) Whatever the general principles of equity jurisdiction may require, is the matter foreclosed for practical purposes by a settled current of authority against injunctions in these cases?

All discussion of these questions runs back to the famous case of *Gee v. Pritchard*.⁶ In that case defendant had been brought up in the family of the plaintiff's late husband and had been educated as an adopted son. Being dissatisfied with the provision made for him on the death of plaintiff's husband, he threatened to publish letters which the plaintiff had written to him as to a member of the family. The cause came before Lord Eldon on motion to dissolve an interlocutory injunction against such publication. In the course of a colloquy with counsel at the hearing, Lord Eldon said that equity would not enjoin publication of a libel because such publication was a crime and equity had no jurisdiction to prevent crimes; that the case could not be maintained on the ground of protecting plaintiff's feelings or securing any other interest of personality, and that relief could only be rested on protection of rights of property. Afterwards he denied the motion to dissolve and continued the injunction in force on the ground that the plaintiff had a "sufficient

the title to property one may seriously injure another by disparaging the property itself.

⁶ 2 Swanst. 402.

property in the original letters to authorize an injunction unless she has by some act deprived herself of it." ⁷

Had it not been repeated many times ⁸ Lord Eldon's first proposition would hardly appear to require consideration. No one would assert that equity has jurisdiction to prevent crimes as such. But equity is not precluded from preventing irreparable injury through a civil wrong because the act, in another aspect, may be the subject of a criminal prosecution.⁹ Indeed the very court which cites Lord Eldon's *dictum*, repeated by Lord Campbell, as a ground for refusing an injunction against disparagement of title, has settled the point in a long line of decisions.¹⁰ We must remember that in 1818 the jurisdiction of equity to enjoin trespasses on land was not yet well developed and the whole subject of equity jurisdiction over torts was backward because of the unsatisfactory mode of trial.

It will have been perceived that the real injury in *Gee v. Pritchard* was an invasion of the right of privacy. In result therefore, a case in which we are told that equity has no jurisdiction to secure interests of personality, and the case always cited since for that proposition, was a pioneer decision finding a way for securing the then unknown right of privacy.¹¹ Characteristically, Lord Eldon's language was cautious, but his action was bold. As in *Lane v. Newdigate*¹² he did not strike down a historical prejudice which stood in

⁷ 2 Swanst. 424.

⁸ *E. g.*, by Lord Campbell in *Emperor of Austria v. Day*, 3 DeG. F. & J. 217, 238-41, relied upon in *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69.

⁹ *Springhead Co. v. Riley*, 6 Eq. 551; *Atty. Gen. v. Terry*, 9 Ch. App. 423, 431; *Atty. Gen. v. Heatley* (1897), 1 Ch. 560; *In re Debs*, 158 U. S. 564, 593; *Beck v. Teamsters' Union*, 118 Mich. 497, 526, 77 N. W. 13; *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106. Lord Eldon himself saw this. In the very sentence under discussion he adds: "excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime, — an exception arising from that peculiar jurisdiction of this court." In other words, when equity has jurisdiction apart from any question of a crime, its jurisdiction is not defeated by the circumstance that the act might also be the subject of a prosecution.

¹⁰ See *Vegelahn v. Guntner*, 167 Mass. 92, 99, 44 N. E. 1077, and cases cited. There are numerous subsequent decisions to the same effect.

¹¹ This did not escape notice. In *Brandreth v. Lance*, 8 Paige, 24 (1839), Walworth, C., said: "But it may perhaps be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property only, when in fact the object of the plaintiff's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence as a matter of feeling only."

¹² 10 Vesey Jr. 192.

the way of the right result, but found a way around it to that result, so here, while apparently denying the legal right and in terms cautiously restricting the jurisdiction of equity to the securing of interests of substance, with which it had long been occupied, he found a way to take the great forward step of securing plaintiff in her sensibilities and protecting her right of privacy by securing a right in property which had no value as property and was a mere formal peg on which to hang the substantial relief. But there were other reasons for this cautious mode of concealing a bold step. For one thing at that time courts of equity were hesitant in dealing with torts, feeling a natural reluctance to try questions which were adapted peculiarly to trial by jury, in view of the unsatisfactory method of taking evidence in equity. Again he might properly fear infringement of freedom of the press, a point to be considered presently. Again 1818 was too early to be raising a question of the legal right of privacy. But if the jurisdiction of equity was to be invoked it was necessary to find a legal right and a legal tort. Most of all, however, Lord Eldon's language (as distinguished from his action) was influenced by the *dicta* of Lord Hardwicke in *Huggonson's Case*.¹³ What, then, was the state of the authorities prior to *Gee v. Pritchard*?

In *Huggonson's Case*, pending a suit in chancery, certain newspapers printed articles attacking the parties upon one side and reflecting upon their witnesses, who were said to have "turned affidavitmen." Application was made to commit the publishers for contempt. Here the publication with reference to the pending cause for the purpose of deterring witnesses from testifying was a clear contempt for which the authors and publishers could and should be punished.¹⁴ Lord Hardwicke said that he could deal with the matter only as a contempt, as an interference with the course of justice in the pending cause, not as a libel. Evidently this meant that he could not punish the publication as a libel, but only as a contempt. Nothing else was before the court, and the punishment of libels as libels belongs to the criminal law. There is no reason to suppose he meant that interests of personality could not be protected in equity or that a wrong could not be prevented in equity,

¹³ 2 Atk. 469.

¹⁴ The leading American case is *Resp. v. Oswald*, 1 Dall. 319, which has been followed ever since.

where it involved irreparable injury and the legal remedy was wholly inadequate, merely because it took the form of a libel. The question of enjoining a libel which interferes with the course of justice in a pending cause was not involved.¹⁵

Two other *dicta* prior to *Gee v. Pritchard* remain to be noticed. In *Burnet v. Chetwood*,¹⁶ Lord Parker (afterwards Lord Macclesfield) argues that the chancellor has a general superintendency over all books and hence may abate immoral books as a nuisance. This was after the parliamentary censorship of the seventeenth century had come to an end. But the old royal censorship, to which the chancellor might claim to have succeeded, had ceased in Tudor times. Obviously the *dictum* went very much too far. But it goes to show that when Lord Eldon foreclosed the matter by his offhand remarks in 1818 it was by no means settled by authority. Indeed a characteristic *dictum* of Lord Ellenborough in 1810 shows what some lawyers at least thought at that time. In *DuBost v. Beres-*

¹⁵ The English courts enjoin such publications. In *Coleman v. Railway Co.* (1860), 8 W. R. 734, Sir W. Page Wood, V. C., enjoined one of the parties pending litigation, from publishing garbled accounts tending to prejudice his adversary's case. He cites *Huggonson's Case*. In *Kitcat v. Sharp*, 52 L. J. Ch. 134, the same question was before Fry, J., and he granted an injunction citing the *Coleman* case. This is after the Judicature Act. But the *Coleman* case was before that act and is a clear authority for power to enjoin such libels without a statute.

In *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458, Durrant was on trial in San Francisco for murder. Pending the prosecution, Dailey produced in San Francisco a play, entitled "The Crime of a Century," purporting to depict the murder. The trial court ordered him to cease advertising and producing the play. The Supreme Court held, one judge dissenting, that there was no jurisdiction to make the order. Neither of the English cases in point was referred to. The chief argument was that the order interfered with free speech, guaranteed by the Constitution, but it was said also that if equity could interfere in such a case it could do so only in order to protect property. One might perhaps ask whether this injury to public justice could not have been enjoined upon information, as in case of a public nuisance. The spectacle purporting to represent the murder is not very different in principle from the prize-fighting spectacles that have been enjoined. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914; *Atty.-Gen. v. Fitzsimmons*, 35 AM. LAW REG. 100. And the posters and other advertising are not like ordinary publications. Certainly indecent posters on defendant's property which injured public morals could be reached in this way. Why not, then, libelous posters which interfere with the course of justice in a pending cause? Some of the results of denying an injunction in such cases may be seen in *People v. Durrant*, 116 Cal. 179, 223, 225-26, 48 Pac. 75, 87, 88.

It should be said that the Supreme Court of the United States took the same position *arguendo* in *Patterson v. Colorado*, 205 U. S. 455, 462.

¹⁶ (1720), 2 Meriv. 441, note.

*ford*¹⁷ an artist had painted a picture entitled "Beauty and the Beast," which, the report tells us, "was a scandalous libel upon a gentleman of fashion and his lady." The picture was exhibited for money and great crowds went to see it. Defendant, the brother of the lady, cut it to pieces and was sued in trespass by the owner. Lord Ellenborough said *obiter* that upon application to the chancellor he would have granted an injunction against the exhibition. Here the interest involved in a suit for an injunction would have been one of personality. The basis of the plaintiff's claim would have been reputation or privacy. There was no writing or speaking, and no infringement of liberty would have been involved beyond that involved in any injunction. The remedy at law was grossly inadequate. If Lord Ellenborough was wrong and if Mr. Campbell (as he then was) should have put this case in his drawer for bad law, it was not because of authority or because of any difficulty on principles of equity jurisdiction, but because equity was just learning to enjoin torts generally and was held back by its mode of trying questions of fact.

It may be repeated, Lord Eldon's *dicta* in *Gee v. Pritchard* were over-cautious. But, as in *Lane v. Newdigate*, his action was bold. He did in effect secure a right of privacy by the transparent device of protecting a nominal property in the letters.

Supposing, however, that only rights of property may be protected in equity, what does "property" mean in this connection? This question arose in *Dixon v. Holden*.¹⁸ In that case defendants were about to publish falsely (and knowing it to be false) that plaintiff was a partner in a bankrupt firm and that he had defrauded the creditors of that firm. An injunction was granted. It will be noted that the interest involved was wholly one of substance. The injury threatened was to credit and business reputation and involved de-

¹⁷ 2 Camp. 511. "Lord Ellenborough ought to have been particularly grateful to me for suppressing his bad decisions. . . . Before each number was sent to the press, I carefully revised all the cases I had collected for it and rejected such as were inconsistent with former decisions or recognized principles. When I arrived at the end of my fourth and last volume, I had a whole drawer full of 'bad Ellenborough law.'" Autobiography of Lord Campbell, *HARCASTLE, LIFE OF LORD CAMPBELL*, I, 215. There is nothing in the case of *DuBost v. Beresford* worthy of a report unless it is the *dictum* in question. Hence the remark of the editor of the *State Trials* as to the astonishment with which it was received by the profession (20 How. St. Tr. 799, note) is probably apocryphal.

¹⁸ 7 Eq. 488.

struction of plaintiff's business. But it was argued for the defendant that equity had no jurisdiction unless property was involved, and counsel seem to have taken property to mean such property as may be bought and sold. The court rejected this argument, holding that equity had power to secure not only one's business but his business reputation against wrongful injury.

Malins, V. C., said:

"I am told that a Court of Equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and cannot be denied, that the effect of this will be seriously damaging to the Plaintiff's business of a merchant.

"Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property."

This may seem to confuse the two aspects of reputation and to indicate that the court thought of reputation on its purely personal side, where the injury goes to feelings, sensibility, and honor, as only a specially valuable asset. Possibly the meaning is that no matter whether the interest is one of personality or one of substance, the suit should be entertained on principles of equity jurisdiction. Or it may mean that reputation is always an asset and so should be secured by equity as such because in case of such an asset the legal remedy is necessarily inadequate. If the latter is meant, we cannot agree. But the interest in this case was one of substance only and the distinction did not press. The court might have assumed that equity protected rights of property but not rights of personality, and reached the same conclusion. The main point discussed was whether business credit and standing were entitled to protection as being property. Granting that they were, it remained to consider whether equity could protect them by injunction in view of the

policy of the law as to freedom of speech. This point is not referred to. But there is an elaborate review of the prior cases in order to show that an injunction was not precluded by authority. As to the injunction against libel, *Dixon v. Holden* is generally regarded as overruled by *Prudential Assur. Co. v. Knott*.¹⁹ On the point chiefly argued, however, the view taken as to the meaning of the term property in connection with equity jurisdiction still obtains.²⁰ In any event, therefore, so far as defamation infringes interests of substance, there is ample warrant for resort to equity for relief, unless the two obstacles next to be considered stand in the way.

Next in order we must inquire whether common-law policy or constitutional provisions as to freedom of the press preclude relief by injunction against libel or written disparagement of property. The case which long determined the course of decision upon this point is *Brandreth v. Lance*.²¹ In that case the plaintiff was a manufacturer of pills which had come into extensive use, and in consequence was generally well known. The defendant, a discharged employee, was about to publish a pretended life of "Benjamin Brandling . . . a distinguished pill vender," so palpably intended as a libel on the plaintiff that no one could misunderstand it. Suit was brought to enjoin this publication. It is clear that the interest which plaintiff sought to protect was one of personality only. There was some attempt to plead a threatened injury to plaintiff's business. But it was feeble and the court rightly considered that no such injury was involved. It is clear also that no roundabout mode of protecting personality such as that resorted to in *Gee v. Pritchard* was possible. The case was one of threatened invasion of privacy and of threatened defamation injuring the plaintiff's reputation, not as part of his substance, but as part of his personality. The chancellor sustained a demurrer on two grounds, one, that in any event equity will only protect property rights, interests of substance, not interests of personality; the other, that an injunction against defamation would infringe the liberty of the press and run counter to constitutional guarantees. "Principles of free government," we are told, require that preventive justice be in

¹⁹ 10 Ch. App. 142.

²⁰ This has been settled in the cases involving interference with business relations by strikes and boycotts. 6 POMEROY, EQUITY JURISPRUDENCE, 3 ed., §§ 592, 594. Cf. *Monson v. Tussauds*, [1894] 1 Q. B. 671.

²¹ 8 Paige, 24.

abeyance where the wrongs complained of involve printing, publishing, or writing.

At the outset we might ask, why does not this argument apply equally to such a case as *Gee v. Pritchard*? For not only is that case cited and relied upon in *Brandreth v. Lance*, but it has been followed and approved universally.²² Probably the answer would be that in such a case as *Gee v. Pritchard* the defendant is not writing or publishing his own sentiments, opinions, or views, but is publishing those of another in which the other has a property. He is not endeavoring to give public utterance to his own ideas and opinions, he is trying to steal or destroy another's property by publishing another's writings to the world. Obviously the common-law policy or constitutional provision has no reference to such a situation. But the courts have not limited injunctions on the authority of *Gee v. Pritchard* to cases where A is about to print B's unpublished lectures or the manuscript of his unpublished book or letters of literary character and merit which he has written. They conceive that there is sufficient property in any private letter to meet the rule. Yet it might be urged that even so free speech on the part of A is not involved, as it may be where a defendant publishes his own composition.

In order to show a common-law policy against enjoining a libel where the remedy at law is grossly inadequate, the chancellor in *Brandreth v. Lance* relies on two things — the abolition of the Star Chamber, and the Impeachment of Sir William Scroggs. As to the first point, he says:

"The court of Star Chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages (Hudson's Star Chamber, 2 Collect. Jurid. 224). And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation." [Citing the case of the injunction against the "Weekly Packet of Advice from Rome" for which Chief Justice Scroggs was impeached.]²³

²² See 4 POMEROY, EQ. JUR., § 1353; 2 STORY, EQ. JUR., §§ 948, 948 a.

²³ 8 Paige, 24, 27.

The statement as to injunctions against libel in the Star Chamber seems to be quite without foundation. No case where the Star Chamber enjoined a libel appears in the Star Chamber cases in the Selden Society volumes, in the portions of Hudson's Star Chamber relating to civil jurisdiction (§ 4), libel (§ 11), or injunctions (§ 20), nor in the portions of Coke's Third and Fourth Institutes treating of the Star Chamber and of Libels. Indeed the chancellor does not say that he knows of any such case, and there is none in Hudson, which he cites. What the Star Chamber did was to punish libels and unlicensed writings as misdemeanors. The Star Chamber had a certain civil jurisdiction.²⁴ But no one seems to have urged that enjoining defamation was an item thereof. As to the impeachment of Sir William Scroggs,²⁵ the third article was based on an injunction issued by the Court of King's Bench against a publication of an unlicensed book. It was a sort of injunction against a public nuisance granted by the court with no case before it and without a hearing. Even if the book was a nuisance, the court could not abate it till after conviction. This arbitrary and high-handed proceeding has no relation to the question under consideration.

We are brought, then, to the question which is the crux of the matter in this country, namely, what is an infringement of freedom of the press and freedom of speech, as guaranteed by the bills of rights in American constitutions? Historically these provisions are connected with censorship of publications in England. At first this censorship was exercised by the Crown, later by the Star Chamber, and finally by Parliament, which provided for the censoring of all written publications down to 1694, when the statute for the time being expired and was not renewed. Writers of the end of the eighteenth century took this obsolescence of the censorship as declaratory of a natural or common-law principle of liberty of the press, as one of the rights of Englishmen. Accordingly our bills of rights guarantee freedom of speech and of publication as an individual natural right. Blackstone, whose views were generally accepted as common law in this country when the bills of rights were framed, holds that liberty of the press means simply the absence of restraints upon publication in advance as distinguished from liability, civil or crim-

²⁴ Hudson, *Star Chamber*, § 4, 2 *COLLECTANEA JURIDICA*, 55.

²⁵ 6 *How. St. Tr.* 198.

inal, for libelous or improper matter, when published.²⁶ Story contends that it was intended to guarantee liberty of publishing the truth, with good motives and for proper ends, and approves a distinction between political publications, criticisms, and general discussions on the one hand and mere defamation of private individuals on the other hand.²⁷ A third view is taken by Cooley. He considers that the bills of rights guarantee "not only liberty to publish but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character, when judged by such standards as the law affords."²⁸ In other words, printing and speaking are to be subject to general rules of law, not to administrative censorship or arbitrary legislative restriction. The cases are most nearly in accord with this view.

Of the three doctrines as to the scope of liberty of publication, only Blackstone's would justify the position taken in *Brandreth v. Lance*, namely, that there can be no preventive judicial justice as against defamation; that as to writing and speaking, all legal action must necessarily come after the act. But this view is open to obvious criticism. For if liability for any sort of publication which the legislature chooses to penalize may be imposed upon the publisher after the act, the result may easily be to effectually prevent indirectly and so establish a censorship and evade the guarantee. Blackstone's doctrine has usually been criticised as not going far enough in securing against imposition of liability after publication upon arbitrary or unreasonable grounds. Equally it goes too far in denying to the law all power of restraint before publication. Although its best title to consideration is in the history of the subject, it goes beyond what history indicates as the main purpose, namely, freedom from a régime of general censorship and license of printing.

No very clear line is to be found in the decisions. Excepting *Brandreth v. Lance* and the cases following it, Blackstone's view has been urged chiefly in *dicta*.²⁹ So far as imposition of liability

²⁶ 1 BLACKSTONE, COMMENTARIES, 152-53. Cf. the *dicta* of Lord Cottenham in *Fleming v. Newton*, 1 H. L. Cas. 363, 376.

²⁷ 2 STORY, CONSTITUTION, §§ 1880, 1886. Cf. Kent, C. J., in *People v. Croswell*, 3 John. Cas. 393. See also *State v. Pioneer Press Co.*, 100 Minn. 173, 176, 110 N. W. 867.

²⁸ CONSTITUTIONAL LIMITATIONS, 441-42.

²⁹ E. g., "Besides it is well understood and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous re-*

after publication interferes with freedom of publication, four limitations are well established: (1) The constitutional provision does not guarantee the liberty to intimidate by speech and writing.³⁰ If this limitation may be enforced preventively as well as by penalty or damages, there is sufficient support for the cases presently to be noted, where publication incidental to or as part of an unlawful system of coercion or intimidation was enjoined.³¹ It will be seen that the only courts which clearly hold to the contrary in the latter case are those of Missouri and Montana. But the decisions in the former jurisdiction are not very consistent. Although in *Marx v. Watson*³² the court held that the constitution protected a power to

strains upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction." *Com. v. Blanding*, 3 Pick. (Mass.) 304, 313.

The comparison is significant. See the remarks of Brown, J., in *Robertson v. Baldwin*, 165 U. S. 275: "The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy, (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*U. S. v. Ball*, 163 U. S. 662, 672,); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (*Brown v. Walker*, 161 U. S. 591, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial."

Blackstone's doctrine is announced in *Patterson v. Colorado*, 205 U. S. 455, 462. But the same court upholds "previous restraint" upon publication when incidental to enjoining an unlawful boycott. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 437.

³⁰ See, for example, *Thomas v. Railway Co.*, 62 Fed. 803; *Jordahl v. Haydn*, 1 Cal. App. 696, 82 Pac. 1079.

³¹ *Infra*, note 41.

³² 168 Mo. 133, 67 S. W. 391. But see *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106.

intimidate through publication, in *State v. McCabe*³³ it held that the constitution did not protect a creditor in the power to compel a debtor to pay a just debt by publishing that it was unpaid and injuriously affecting the debtor's credit — even if the publication was true. In *State v. Shepherd*³⁴ the same court seems to adopt Story's doctrine. (2) The constitution does not protect the citizen in publishing immoral or indecent matter, nor guarantee such publication against prohibition by the legislature. All the courts seem to agree to this.³⁵ (3) It does not give immunity for contempt in interfering with the course of justice. All courts are agreed as to this,³⁶ though as we have seen, the sole American decision is against enforcement of this limitation preventively to secure a litigant against unlawful interference with his right to obtain justice in the courts by threatening or prejudicial publications. It may be noted that this question was involved in the earliest reported suit to enjoin a libel.³⁷ (4) The constitutional provision does not preclude restrictions upon publication dangerous to the conduct of military operations in time of war.³⁸ In the foregoing cases the legislature may prohibit publication and impose adequate penalties to enforce the prohibition. Except for the matter of trial by jury, to be considered presently, the difference between this course and the finding of a court that a threatened publication involves gross and palpable violation of private rights for which damages would be no remedy, followed by a contempt proceeding in case of violation, is

³³ 135 Mo. 450, 37 S. W. 123.

³⁴ 177 Mo. 205, 76 S. W. 79. In *Flint v. Hutchison Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, the court said that repetition of a libel after it had been so pronounced by a jury might be enjoined.

³⁵ Typical discussions may be seen in *State v. McKee*, 73 Conn. 18, 46 Atl. 409, and *People v. Most*, 171 N. Y. 423, 64 N. E. 175.

³⁶ See *supra*, note 14.

³⁷ *Elnet v. Belgrave* (1395 or 1396) Baildon, Sel. Cas. Ch. No. 108. In this case plaintiff and defendant were litigating in the ecclesiastical court. The official (clerical judge of first instance) had fixed a day for hearing and defendant grossly libeled the official in order to deter him from hearing the cause. This was a contempt and a court might deal with it as such. But apparently the libel deterred the judge from doing anything. The official did not proceed for contempt nor sue to protect his interest of personality, but the plaintiff sued in equity to enjoin repetition of the wrong which prevented him from getting justice. Hence the question was not one of enjoining a libel *as such*, but of whether plaintiff's interest of substance could be secured by enjoining a libel on a third person which had the effect of paralyzing the legal machinery plaintiff was entitled to employ in vindication of his rights.

³⁸ *Ex parte Vallandigham*, 1 Wall. (U. S.) 243.

not very substantial. It cannot be denied that for the most part these limitations may be reconciled with the doctrine that all preventive interference with publication is prohibited. But that doctrine makes the guarantee merely formal, and unless the language of the bill of rights in a particular jurisdiction clearly adopts Blackstone's view, it might well be held that there are limitations on the guarantee, whether invoked against preventive or against remedial justice.

A number of decisions adopt the view of *Brandreth v. Lance*, that the constitutional guarantee of free speech and free publication absolutely precludes an injunction against speaking and writing under any circumstances.³⁹ But most of the cases which accord with the result of that decision proceed either upon the proposition that equity will not protect interests of personality or simply on authority.⁴⁰

On the whole, the argument that defamation may not be enjoined because of the constitutional obstacle is the soundest reason that can be given for the doctrine of *Brandreth v. Lance*. But this argument is open to four observations: (1) As has been said already, it proceeds on a formal interpretation of the guarantee that deprives it of substantial efficacy when applied to legislation imposing prohibitive penalties. Moreover, so interpreted, the constitution would forbid administrative prevention of false labels under a pure food law. (2) It rests chiefly on history. But if history is to be the sole criterion of interpretation, Story's view is more nearly in accord with the ends indicated by the historical development of the subject. Moreover, it is generally conceded that this restricts the scope of the guarantee too narrowly. Hence it would seem that we cannot safely rely on history to give us the proper construction. (3) None of the cases that make this view of the constitution the basis of denying relief argue the question of the meaning or limitations of the constitutional guarantee. They are content to cite *Brandreth v. Lance*, where the interpretation is as-

³⁹ *Life Ass'n v. Boogher*, 3 Mo. App. 173; *Marlin Fire Arms Co. v. Shield*, 171 N. Y. 384, 64 N. E. 163; *Juvenile Society v. Roosevelt*, 7 Daly 188; *Dopp v. Doll*, 13 Weekly Law Bull. 335; *Judson v. Zurhurst*, 30 Ohio Circ. Ct. R. 9.

⁴⁰ *Balliet v. Cassidy*, 104 Fed. 704; *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982; *Donaldson v. Wright*, 7 App. D. C. 45 (*semble*); *Christian Hospital v. People*, 223 Ill. 244, 79 N. E. 72; *Meyer v. Journeyman Stonecutters' Ass'n*, 47 N. J. Eq. 519, 20 Atl. 792; *De Wick v. Dobson*, 18 App. Div. 399, 46 N. Y. Supp. 390; *Owen v. Partidge*, 40 Misc. 415, 82 N. Y. Supp. 248.

sumed. (4) A growing number of decisions allow an injunction where the writing or publication is part of a wrong which would be enjoined of itself.⁴¹ But this would be wrong on Blackstone's theory and also under the view taken in *Brandreth v. Lance*. Under such circumstances this basis seems a doubtful one on which to rest a sweeping rule that admittedly results in great injustice.

If it be conceded that the constitutional guarantee of free publication does not interpose an insuperable obstacle, the question next arises whether a common-law policy of trial of questions of defamation by jury, declared by Fox's Libel Act and analogous statutes in this country, requires the issue as to truth of the publication sought to be enjoined to be tried by jury and so precludes jurisdiction in equity. This point was first raised in *Fleming v. Newton*.⁴² In that

⁴¹ *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Emack v. Kane*, 34 Fed. 46 (intimidation by false circulars maliciously issued); *Cœur D'Alene Mining Co. v. Miners' Union*, 51 Fed. 260 (intimidation of employees); *Casey v. Cincinnati Typographical Union*, 45 Fed. 135 (handbills incidental to boycott); *Lewin v. Welsbach Light Co.*, 81 Fed. 904; *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011 (notices incidental to boycott); *American Federation of Labor v. Bucks Stove & Range Co.*, 33 App. D. C. 83 (advertisement as part of boycott); *National Life Ins. Co. v. Myers*, 140 Ill. App. 392 (malicious publication as part of conspiracy to destroy business); *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471, 35 N. E. 280 (libel incident of malicious attempt to destroy plaintiff's business); *Gilly v. Hirsh*, 122 La. 966, 48 So. 422 (libelous sign treated as nuisance); *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307 (nuisance in form of banners displayed in front of plaintiff's premises); *Beck v. Teamsters' Protective Union*, 118 Mich. 497, 77 N.W. 13; *Pratt Food Co. v. Bird*, 148 Mich. 631, 112 N. W. 701 (bill of peace, unlawful threats of prosecution in printed circular); *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106 (intimidation); *Gilbert v. Mickle*, 4 Sandf. Ch. 357 (placard posted before door of auctioneer warning against "mock auctions"); *Newton v. Erickson*, 70 Misc. 291, 126 N. Y. Supp. 949; *McCormick v. Local Unions*, 32 Ohio Cir. Ct. R. 165 (printed cards in course of boycott).

Francis v. Flinn, 118 U. S. 385 (*semble*); *Citizens' Light Co. v. Montgomery Light Co.*, 171 Fed. 553; *Reyer v. Middleton*, 36 Fla. 99, 17 So. 937 (cloud on title); *Marx v. Watson*, 168 Mo. 133, 67 S. W. 391 (boycotting); *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127. *Contra*.

Also there is coming to be good authority for enjoining circulars charging infringement of a patent and threatening purchasers from plaintiff with legal proceedings, where such circulars are published with no intention of suing for the alleged infringement or in pure malice. *Celluloid Mfg. Co. v. Goodyear Dental Co.*, 13 Blatchf. 375 (*semble*); *Emack v. Kane*, 34 Fed. 46; *Kelly v. Ypsilanti Mfg. Co.*, 44 Fed. 19 (*semble*); *Lewin v. Welsbach Light Co.*, 81 Fed. 904; *Farquhar v. National Harrow Co. (C. C. A.)*, 102 Fed. 714; *Adriance v. National Harrow Co. (C. C. A.)*, 121 Fed. 827, 98 Fed. 118; *Dittgen v. Racine Paper Co.*, 164 Fed. 85; *Electric Renovator Co. v. Vacuum Cleaner Co.*, 189 Fed. 754; *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347; *Bell v. Singer Mfg. Co.*, 65 Ga. 452 (*semble*).

⁴² 1 H. L. Cas. 363.

case the Court of Session in Scotland had granted an interdict against publication of a public record of protested and dishonored bills and notes. This order was reversed on the ground that anyone had a right to publish the contents of the public record as a matter of general information, so that there was no legal wrong and no ground for the proceeding, apart from any question of power to enjoin a libel. But Lord Cottenham said *obiter* that if the Court of Session claimed the power to enjoin libels, it must be considered —

“How the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 Geo. 3, cap. 42 [Fox’s Libel Act] or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel and defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels.”⁴³

The second point urged in this *dictum* has been discussed above. What shall we say as to the first point?

It might be argued that Fox’s Libel Act applies only to criminal prosecutions and to actions on the case for damages; that it does not refer to the jurisdiction of equity at all, nor was it intended to affect procedure in equity. It was enacted because courts of law had been directing verdicts upon the question whether a publication was or was not a libel. But this had been happening in prosecutions where courts took it on themselves to pronounce publications libelous from mere inspection of their contents, irrespective of the truth of their contents or the motives of publication. Hence, for example, the statute had no reference to failure of a defendant to prove the truth of a publication libelous *per se* and a consequent charge that the defendant in an action for libel had failed to sustain the burden of proof which the law casts upon him. Accordingly two answers might be made to Lord Cottenham’s *dicta*. First, it might be said that neither in terms nor upon consideration of the mischiefs that led to its enactment does Fox’s Libel Act apply to the remedy, if any, in equity. But this would be unduly narrow. After all there is a clear policy in favor of jury trial of an issue of truth in a charge of defamation. Juries are peculiarly adapted to try such an issue, so that in England to-day, where relatively few civil cases are tried to juries, libel, slander, malicious prosecution,

⁴³ *Id.*, 376.

and breach of promise are regularly so tried. Secondly, however, it might be urged that, granting such a policy, where it is admitted that the publication is false, or the falsity is so clear that there is really nothing for a jury to try, then, trial by jury being a mere form — there being no substantial occasion for it — the policy in question should not stand in the way of an injunction. The great majority of cases where an injunction has been sought have been of this character. Hence the requirement of trial by jury is no more an obstacle here than in the case of equity jurisdiction to enjoin trespass,⁴⁴ disturbance of easements,⁴⁵ or nuisance.⁴⁶ But it must be admitted that Lord Cottenham put his finger on a serious difficulty in the way of injunctions in these cases.⁴⁷

Although the arguments thus far were wholly satisfactory in principle, it might still be argued that the settled course of decision against injunctions in case of defamation or disparagement of property has put the matter where it may only be reached by legislation. The cases prior to *Gee v. Pritchard* and *Brandreth v. Lance* have already been considered. The subsequent English cases which seem to sustain jurisdiction in equity are collected in *Dixon v. Holden*.⁴⁸ Some of these are worthy of brief notice. *Springhead Spinning Co. v. Riley*,⁴⁹ decided by the same judge who decided *Dixon v. Holden*, was a case of intimidation by placards and advertisements, exactly like the American cases above referred to.⁵⁰ The injunction ran against all forms of coercion or intimidation of plaintiff's employees, and incidentally against intimidation by publications. There was no issue of fact as to the truth of the placards or notices. Hence the policy of trial by jury was not involved. One could pronounce the decision wrong only by adopting Blackstone's doctrine as to

⁴⁴ *Miller v. Lynch*, 149 Pa. St. 460, 24 Atl. 80; *Hart v. Leonard*, 42 N. J. Eq. 416, 418, 7 Atl. 865.

⁴⁵ *Selby v. Nettlefold*, 9 Ch. App. 111; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Kelly v. Saltmarsh*, 146 Mass. 585, 16 N. E. 460; *McConnell v. Rathbun*, 46 Mich. 303, 9 N. W. 426; *French v. Smith*, 40 N. J. Eq. 361, 3 Atl. 130.

⁴⁶ The cases are collected in 1 AMES' CASES IN EQUITY JURISDICTION, p. 559, note.

⁴⁷ Lord Cottenham seems to have thought that Fox's Libel Act applied only to "injuries to the person by defamation." In *Dixon v. Holden*, 7 Eq. 488, Malins, V. C., thought to distinguish injuries to business by defamation on that ground. But no such line may be drawn. For one thing, in *Fleming v. Newton* the injury was to credit only. Again it is evident that Lord Cottenham was simply making a distinction between publishing one's own composition and such a publishing as was threatened in *Gee v. Pritchard*.

⁴⁸ 7 Eq. 488.

⁴⁹ 6 Eq. 551.

⁵⁰ *Supra*, note 41.

liberty of publication. *Routh v. Webster*⁵¹ was an injunction against publication of plaintiff's name without authority as a trustee of a newly formed company. Here again no question could arise under Fox's Libel Act. Plaintiff was not seeking to prevent defamation. Instead he sought to protect himself against vexatious claims by creditors of the company to hold him as trustee. Question could arise only in case Blackstone's doctrine of liberty of the press were adopted. It might be said that the use of plaintiff's name as trustee was not an expression of belief or opinion. Still it was a statement of fact made as if and purporting to be true. *Clark v. Freeman*⁵² was a case of unauthorized use of the name of a famous physician in advertising a pill made by defendant. The wrong was the appropriation of plaintiff's name, which had become a valuable bit of property through plaintiff's skill, learning, and experience in his profession. In such case a name ought to be protected the same as any other property.⁵³ The court denied an injunction on the ground that no special damage was shown — a ground which is now regarded as quite untenable — and said also that if the published statement was defamatory, as falsely imputing to plaintiff that he was concerned in making and vending a quack medicine, the issue of falsity would have to be established at law before there could be an injunction. This is a familiar proposition in suits to enjoin torts. But it has much more justification here than in the case of other torts because of the policy of the law as to jury trial of the question of libel or no libel.

The English cases since *Gee v. Pritchard* which deny jurisdiction to enjoin defamation are collected in *Boston Diatite Co. v. Florence Mfg. Co.*⁵⁴ and *Prudential Assurance Co. v. Knott*.⁵⁵ These two decisions have exercised a controlling influence in the United States.

In *Boston Diatite Co. v. Florence Mfg. Co.* the bill set up that plaintiff was manufacturing toilet articles under a patent and that defendant, which had an unpatented process from which it made competing articles, fraudulently, in order to get an unfair advantage over plaintiff, represented that it owned a patent covering plaintiff's process and that plaintiff was infringing its patent, and threatened

⁵¹ 10 Beav. 561.

⁵² 11 Beav. 112.

⁵³ *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Edison v. Edison Polyform Co.*, 73 N. J. Eq. 136, 67 Atl. 392.

⁵⁴ 114 Mass. 69.

⁵⁵ 10 Ch. App. 142.

those who bought from plaintiff with liability for infringement. A demurrer was sustained. It will be observed that the interest involved was one of substance, not of personality; that, while liberty of publication was involved if Blackstone's doctrine is to be adopted, the publication was admittedly false, malicious, and threatening, and that the case was not within the purview or the policy of Fox's Libel Act. The case was one of disparagement of property; of slander of title and cloud cast on the title to plaintiff's patent by defendant's false and malicious publications. In sustaining the demurrer, the court asserts that equity has no jurisdiction to prevent slander or libel, to prevent false representations as to the quality or character of a plaintiff's property, or to prevent slander of title to a plaintiff's property, unless breach of trust or breach of contract is involved. These propositions are not argued in the least. It is assumed that they are concluded by authority, the court holding *Dixon v. Holden* and *Springhead Spinning Co. v. Riley* to be contrary to the settled doctrine of the English cases. As the wrong here was an injury to property, the objection, on principle, would have to proceed on infringement of liberty of publication. The same court had previously removed a cloud on the title to personalty by canceling an invalid mortgage asserted by defendant.⁵⁶ But apparently it would remove a cloud on the title to a chattel only by injunction coupled with cancellation, not by an injunction alone, when, as in this case, there was nothing to cancel. And yet in any decree removing a cloud on title there is likely to be an injunction against asserting the wrongful claim which, according to Blackstone's view, would infringe liberty of publication. Hence the decision must rest where the court puts it, namely, squarely upon authority, and the only authorities exactly in point at that time were the two decisions of Vice-Chancellor Malins, which the court rejects. For decisive authority it refers us to the *dicta* of Lord Hardwicke, Lord Eldon, Lord Cottenham, and Lord Campbell, already discussed, and to two other cases which must next be looked into.

In *Seeley v. Fisher*⁵⁷ plaintiff owned the copyright of the last edi-

⁵⁶ *Sherman v. Fitch*, 98 Mass. 59. Cf. cases where equity removes a cloud cast upon a title by oral assertions of adverse claims. *Morot v. Germania Co.*, 54 Ind. 37; *Rausch v. Trustees*, 107 Ind. 1, 8 N. E. 25.

⁵⁷ 11 Sim. 581.

tion of Dr. Scott's "Commentary on the Bible." As Dr. Scott was old at the time, this last edition was the joint product of the author and an assistant and was not complete when the author died. Defendants were reprinting the last prior edition, written wholly by Dr. Scott. They advertised it as containing "the whole unadulterated labors of the author, not as re-edited by a different hand and an inferior mind." An injunction against such advertisements was rightly refused. There was no legal wrong. The case in this respect is like *White v. Mellin*.⁵⁸ A puffing advertisement, recommending one's wares as against plaintiff's, is not actionable, at least if it does not contain false statements as to plaintiff's wares. Moreover, if the statements or any of them could be proved to be false, the question was clearly doubtful and hence a jury trial would be the proper course.

In *Mulkern v. Ward*⁵⁹ plaintiffs were trustees of a building society which was also a bank of deposit. Defendant was what might be called a crank on the subject of building societies. He wrote a book on the subject in which he attacked plaintiffs' society, among others, criticised its balance sheet, and argued that such companies could not be solvent. The court properly refused an injunction, distinguishing the case from *Dixon v. Holden* in that the defendant was publishing an opinion, an argument, not a maliciously false assertion of fact. In truth there was no tort here at all, so that the criticism of *Dixon v. Holden* was wholly unnecessary. Nor does the decision sustain *Boston Diatite Co. v. Florence Mfg. Co.*, for in the latter case there was a wrongful threat and an admittedly false statement published to get an unfair advantage over a rival by deterring the public from buying his wares. In *Mulkern v. Ward* there was no threat. There was an argument and a statement of opinion. If there was a statement of fact, there was a doubtful question whether it was true or false so that the cause called for trial by jury.

It is admitted in the opinion in *Boston Diatite Co. v. Florence Mfg. Co.* that if there had been a relation of trust or a contract between plaintiff and defendant, there could be an injunction. This statement is very common in the books. One may enjoin a breach of contract and incidentally have an injunction against publication; he may enjoin breach of trust and incidentally have an injunction against publication; he may have a decree canceling a cloud on

⁵⁸ (1895) A. C. 154.

⁵⁹ 13 Eq. 619.

title and incidentally have an injunction against assertion of a claim under it. In other words, there is no objection to "previous restraint" upon publication by injunction if only it may be tacked to something else!

A long line of decisions accord with *Boston Diatite Co. v. Florence Mfg. Co.*⁶⁰ But most of them involve the point that pending an infringement suit one is wholly within his rights in publishing to the world that he is bringing the suit and will endeavor to hold all infringers, or that one who is about to bring such a suit is within his rights in publishing in good faith what he claims and what he will attempt to do, unless such publication will interfere with the course of justice. In each case there is no legal wrong. In consequence the *dicta* following the more sweeping denial of relief in the *Diatite* case are of much less weight.⁶¹ Moreover, a strong current of authority contrary to the *Diatite* case has arisen in the federal courts.⁶² These decisions seem to be right on three grounds: (1) The publications involve malicious threats and the injunction is against the intimidation of plaintiff's customers and wrongful interference with his business relations thereby.⁶³ (2) They are not statements of belief or sentiment or opinion within the principle of freedom of publication. (3) In substance they do not involve any question of truth or falsity for a jury to try. Almost without exception they are cases of what may be called hold-ups, defendant having no real intention to sue and often no serious pretense of a claim to sue upon.

In *Prudential Assurance Co. v. Knott*⁶⁴ defendant published a

⁶⁰ *Chase v. Tuttle*, 27 Fed. 110 (*semble*); *Kidd v. Horry*, 28 Fed. 773; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. 95; *Welsbach Light Co. v. American Incandescent Light Co.*, 98 Fed. 613; *Hobbs v. Gooding*, 113 Fed. 615; *Warren Featherbone Co. v. Landauer*, 151 Fed. 130; *Whitehead v. Kitson*, 119 Mass. 484; *Consumers Gas Co. v. Kansas City Gas Light Co.*, 100 Mo. 501, 13 S. W. 874; *Mauger v. Dick*, 55 How. Pr. 132; *Cohen v. United Garment Workers*, 35 Misc. 748, 72 N. Y. Supp. 341. *Contra*, *Croft v. Richardson*, 59 How. Pr. 356.

⁶¹ In *Rollins v. Hinks*, 13 Eq. 355, and *Axmann v. Lund*, 18 Eq. 330, *Malins, V. C.*, who uniformly exhibited much good sense on this subject, held that a conditional injunction should issue enjoining publications like the one in the *Diatite* case, unless the defendant would undertake to sue at once to try the validity of the patent. Otherwise defendant could do plaintiff a great injury by threats which he had no intention of carrying out. The Irish chancery refused to take this course in *Hammersmith Skating Rink Co. v. Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235.

⁶² See cases cited in the last paragraph of note 41, *supra*.

⁶³ See cases cited in the first paragraph of note 41, *supra*.

⁶⁴ 10 Ch. App. 142.

pamphlet on life insurance companies, giving statistics as to their incomes, rates of premiums, expenses of collections, and ratio of assets to liabilities. The plaintiff claimed that certain statements as to its premium rates were erroneous and that the effect was to represent the management of the company as recklessly extravagant, which was alleged to be untrue. A decree denying an injunction was affirmed. Plaintiff here had no cause of action at law. The matter published was the opinion of a critic upon a subject of great public interest, not a maliciously false statement of fact concerning a private individual persisted in after its untruth had been shown, as in *Dixon v. Holden*. Hence in its result *Prudential Assurance Co. v. Knott* may be reconciled with *Dixon v. Holden*. Besides, if there was a libel in the *Prudential Assurance Co.* case, the question of fact was doubtful. It was largely a question of inferences; a question of fair comment on the conduct of plaintiff's business. In other words, it was exactly the sort of case where the policy of the law, if not actual legislation, calls for trial by jury. *Dixon v. Holden*, on the other hand, was a perfectly clear case of intentional defamation. Nevertheless Lord Cairns proceeds to argue that *Dixon v. Holden* and *Springhead Spinning Co. v. Riley* were wrongly decided. He puts a dilemma. If there was not a libel at common law, there was no ground for equity to interfere, for equity has no jurisdiction as censor of publications. This is obviously true. The jurisdiction over torts is concurrent. But, he says, if there was a libel, it is clearly settled that equity will not enjoin a publication merely because it is a libel. This horn of the dilemma is not one that we are bound to take. Suppose in this case the pamphlet had been shown beyond contradiction to be maliciously false. Could it be said that the aid of equity was sought solely because the publication was a libel? No. The argument would run thus: (a) There is a libel, a tort; (b) it injures property rights; (c) the remedy at law is wholly inadequate. What more could be asked in order to give equity jurisdiction? As in the *Diatite* case, so here it is admitted that there are publications which equity will restrain, although they are libelous, if there is some ground of injunction other than libel. In other words, Blackstone's view as to liberty of publication is not tenable as the ground of denying relief and the main argument in *Brandreth v. Lance* is put out of the way. The *Prudential Assurance Co.* case seems to have been decided

rightly. But the reasoning of Lord Cairns was singularly undiscriminating and he lost a great opportunity to put the law on a sound basis. Possibly the Lords Justices who concurred meant that the argument in *Dixon v. Holden* was susceptible of too broad a construction. But the argument in *Prudential Assurance Co. v. Knott* was susceptible of too narrow a construction, and in this country the case has uniformly been taken to mean that there may be no relief in equity against a clearly false and malicious libel which does irreparable injury to property rights.⁶⁵

One American case, containing an elaborate but superficial review of the authorities, deserves notice. In *Marlin Fire Arms Co. v. Shields*,⁶⁶ plaintiff, a manufacturer of firearms, had been advertising with defendant, the publisher of a well-known and widely taken magazine for sportsmen, but had withdrawn its advertisement. Thereupon defendant, in order to coerce plaintiff to renew its advertising, or, if this did not result, to gratify his spite, wrote sham letters, purporting to be written by correspondents and published as coming from correspondents, in which the pretended correspondents pointed out pretended defects in plaintiff's rifle, criticised it for pretended shortcomings and disparaged it generally. A demurrer was sustained. We must first ask, was there a cause of action at law? Apparently there was not. At common law an action for disparagement of property seems to require three things: (1) Publication of false statements in disparagement of plaintiff's property, (2) malice, (3) proof of special or actual damage in consequence of the publication.⁶⁷ The first two requisites were shown. The third was not covered by plaintiff's complaint except by an averment that the publication had caused plaintiff to lose sales "to a

⁶⁵ *Martin v. Wright*, 6 Sim. 297 (*semble*); *Seeley v. Fisher*, 11 Sim. 581 (*semble*); *Edison v. Thomas A. Edison, Jr., Chemical Co.*, 128 Fed. 957; *Montgomery Ward & Co. v. Dealers' Ass'n*, 150 Fed. 413 (*semble*); *Citizens' Light Co. v. Montgomery Light Co.*, 171 Fed. 553; *American Malting Co. v. Keitel (C. C. A.)*, 209 Fed. 351; *Singer Mfg. Co. v. Sewing Machine Co.*, 49 Ga. 70; *Chicago City Ry. Co. v. General Electric Co.*, 74 Ill. App. 465; *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558; *Raymond v. Russell*, 143 Mass. 295; *Finnish Temperance Society v. Publishing Co.*, 219 Mass. 28, 106 N. E. 561; *Life Ass'n v. Boogher*, 3 Mo. App. 173; *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719; *Richter v. Journeyman Tailors' Union*, 24 Weekly Law Bull. (Ohio) 189; *Baltimore Life Ins. Co. v. Gleisner*, 202 Pa. St. 386, 51 Atl. 1024; *Mitchell v. Grand Lodge (Tex. Civ. App.)*, 121 S. W. 178.

⁶⁶ 171 N. Y. 384, 64 N. E. 163.

⁶⁷ *White v. Mellin* (1895), A. C. 154; *Lyne v. Nichols*, 23 T. L. R. 86; *Barrett v. Associated Newspapers*, 23 T. L. R. 666; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527.

large extent, but to what extent, plaintiff is unable to state." The court, therefore, assumed that there was no cause of action at law because of inability to show special damage. It might be argued that this would not necessarily be fatal. Why should not the plaintiff be able to maintain the suit by showing that actual damage was threatened for which damages would be no adequate remedy? Why must he wait for actual damage to accrue where all the other elements exist and grave actual damage is so clearly threatened?⁶⁸ The court appears to assume too readily that failure to show a money damage now suffered must be fatal even though irreparable special damage is obviously impending.

As no cause of action at law had accrued, if we assume as the court did that threatened special damage would not suffice in such a case in equity, the *Marlin* case might well be decided without considering the general question of injunctions against defamation or disparagement of property. But the court argues that such injunctions cannot be granted in any case, reaching this conclusion on the ground taken in *Brandreth v. Lance* and also upon review of the prior decisions.⁶⁹ It might well be argued that liberty of publication was not involved, since admittedly the published statements were false and were made for the purpose of coercing the plaintiff and for spite. Nor was the policy of jury trial involved. There was no dispute as to the facts. The letters were admitted to be shams, concocted to injure the plaintiff. There was no more need of a jury

⁶⁸ It must be confessed that the English cases have sometimes denied an injunction where no actual damage was proved. *Lyne v. Nichols*, 23 T. L. R. 86. But in the case cited perhaps no actual damage was threatened since the false statements related to the circulation of plaintiff's newspaper, and intending advertisers could inspect plaintiff's books and ascertain the facts, whereas in the *Marlin* case the experience of hunters with plaintiff's rifle could not be shown to intending purchasers in any such way.

⁶⁹ There is nothing said upon the subject of liberty of publication which adds anything to *Brandreth v. Lance* unless it be the suggestion that if such injunctions were allowed, a judicial censorship of the press would result under which one might be punished in a contempt proceeding for publishing an article that was not libelous. There may be a miscarriage of justice in spite of every safeguard. We must inevitably run certain risks in the administration of justice. But if such injunctions are granted only where (1) there is a legal cause of action for defamation or for malicious disparagement of property, (2) there is a case for equity jurisdiction because of the inadequacy of the legal remedy, and (3) there is clearly a libel or a malicious false statement so that there is no substantial call for jury trial, it would seem that review of the decree by an appellate tribunal ought to insure against the evils which the court fears. If not, we may as well revert to the methods of colonial America and cut off all equity jurisdiction for fear of judicial tyranny.

than in a clear case of nuisance or a clear case of disturbance of an easement.

The English courts now grant injunctions freely in these cases. *Prudential Assurance Co. v. Knott* had scarcely been decided when the practice arose of allowing an injunction in case the libel was repeated or publication was continued after a jury had found the matter libelous.⁷⁰ Presently it came to be held that if the libel was clearly established, an injunction would be granted without requiring the plaintiff to go to a court of law.⁷¹ To-day the English courts will even grant an interlocutory injunction against a libel if it is clearly shown to be one,⁷² exactly as in case of any other tort.⁷³ The books attribute this repudiation of *Prudential Assurance Co. v. Knott* to the effect of the Common Law Procedure Act (1854) and the Judicature Act (1873). But those statutes afford very slight foundation for such a result. The former gave the courts of common law in their discretion power to grant injunctions in actions at law in cases where an injunction ought to issue, just as the codes of procedure in this country gave the courts of both legal and equitable jurisdiction power to allow injunctions in the course of legal proceedings.⁷⁴ It is reasonably clear that this referred to cases where there ought to be an injunction on the principles of equity jurisdiction. But the argument is that from 1854 to 1873 English courts of law had a wider power of granting injunctions than the court of chancery. They could enjoin parties in their discretion whenever they thought there ought to be an injunction, while the chancellor had no such power until by the Judicature Act it was extended to all the divisions of the High Court.⁷⁵ Thus, we are to believe, the Act of 1854 put liberty of the press and all the common-law rights of

⁷⁰ *Saxby v. Easterbrook*, 3 C. P. D. 339; *Halsey v. Brotherhood*, 15 Ch. D. 514, 19 Ch. D. 386. See also *Flint v. Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804.

⁷¹ *Liverpool Ass'n v. Smith*, 37 Ch. D. 170; *Bonnard v. Perryman* (1891), 2 Ch. 269.

⁷² *Collard v. Marshall* (1892), 1 Ch. 571. For the present practice, see *James v. James*, 13 Eq. 421; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Thomas v. Williams*, 14 Ch. D. 864; *Hermann Loog v. Bean*, 26 Ch. D. 306; *Hayward v. Hayward*, 34 Ch. D. 198; *Walter v. Ashton* (1902), 2 Ch. 262.

⁷³ See, for example, *Cronin v. Bloemcke*, 58 N. J. Eq. 313, 43 Atl. 605.

⁷⁴ A statute substantially the same as the Common Law Procedure Act on this point was construed not to give a court of law power to do more than a court of equity could have done in the way of preserving the *status quo* pending the action at law. *Richmond v. Dubuque R. Co.*, 33 Ia. 422, 476.

⁷⁵ *Beddow v. Beddow*, 9 Ch. D. 89; *Quartz Hill Consolidated Co. v. Beall*, 20 Ch. D. 501.

Englishmen into the hands of the judges, so far as injunctions may affect them, subject to no restraint beyond the judicial sense of what justice may demand. If the judges had not been anxious to put equitable relief against defamation on a sound basis, we may be sure they would never have tolerated such arguments. In truth the good sense and sound instinct of the English courts led them to strain a point in order to rid themselves of the doctrine of *Prudential Assurance Co. v. Knott*.

American courts have moved more cautiously and less directly. In *Emack v. Kane*,⁷⁶ a case similar to *Boston Diatite Co. v. Florence Mfg. Co.*, except that the bill set forth a very strong case of intimidation of plaintiff's customers by wrongful threats of infringement suits, made with no intention of really suing, the court enjoined wrongful interference with plaintiff's business relations with his customers and thus enjoined the publications by which the interference was effected. This reminds one of *Lane v. Newdigate*, and has the same justification, as a way round a prejudice that obstructs the course of justice. If the reasoning is not much better than that by which the English courts evaded *Prudential Assurance Co. v. Knott*, it is no worse, and the result is by no means so bold. At first *Emack v. Kane* was much criticised. But the need of doing something to prevent such extortion as that involved, for example, in the *Marlin* case, moved one court after another to take the same step until two respectable lines of authority came into existence which justify injunctions against writing and publishing.⁷⁷ Some of the cases involve publication as incidental to an unlawful boycott or to unlawful intimidation of employees.⁷⁸ Here the order clearly involves "previous restraint" upon publication. It is argued, however, that equity has jurisdiction independently to enjoin the injury of which the publication is but an incident.⁷⁹ This position is now

⁷⁶ 34 Fed. 46.

⁷⁷ See *supra*, note 41.

⁷⁸ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, and cases cited on p. 437; *Cœur D'Alene Mining Co. v. Miner's Union*, 51 Fed. 260; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011; *American Federation of Labor v. Bucks Stove & Range Co.*, 33 App. D. C. 83; *Beck v. Teamsters' Union*, 118 Mich. 497, 77 N. W. 13; *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106; *McCormick v. Local Unions*, 32 Ohio Cir. Ct. R. 165.

⁷⁹ Thus in *Beck v. Teamsters' Union*, 118 Mich. 497, the court says:

"It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot

taken by the Supreme Court of the United States,⁸⁰ which has given up its *dictum* that "in the eyes of the law" damages are an adequate remedy for all publications.⁸¹ Others are substantially like *Emack v. Kane*.⁸² The most significant are cases of attempt to extort by means of gross libels. For example, in *National Life Ins. Co. v. Myers*,⁸³ the principal defendant was a discharged employee of a life insurance company. He and others conspired to extort money from the company by publishing advertisements in the newspapers and sending pamphlets to policy-holders containing extravagantly false charges, such as, for example, that \$1,600,000 of assets had disappeared. An order allowing an interlocutory injunction was affirmed. This goes a long way. But beyond doubt the case was one where nothing in the way of fair comment or criticism was involved and the libel was so indubitable that there was no substantial occasion for jury trial. The interlocutory injunction is justified by

be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word "boycott," and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our Constitution, no one can be enjoined from publishing a libel."

If Blackstone's view of liberty of publication is intrenched in the constitution, it is not easy to meet the criticism of this argument in *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 276, 96 Pac. 127.

⁸⁰ *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418.

⁸¹ *Francis v. Flinn*, 118 U. S. 385.

⁸² *Lewin v. Welsbach Light Co.*, 81 Fed. 904; *Farquhar v. National Harrow Co.*, 99 Fed. 160; *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 98 Fed. 118; *Dittgen v. Racine Paper Goods Co.*, 164 Fed. 85; *Electric Renovator Co. v. Vacuum Cleaner Co.*, 189 Fed. 754; *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347; *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471, 35 N. E. 280.

In the latest and most elaborately argued case, *American Malting Co. v. Keitel*, 209 Fed. 351, an injunction against repeated pamphlets and circulars, accusing plaintiff of being party to an unlawful combination and seeking to divert trade from plaintiff, was denied. The case looks very much like one of malice. Unless the statement could be held to amount to criticism or opinion or the question of truth was doubtful, the result seems unfortunate.

⁸³ 140 Ill. App. 392.

the same reasons that warrant such an injunction against a palpable nuisance.

Looking back over these cases of injury to person or property by writing and publishing, we see that the English courts now deal with them as with any other torts; that in England the subject has had the very same development as equity jurisdiction over trespass, over disturbance of easements, and over nuisance. We see also that American courts are moving in the same direction, reaching such cases indirectly by laying hold of some admitted head of equity jurisdiction and tacking thereto what is in substance a concurrent jurisdiction over legal injuries through publication. In some of the cases this is so obviously but a matter of pleading that we may be confident some strong court presently will take the direct course and will be followed therein.⁸⁴ Most of the cases that grant relief speak strongly of the injustice that must result from denial of jurisdiction in these cases. In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion. So long as denial of relief in such cases rests on no stronger basis than authority our courts are sure to find a way out.

II

INJURIES TO PERSONALITY

In the colloquy in *Gee v. Pritchard* Lord Eldon's second proposition was that the suit could not be maintained to protect the feelings of the plaintiff, but only to protect her rights of property. The same proposition was laid down in *Brandreth v. Lance*. I have endeavored to show that difficulties involved in injunctions against publication have had much to do with this doctrine in the cases of defamation, in which it has chiefly come in question. But it is asserted no less dogmatically in cases of injury to personality otherwise than by writing or speaking, in which liberty of publication is in no wise involved.

A typical decision, often cited, is *Chappell v. Stewart*.⁸⁵ In that case, the defendant employed detectives to follow the plaintiff

⁸⁴ Compare the vigorous assertion of equity jurisdiction to protect purely personal rights in *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97.

⁸⁵ 82 Md. 323, 33 Atl. 542.

wherever he went and threatened to continue so to do, causing the plaintiff great inconvenience and annoyance and subjecting him to humiliation. The court sustained a demurrer to a bill for an injunction. There were allegations of injury to business and credit, but no facts showing any such injury were set forth and the case was clearly one of invasion of the right of privacy. The defendant argued that there was no such legal right. But the court refused to pass upon the question whether an action at law would lie, and held, assuming there was a legal cause of action (1) that "the ordinary processes of the law are fully competent to redress all injuries of this character," (2) that by the settled doctrine equity has no jurisdiction to secure purely personal rights. If there was a legal wrong in this case, the legal remedy was an action on the case for damages, and it is a mockery to say that a court which could give no other relief is "fully competent" to redress the wrong. Suppose, for instance, the plaintiff were a clergyman, a man of refined and sensitive feelings, and the defendant was having him "shadowed" notoriously by a detective out of pure spite with no other end than annoyance and humiliation. To say that damages under such circumstances would be an adequate remedy "in the eyes of the law" is to use the term "adequate" in a Pickwickian sense or to attribute to the law unnecessary obliquity of vision. The other point is rested on the *dicta* of Lord Eldon in *Gee v. Pritchard* and on the statements of two text writers who repeat those *dicta*. We have seen elsewhere that this is a very slender basis for such a conclusion. The crucial question in such a case as *Chappell v. Stewart* is as to the legal right. There is no danger of interference with freedom of publication, and common-law policy as to jury trial is not involved more than in case of any injunction against a threatened tort. It is significant that all but one of the cases in accord with *Chappell v. Stewart* deny the legal right.⁸⁶

In one case, however, the legal right was undoubted. *Kneedler v. Lane*⁸⁷ was a suit for an injunction against enforcement of the draft during the Civil War, on the theory of enjoining threatened assault and false imprisonment under an unconstitutional statute. It appeared that the writ of *habeas corpus* was suspended. The court

⁸⁶ *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442; *Kneedler v. Lane*, 3 Grant Cas. (Pa.) 325. Cf. *Woollcott v. Shubert*, 154 N. Y. Supp. 643.

⁸⁷ 3 Grant Cas. (Pa.) 325.

divided three to two against the injunction. The main question was one of constitutional law. On the question of equity jurisdiction, Strong, J., said for the majority:

"But when, before these cases, was an injunction ever granted to restrain the commission of a purely personal tort? What chancellor ever asserted he had such power?"⁸⁸

To this not very conclusive argument, Woodward, C. J., replied:

"Courts of equity are accustomed to enjoin to prevent frauds, waste, nuisances, trespasses, obstructions and diversions of water courses, and in numerous other torts. The principle of injunctive relief against a tort is that the inadequacy of the remedy at law is a sufficient equity and will warrant an injunction against the commission or continuance of the wrong. . . . The inadequacy of all remedies at law for infringement of personal liberty, when *habeas corpus* is suspended, is too plain to be doubted or discussed, and the necessary consequence is that courts of chancery would have jurisdiction. . . . If courts of chancery have not jurisdiction of torts which touch liberty, what are we to say, — that property is better guarded with us than liberty? Who is willing to stand on that ground? . . . I would not say that man has more rights in his horse or his house than he has in himself. If equity will restrain torts in respect to lands and goods, much more will it restrain torts in respect to the immensely higher interest — his liberty — when all legal remedies have been taken away."⁸⁹

Although *Kneedler v. Lane* turned chiefly upon the constitutional question, these statements are important in that they put each side of the question as well as it has ever been put in the cases. But it should be said that a serious question of policy as to exercise of jurisdiction was involved, which is not present in the ordinary case.

In a note to *Chappell v. Stewart*, which has frequently been quoted,⁹⁰ the doctrine of that case is vigorously criticised. The editor says that the proposition announced "taken literally and in its full meaning would make the system of equity suitable only to a semi-savage society which has much respect for property but little for life." He adds:

"Our equity jurisprudence does not quite deserve so severe a reproach. It does, indeed, do much for the protection of personal rights, although it has not been willing to acknowledge the fact, but has persisted in declaring the contrary."

⁸⁸ 3 Grant Cas. (Pa.), 524.

⁸⁹ *Id.*, 568.

⁹⁰ 37 L. R. A. 783, discussed in *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S. W. 933; *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97.

To support the latter proposition, the editor puts five classes of cases where, he conceives, equity in truth secures personality, although purporting to secure substance only. These five categories deserve careful examination.

(1) First the editor puts cases of nuisance such as a rifle range, dangerous to life, noise which prevents rest and sleep, and odors or sewage, dangerous to health. It is true that in these cases protection of property does indirectly secure individual interests of personality along with social interests in the general safety and the general health. But in a very real sense the interests secured are interests of substance only. The plaintiff may sue only because he has an estate in the property and is deprived of or injured in his *jus utendi*. If his nerves are steeled, his ears are deaf, or his nose is indifferent, the members of his household, injured only in their personal rights, will suffer in vain.

(2) Next he puts cases of publication in violation of contract or of trust. These cases bear out his point. For the most part the protection of property, on which they purport to proceed, is no more than a fiction. The theory is that the beneficial interest in the trust *res* or the contract right is an asset to be protected. But in reality the substantial interest secured is generally one of personality. If it were not for this, especially in the contract cases, the court would be certain to say that there was no substantial interest in the plaintiff to make it worth while for equity to interfere. The true interest secured is brought into equity, as it were, "parasitic" to a merely nominal interest of substance.

(3) The cases next cited are those involving private letters, which follow *Gee v. Pritchard*.⁹¹ Here also the editor's point is well taken. Where, as in the cases referred to, the letters have no literary or historical quality and no value as autographs, the property in them is not much more than a fiction. If it were not for the invasion of privacy involved, we may be sure the chancellor would say that plaintiff's interest was too trivial to justify relief in equity.

(4) He next puts the cases where the chancellor acts for the protection of infants. These cases, however, do not seem to be in point. In them the chancellor, representing the king as *parens patriae*, secures all manner of interests of infants. But he does not act to

⁹¹ *E. g. Woolsey v. Judd*, 4 Duer 379.

secure any individual interests of the infants. Rather he acts to secure a general social interest in dependents. Such cases are not at all comparable to ordinary proceedings in equity to vindicate private rights.

(5) Finally he refers to certain recent English cases. An objector might answer that these cases depend upon statutes. And if it be replied that a strained construction was given those statutes to enable equity to act, yet the effect is to secure all interests of personality directly, which is more than the editor contends for as the actual practice.

It is submitted, therefore, that the five classes of cases shrink to two. But the two are highly significant, and a third no less significant may be added, namely, the cases of wrongful expulsion from social clubs where the real wrong complained of is the humiliation and injury to feelings. Here, as we shall see presently, courts of equity generally insist upon some shadow of a property interest, however trivial; actually protecting the feelings, but purporting to protect only the pocketbook. The analogy to what we have seen taking place in the cases as to defamation and disparagement of property is suggestive. In each case the courts protest that the law is unchanged. The old doctrine is announced with conviction. But its whole spirit is rejected and in the result it is evaded. Something is found which gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows in order to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule.

There are now some American cases which directly or by way of *dictum* authorize the securing of personality through injunction.⁹² But most of them turn on the existence and scope of the legal right. The two decisions in Louisiana assume the right of privacy and the remedy by injunction without any discussion of the difficulties involved. The New York case must be regarded as overruled. The rest are *dicta*. Nevertheless the proposition is by no means so burdened with adverse authority as in case of defamation and disparagement of property and involves fewer difficulties. If the right

⁹² *Corliss v. Walker*, 57 Fed. 434 (*semble*); *Itzkowitz v. Whitaker*, 115 La. 479, 39 So. 499, 117 La. 708, 42 So. 228; *Schulman v. Whitaker*, 117 La. 704, 42 So. 227; *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (*semble*); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97; *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908; *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122.

of privacy succeeds in establishing itself, injunction, as the only effective remedy, is likely also to establish itself for such cases.

It remains to consider a related group of cases in which equitable relief has been sought to protect individual interests in the domestic relations.

In *Hodecker v. Stricker*,⁹³ plaintiff was the wife of H., but defendant was living with him unlawfully as his wife and assumed the name of Mrs. H., appropriating plaintiff's lawful name to the prejudice of plaintiff's standing in the community. Suit was brought to enjoin this use of plaintiff's name and usurpation of plaintiff's rightful social position as H.'s wife. There was no suggestion of injury to property, of any cloud upon title, or of any embarrassment of an inchoate right of dower. Nor did plaintiff seek to vindicate her claims to the society and affection of her husband against interference by defendant. Apparently she did not want the one and had acquiesced in loss of the other. Her case rested, therefore, upon an interest of personality; upon a claim of a right very like privacy. The wrong sought to be enjoined was usurpation of the name to which she was entitled as the lawful wife of H. and the injury consisted in humiliation and injury to feelings and mental comfort caused by this open assumption of her name as well as her place by an adulteress. The main question, accordingly, was whether the law recognizes such a right; whether it secures a wife in a claim not to be humiliated and subjected to gossip and unjust suspicion by another's holding herself out to the world as her husband's lawful wife, thus in substance asserting that the true wife is not what she purports to be, and casting doubt upon her status in a relation in which a woman is peculiarly and properly sensitive. Such a case is quite unlike those where two persons bear the same name and one claims to use it exclusively for business purposes. For a name may be property, as in *Edison v. Edison Polyform Co.*,⁹⁴ or it may, as in this case, be a part of one's personality. This is recognized in the civil law,⁹⁵ and it is not easy to see why our law should not look at the matter in the same way. If so, the remedy at law is so palpa-

⁹³ 39 N. Y. Supp. 515.

⁹⁴ 73 N. J. Eq. 136, 67 Atl. 392.

⁹⁵ I BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 122, 122-4, 122-5;
I ENNECCERUS, KIPP UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, 11 ed.,
§ 93 (9).

bly inadequate that an injunction would seem appropriate.⁹⁶ A demurrer was sustained by a court bound by *Roberson v. Rochester Folding Box Co.* and *Brandreth v. Lance* to deny both the right and the remedy.

Equity jurisdiction to protect an individual interest in a domestic relation was involved in *Ex parte Warfield*.⁹⁷ Here the court had enjoined the defendant, who was alleged to have partially alienated the affections of plaintiff's wife and to be threatening and endeavoring to wholly alienate them, from visiting or associating with her, going to or near her at a certain house, or interfering with plaintiff's attempts to communicate with her. The defendant having violated the injunction by meeting and talking with plaintiff's wife and going to the house in question for that purpose, was committed for contempt and brought a *habeas corpus* proceeding, claiming that the injunction was void for want of jurisdiction. As the court had general jurisdiction at law and in equity and the defendant was before it, one might think that at most the order could only be pronounced erroneous and hence the collateral attack must fail. But for historical reasons the equity side of a court possessing both common-law and equity jurisdiction is looked on as if it were a distinct court of equity. Hence we ask in such cases whether the cause is within some class of causes which may be entertained by a court of equity as distinct from a court of law. If not, the injunction is treated as void. If it is in the class of causes of which equity has jurisdiction but on the principles of exercise of that jurisdiction the injunction should not have been granted in the particular case, the order allowing the injunction is merely erroneous.⁹⁸ Hence in *Ex parte Warfield* it became necessary to determine whether equity had jurisdiction to protect a purely personal right of the husband to the society and affection of his wife. The court held that it had such jurisdiction, since there was a legal cause of action for alienation of the wife's affections and the legal remedy was inadequate.⁹⁹

⁹⁶ See the remarks of Dill, J., in *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 920-21, 67 Atl. 97.

⁹⁷ 40 Tex. Crim. 413, 50 S. W. 933.

⁹⁸ *In re Sawyer*, 124 U. S. 200.

⁹⁹ If the order had been appealed from, there might have been a serious question as to the expediency of exercising the jurisdiction. The chancellor would have to consider whether he could reasonably expect to accomplish anything by such an injunction; to consider whether a situation where the defendant was in jail because he persisted

Two circumstances, however, detract somewhat from the weight of *Ex parte Warfield* as an authority. There was a statute in Texas¹⁰⁰ which the courts of that state construe as giving a wider power of granting injunctions than that possessed by courts under the general equity doctrine. Also it might be urged that at common law the husband has a legal right to the services of the wife which is to be regarded as a property right and hence that equitable relief may be invoked to secure that right and may be employed incidentally to secure the more significant interests of a purely personal nature. Thus the case could be brought within the analogy of *Gee v. Pritchard*. But it is significant that the property right of the husband in the wife's services, now thoroughly moribund for all substantial purposes, should acquire a temporary vitality to enable the courts to secure interests of personality which they hesitate to protect avowedly as such.

Still another type of personal right was involved in *Vanderbilt v. Mitchell*.¹⁰¹ In that case the plaintiff's wife, who was living in adultery with a third person, fraudulently procured a physician to insert in a birth certificate, provided for by the laws of New Jersey, that the plaintiff was the father of a child born to her in adultery. The certificate was recorded, and under the terms of the statute a certified copy might be used as *prima facie* evidence of the facts therein set forth. Suit was brought for cancellation of the fraudulent birth certificate and the record thereof and to enjoin the mother and the child from claiming for the child the status, name, or property of a lawfully begotten child of the plaintiff. The vice chancellor denied an injunction on the ground that the case did not come under any recognized head of equity jurisdiction, that no property rights were involved, and that equity was not competent to protect rights

in seeing her would not be likely to fan the wife's erring affection for defendant, and to consider that he could not keep the wife away from the defendant even if he could keep the defendant away from the wife. But these considerations are not relevant to the question of jurisdiction.

¹⁰⁰ Article 2989, REV. STAT., providing that judges might grant injunctions in three cases. The first was, "When it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the applicant." The third was, "All other cases where the applicant for said writ may show himself entitled thereto under the principles of equity." See *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994.

¹⁰¹ 72 N. J. Eq. 910, 67 Atl. 97.

which were purely personal.¹⁰² This decree was reversed and the demurrer was overruled in the Court of Errors and Appeals by the unanimous judgment of fourteen judges.

The bill in *Vanderbilt v. Mitchell* showed that plaintiff had a vested remainder in an undivided share of certain lands under his mother's will, dependent upon the number of her descendants at the date of distribution. The interest was alienable and hence the certificate constituted a cloud upon the title which equity had jurisdiction to remove. The court holds this sufficient to justify the suit. But another right was also involved. The plaintiff was confronted with a false and fraudulent public record witnessing that a bastard, born in adultery, was his lawful child. This was such an unwarranted usurpation of his name and of the status and position of being his son as to be an infringement of his personality. The case might, therefore, be based upon an interest of personality analogous to the one involved in *Hodecker v. Stricker*, and the court was quite willing to rest its action upon this right, if necessary, and to hold that equity had jurisdiction to secure a purely personal right of that sort. Dill, J. said:

"If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief."¹⁰³

But, he says, "the *technical basis* of the jurisdiction . . . is the protection of property rights." Conceding so much, he adds:

"The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of the great and immediate interference with the personal rights of the complainant, although as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature to an extent sufficient to satisfy even the rule adopted by the court below."¹⁰⁴

This is *Gee v. Pritchard* over again. But it is *Gee v. Pritchard* used in the right way to advance the ends of law by an intelligent use of the actual decision in that case, not, as has happened too often, to

¹⁰² 71 N. J. Eq. 632, 63 Atl. 1107.

¹⁰³ 72 N. J. Eq. 910, 919.

¹⁰⁴ *Id.*, 926.

defeat the ends of law by looking only to the letter of Lord Eldon's *dicta*. Moreover the remarks of the court on the subject of equitable protection of interests of personality¹⁰⁵ are admirable and will undoubtedly exert a wholesome influence.

III

PROTECTION OF SOCIAL AND POLITICAL RELATIONS

The same questions are presented in another form in cases of wrongful expulsion from social clubs or interference with the exercise of political rights. Suppose, for example, a member is wrongfully expelled from a trade union and sues to enjoin the governing authorities from excluding him. What right does he seek to secure? It may be that the union owns funds or property and (supposing it to be unincorporated) he may be co-owner or co-beneficiary and so be excluded unlawfully from his share in the property. Or it may be that he can obtain work or can exercise his trade or calling only provided he is in good standing in the union, so that if he is wrongfully expelled, the practical effect is to exclude him from exercising the trade on which he depends for a livelihood. It is not easy to differentiate such a case from the injury to the credit and financial standing of a business man, *e. g.*, in *Dixon v. Holden*. Power to work is the chief asset of the laborer as credit is the chief asset of the business man. Again it may be that the club or association is merely social and that no share in any property and no added power of pursuing one's vocation is involved in belonging thereto. In that event, if one is wrongfully expelled, there is a humiliation, an indignity, akin to violation of privacy and akin to defamation. Expulsion from a club may, indeed, be the highest form of injury without involving any interest of substance in the least.

According to the prevailing doctrine in the authorities, there is a remedy only in the first case.¹⁰⁶ In case the club or association has funds or property, even if plaintiff's interest in the common property from which he is excluded is as insignificant as the "little diachylon"

¹⁰⁵ 72 N. J. Eq., 919, 921-23, 924-25.

¹⁰⁶ In *Rigby v. Connol*, 14 Ch. D. 482, Jessel, M. R., says:

"I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property." See *Mesisco v. Giuliana*,

for which Lord Holt was willing to award damages, equity will interfere — nominally to protect the property right, but in truth and in substance to protect the interest in personality against wrongful and malicious injury. This is the same doctrine that we have seen in *Gee v. Pritchard* and *Vanderbilt v. Mitchell*. But in cases where there is no property we are told that equity will not interfere, although in the second of the three cases put there may be a very serious economic injury and in the third case a very serious injury to personality.

It is worth while to note how this conclusion is justified. Sir George Jessel tells us that in case of a voluntary association of individuals without property the court cannot compel persons to associate together if they do not so desire; that a court can assure to a plaintiff participation in the use of property but it cannot secure him in purely social relations. Accordingly Sir George Jessel compares the case to a contract of personal service, where the court cannot coerce the promised personal performance. In other words, plaintiff may have the right, but there is a practical difficulty in enforcing it and so, in so far as it can act at all, equity turns to the indirect method of enforcing some property right, in order to furnish a "technical basis of jurisdiction," just as in the personal service cases relief that in effect coerces performance of the affirmative is tacked to jurisdiction to enforce a negative. Undoubtedly there is much force in the point as to the difficulty of enforcing the rights of a member threatened with wrongful expulsion from an unincorporated association. But these and other difficulties vanish when the "technical basis" of a scintilla of common property is afforded. For there is a real danger that, in exercising the jurisdiction where property is involved, the courts may come to sit on appeal from the committees and meetings of clubs and review their action as they review the acts of inferior judicial or administra-

190 Mass. 352, 76 N. E. 907; *Froelich v. Musicians' Mut. Ben. Co.*, 93 Mo. App. 383; *Allee v. James*, 68 Misc. 141, 123 N. Y. Supp. 581; *Smith v. Hollis*, 33 Weekly Notes Cas. (Pa.) 485; *Robertson v. Walker*, 62 Tenn. 316; *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 119 S. W. 874. That the interest is really one of personality is shown by the remarks of Jessel, M. R., in *Fisher v. Keane*, 11 Ch. D. 353: "The character and prospects in life of any member of this club may be irremediably blasted — for that is the result — by the decision of any three casual members of the committee who happen to walk in on a week-day, having no notice of what is about to be brought before them, but merely with the intention probably of auditing the cook's accounts, or attending to some equally trivial matter."

tive tribunals.¹⁰⁷ Moreover there is no insuperable obstacle to effective securing of a plaintiff's right not to be injured wilfully in his sensibilities by a wrongful expulsion from a club that owns no property. It is not necessary to order the defendants to associate with the plaintiff. If they desire to abandon or to dissolve the club, they may be left free to do so. But they might be enjoined from wrongfully and maliciously excluding the plaintiff so long as they keep it up.¹⁰⁸

Courts are by no means unconscious of what they are really protecting in these cases of wrongful expulsion. This is shown strikingly in *Baird v. Wells*.¹⁰⁹ In that case the club had no property whatever, and there was no possibility of resting relief to plaintiff, who had been wrongfully expelled, upon any "technical basis" of injury to property rights. Accordingly the court denied an injunction on the ground that the injury was solely to personality and hence was not cognizable in equity. But while the court professed to deny all relief and to leave the pure interest of personality unsecured, in reality it took a very ingenious way of securing the interest. Knowing all the while that under the doctrine it announces the court was without jurisdiction, it found means to evade the difficulty by first examining whether plaintiff was rightfully expelled. Then, when it had found that he was wrongfully expelled and had vindicated his character by its finding, it went on to show that no relief could be given to him. In other words, plaintiff was given the very thing he really wanted although it was solemnly explained to him that the court had no jurisdiction and could do nothing to help him.¹¹⁰

¹⁰⁷ See the remarks of Brett, L. J., in *Dawkins v. Antrobus*, 17 Ch. D. 615. This is especially manifest in the English decisions which review the rules of an association with reference to the demands of "natural justice." Cf. *Harris v. Aiken*, 76 Kan. 516, 92 Pac. 537 (*semble*); *Loubat v. Leroy*, 40 Hun (N. Y.) 546; *People v. Hoboken Turtle Club*, 60 Hun (N. Y.) 576; *People v. Uptown Ass'n*, 9 App. Div. 191, 41 N. Y. Supp. 154; *People v. Independent Dock Builders' Benevolent Union*, 164 App. Div. 267, 149 N. Y. Supp. 771 (*semble*); *Williamson v. Randolph*, 48 Misc. 96, 96 N. Y. Supp. 644; *Bachman v. Harrington*, 52 Misc. 26, 102 N. Y. Supp. 406; *Grassi Bros. Co. v. O'Rourke*, 89 Misc. 234, 153 N. Y. Supp. 493; *Metropolitan Base Ball Ass'n v. Simmons*, 17 Phila. 419.

¹⁰⁸ Cf. the decree in *Hood v. Northeastern R. Co.*, L. R. 8 Eq. 666.

¹⁰⁹ 44 Ch. D. 661.

¹¹⁰ The plaintiff having appealed from the order denying an injunction, the following proceeding took place in the Court of Appeal:

"1890. April 23. Sir *Horace Davey*, Q. C. (Sir *C. Russell*, Q. C., and *Ernest de Witt*, with him), appeared for the appellant, and stated that, as the judgment of Mr. Jus-

Some American courts have secured the rights of the member threatened with wrongful expulsion from his club by resorting to a theory of contract.¹¹¹ The doctrine of these courts is that the constitution and rules of a voluntary association constitute a contract between the members and that equity may enjoin any injurious breach of the contract such as expulsion contrary to the rules. As the courts of New York are committed to the doctrine that equity will not secure personality as such, but only property, it is a convenient mode of evading the difficulty to hold that the "contract of membership" is an asset which may be protected in equity. This enables relief to be given in a case like *Baird v. Wells*, where the club has no property and yet there is a serious injury to personality. But the theory is open to serious objection, apart from the questionable use of the idea of contract which it involves. If the basis of relief is breach of contract and the constitution and rules of the club or association are the contract, any breach of the rules that injures the plaintiff seriously may be enjoined and so the courts may be called on to enforce the rights of members of fraternal orders where, if we look at the real interest involved and weigh the difficulties we must feel that relief should be denied.¹¹² Again, if the basis of relief is breach of contract and the constitution and rules of a voluntary association give the terms of the "contract of membership," the interpretation of the written contract is for the court. Thus a court of equity is to be the final interpreter of the laws and rules of all voluntary associations, clubs, and fraternal orders. This

time *Stirling* had been in favour of the Plaintiff as regarded the irregularity of the proceedings of the Defendants, the Plaintiff had no wish to continue in the club, and would now assent to an order dismissing the appeal with costs."

"Order made accordingly."

In other words, the plaintiff appealed simply for the opportunity of saying publicly that the lower court had given him the substance of a victory although depriving him of the form.

¹¹¹ *Krause v. Sander*, 66 Misc. 601, 122 N. Y. Supp. 54; *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763.

¹¹² For example, in such a case as *Wellenvoss v. Grand Lodge*, 103 Ky. 415, 45 S. W. 360, where plaintiff sought an injunction against wrongfully excluding him from participation in the proceedings of the Grand Lodge, the real injury was to his dignity, to his pride, and his feelings. The chancellor might well ask, is this injury serious enough to warrant the extraordinary interposition of equity? Is it serious enough to warrant the expense and the consumption of public time involved in a judicial proceeding? Is it serious enough to balance the practical difficulty involved in the court's endeavor to learn, interpret, and apply the laws and customs of a fraternal order? See *Hershiser v. Williams*, 6 Ohio Cir. Ct. R. 147.

is neither intrinsically desirable nor expedient from the standpoint of dispatch of public business in the courts.¹¹³ The advantage of the contract doctrine is that it enables the courts to deal more straightforwardly with such cases as *Baird v. Wells*. But the same result may be attained in a better way by recognizing that we are protecting interests of personality and by treating the cases on the ordinary principles of the concurrent jurisdiction.

It remains to notice a line of cases in which equitable relief has been sought against wrongful denial of political rights.¹¹⁴ In these cases there was no tort, and hence there was no question of concurrent jurisdiction. But they repeat the *dichum* in *Gee v. Pritchard* and also assert that only civil, as distinguished from political, rights are taken into account in equity. If there is a tort, as in *Ashby v. White*,¹¹⁵ it is because there is a civil right, cognizable in courts of justice, and the circumstance that it is a civil right to exercise one's faculties politically cannot change the situation. The real difficulties are (1) that the injury is usually to feelings, sensibilities, and dignity, and (2) that a court of equity is practically embarrassed in administering a remedy by the danger of undertaking an impossible task.¹¹⁶

¹¹³ The California court which was the first to announce this contract doctrine deals with the point rather ingeniously. It says that only procedural rules are to be inquired into; that is, the constitution or rules providing the machinery of investigation and expulsion are part of the contract, but it is a part of the contract that the member will abide the determination of the tribunal of the organization as to interpretation of the constitution and rules. In other words, the contract provides that these third parties shall fix the interpretation of the terms of the contract in a binding way. Hence it is said all the court can try is, first, whether investigation or trial has taken place in the appointed way or by the appointed tribunal, and, second, whether the interpretation has been made and applied in good faith. *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763. This is very like the English doctrine that there must be no interpretation on the part of the tribunal of the association which makes the rule or proceeding contrary to natural justice. This proposition, however, has interesting possibilities. Suppose one is a member of a religious association and by the discipline of the association a prophet, or bishop, or spiritual head has power to excommunicate on the basis of revelations from on high. Review of an excommunication as contrary to natural justice under such circumstances might involve delicate questions.

¹¹⁴ *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683; *Kearns v. Howley*, 188 Pa. 116, 41 Atl. 273; *Giles v. Harris*, 189 U. S. 475; *Green v. Mills*, 69 Fed. 852; *State v. Aloe*, 152 Mo. 466, 54 S. W. 494; *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681. That no tort is involved in such cases as *Fletcher v. Tuttle*, see 2 COOLEY, TORTS, 3 ed. 626 ff.

¹¹⁵ 2 Ld. Raym. 938, 950.

¹¹⁶ This is well put in *Winnett v. Adams*, 71 Neb. 817, 825, 99 N. W. 681: "We do not overlook the fact that primary elections have become the subject of legislative regu-

The subject of equitable relief against defamation and injuries to personality is beset with inherent difficulties quite apart from those raised unnecessarily by the current of *dictum* since *Gee v. Pritchard*. Relief against defamation involves the limits of freedom of publication and the policy of trial by jury in cases of libel. Relief against injury to privacy and related wrongs involves unsettled questions as to the existence and scope of the legal right. Many of the difficulties growing out of the need of balancing conflicting interests and the practical limitations upon securing interests of personality through legal machinery, which make the law cautious and bring about a back-handed protection of personality by "parasitic damages,"¹¹⁷ operate to produce a similar halting and oblique course in equity. Equitable protection of personality against injuries to social and political relations involves danger of undue meddling with the internal concerns of social, political, and religious organizations. But we have proceeded long enough upon fictions and "technical bases" of jurisdiction. A century of judicial experience since the cautious *dicta* and bold action of Lord Eldon in *Gee v. Pritchard* has taught us much. More is to be gained by perceiving critically the interests to be secured and the conflicting interests to be balanced against them, by looking the difficulties squarely in the face and by determining what may be done to secure and protect individual personality in view of the difficulties, than by continued lip service to a doctrine laid down only to be evaded.

Roscoe Pound.

HARVARD LAW SCHOOL.

lation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self reliance and ability for self-government, to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err."

¹¹⁷ See my paper, *Interests of Personality*, 28 HARV. L. REV. 343, 359 ff., 454 ff.

THE CONSTITUTIONAL OPINIONS OF JUSTICE HOLMES

CALLED upon late in life to teach constitutional law, a great teacher of property law, after a brief trial, gave it up in despair on the ground that constitutional law "was not law at all, but politics." John Chipman Gray was right — if his norm of law was the rule against perpetuities; not, however, if we concede it to be the law's province also to settle controversies that involve more complex interests, permitting of flexibility in application to make the necessary accommodation to the diversities and changes in the facts of life. We find a growing extension of this sphere of law, a gradual displacement of force by law, bringing not only the peaceful settlement of controversies as isolated instances, each on its own bottom, but settlement based on certain common considerations beyond the mere avoidance of force.¹ Undoubtedly, such a field of law by the very nature of the issues sought to be settled, by reason of the interests sought to be enforced, leaves wider scope and calls for the exercise of a broader experience than the familiar domains of the common law. Such, in effect, has been that body of decisions contained in the two hundred and forty volumes of United States Reports which we call American Constitutional Law. To be sure we are in the field of greatest flexibility. Undoubtedly the Constitution is what the Supreme Court interprets it to be — and constitutional interpretation inescapably opens a Pandora's box of difficulties. But there are differences between this body of constitutional decisions and the judgments of a Kadi or the foreign policies of a Secretary of State. Just these differences entitle the decisions to be called law. But the necessary flexibility makes the personality of the justices so much more important in their decisions on constitutional law than in questions of property or corporation law.

There is thus marked opportunity for individual influence in the collective judgment which a Marshall exercised. Of course he did

¹ See, for instance, the line of thought opened up by Mr. Justice Higgins in "A New Province for Law and Order," 29 HARV. L. REV. 13.

not attain single-handed, and we know that among his associates were probably two men of more commanding equipment as common law lawyers. But it is to Marshall that we owe the foundations of our national power as they were laid. From Marshall's days, except for an occasional flurry, there is a comparatively quiescent period in constitutional law until the acute, and growingly acute, issues of the last thirty years reflected themselves more intensely in legislation. This brought sharp contests before the Supreme Court. Two issues mainly concerned the Court: the scope of the power of Congress over Commerce, and the new limitations placed upon the states by the Fourteenth Amendment. The Commerce clause had been largely a slumbering power until the Interstate Commerce Act and the Sherman Law, and, more particularly, the legislation since 1906, brought its intensive application into constant question and resistance. In a series of important litigations there was pressed for decision, not only invalidity of State legislation as an encroachment upon the Federal power, but, even more, the affirmative exercise of the Federal power, rendered significant and detailed because of the pervasive aspect of modern commerce. The second class of cases involved the whole brood of questions arising from the new power of negation of the Federal Constitution over State action.

Mr. Justice Holmes came to the Supreme Court at this period of legislative exuberance, marking a broad extension of governmental activities both in Nation and States. There was thus presented to the Court in greater volume and with unparalleled intensity, the determination of the powers of the Nation and of the State, and a delimitation of the field between them — questions whose decision probably touched the public at once more widely and more immediately than any issues at any previous stage of the Court's history. On both these two basic problems of constitutional law — the power of the States and the power of the Nation — Mr. Justice Holmes's influence has been steady and consistent and growing. His opinions form a coherent body of constitutional law, and their effect upon the development of the law is the outstanding characteristic of constitutional history in the last decade.

In our days, as in Marshall's, the issues before the Court have necessitated not merely an interpretation of this or that specific clause of the Constitution, but an inquiry into the fundamental attitude

toward the Constitution and a conscious realization of the function of the Court as its interpreter. Marshall's great major premise was that "it is a *constitution* we are expounding." That was the background against which he projected every inquiry as to specific power or specific limitation. With that as a starting point, with the recognition, not as an arid bit of intellectualism but enforced with emotional drive, that the Constitution deals with great governmental powers to be exercised to great public ends, he went far toward erecting the structure within which the national spirit could freely move and flourish. Like all truths, Marshall's great canons had to be revived by new demands that were made upon them by a new generation. Constant resort to the reviewing power of the Court based on claims that acts of legislatures or Congress transcended constitutional limitations, called again for a major premise as to the scope of the instrument which the Court must construe and the right attitude of the Court in its interpretative function. There always *is* a starting point in such questions, however inarticulate or even unconscious. What the pressure of new legislation demanded was a conscious re-examination of the starting point, of a vigorous realization of the scope and purpose of constitutional law, an analysis of the realistic issues in any given constitutional question. In a time of legislative activity, in a period of especial unrest in the law, signifying an absorption of new facts and changing social conceptions,² the starting point must be a conscious one, lest power and policy be unconsciously confused.

Mr. Justice Holmes has recalled us to the traditions of Marshall, that it *is* a Constitution we are expounding, and not a detached document inviting scholastic dialectics. To him the Constitution is a means of ordering the life of a young nation, having its roots in the past — "continuity with the past is not a duty but a necessity" — and intended for the unknown future. Intentionally, therefore, it was bounded with outlines not sharp and contemporary, but permitting of increasing definiteness through experience.

"The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions

² See Dean Pound's various papers, particularly, "Do we need a Philosophy of Law?" 5 COL. L. REV. 339; "Common Law and Legislation," 21 HARV. L. REV. 383; "Mechanical Jurisprudence," 8 COL. L. REV. 605; "The Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 591; 25 *ibid.* 489.

transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."³

He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom. We touch here the most sensitive spot in our constitutional system: that its successful working calls for minds of extraordinary intellectual disinterestedness and penetration lest limitations in personal experience and imagination be interpreted, however conscientiously or unconsciously, as constitutional limitations. When regard is had to the complexities of modern society and the necessary specialization and narrowness of individual experience, the need for tolerance and objectivity in realizing, and then respecting, the validity of the experience and beliefs of others, becomes one of the most dynamic factors in the actual disposition of concrete cases.

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."⁴

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*."⁵

Therefore, except in the case of a few specific constitutional prohibitions (for that very reason rarely called into question), we are at once in a different atmosphere of approach from the rigid and the absolute. We are in a field where general principles are recognized but settle few controversies. Claim or denial of governmental power, of "individual rights," reveal themselves not as logical an-

³ *Gompers v. United States*, 233 U. S. 604, 610.

⁴ *Missouri, Texas and Kansas Ry. v. May*, 194 U. S. 267, 270.

⁵ *Otis v. Parker*, 187 U. S. 606, 608-9.

titheses, but as demands of clashing "rights," of matters of more or less, of questions of degree.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." ⁶

"As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place for that line in nice cases always seems somewhat technical, but still the line must be drawn." ⁷

This by no means implies a crude empiricism. True, judgment, conscious or inert, enters. Choice must be exercised. The choice is not, however, capricious; it involves judgment between defined claims, each of recognized validity, each with a pedigree of its own, but all of which necessarily cannot be satisfied completely.

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain." ⁸

⁶ *Lochner v. New York*, 198 U. S. 45, 76.

⁷ *Ellis v. United States*, 206 U. S. 246, 260.

The recognition of differences of degree in the whole development of the law is most luminously put in the following passage: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. See *Nash v. United States*, 229 U. S. 373, 376, 377. Negligence is all degree — that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the *Leges Barbarorum*, there lies the culture of two thousand years." — *Leroy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.*, 232 U. S. 340, 354.

⁸ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355-6.

Thus, while Mr. Justice Holmes has expounded the philosophy of differences of degree and applied it in a variety of cases, he has been alert to demand a telling difference upon which a distinction can be predicated. A neat instance is his dissenting opinion in *Haddock v. Haddock*.

"I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and none are the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, sec. 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicile when the married pair happens to have resided there a month, even if with intent to make it a permanent abode, than if they had not lived there at all."⁹

This, in brief, is the attitude in which and the technique with which Mr. Justice Holmes approaches the solution of specific questions in the two great active fields of constitutional law: the Commerce Clause and the Fourteenth Amendment.

Just as the needs of commerce among the several states furnished the great centripetal force in the establishment of the Nation, so the Commerce Clause has now become the most important nationalizing agency of the Federal Government. Mr. Justice Holmes has at once applied this power with unimpaired depth and breadth, and affirmed the true basis of its need to-day no less than in 1789.

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views, and how often action is taken that embodies what the Commerce Clause was meant to end."¹⁰

⁹ *Haddock v. Haddock*, 201 U. S. 562, 631-2.

¹⁰ "Law and the Court," Speech at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913, from *SPEECHES* by Oliver Wendell Holmes, 98, 102.

He has sought to enforce the power of commerce among the states with depth and breadth because to him such "commerce is not a technical legal conception, but a practical one drawn from the course of business."¹¹ That interstate commerce is a practical conception he recognizes in its practical implications. Thus, commerce means, not only transportation, not only control over the instrumentalities of transportation, but the human relations involved in commerce. They present some of the acutest problems of commerce. Therefore, insisting in himself as he does in others on the need "to think things instead of words," in one of his memorable opinions, against the majority of the Court, he asserted the power of Congress to legislate in regard to the industrial relations on interstate railroads as a means of securing industrial peace.

"It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, it might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ, — I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind — but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large."¹²

The extension of interstate commerce through modern inventions, the overwhelming field which it has absorbed, are obvious. Logically, there is no limit to the interrelation of national commerce and the activities of men in the separate States. But the main ends of our dual system of States and Nation here, too, call for adjustment, and logic cannot hold sterile sway.

"In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the

¹¹ *Swift v. United States*, 196 U. S. 375, 398.

¹² *Adair v. United States*, 208 U. S. 161, 191-2. Cf. Mr. Justice Higgins in 29 HARV. L. REV. 13, 23 ff.

rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts.¹³

Therefore distinctions have to be made and "even nice distinctions are to be expected."¹⁴ But the Federal power must be dominantly left unimpaired and a State cannot defeat the withdrawal of national commerce from State tampering "by invoking the convenient apologetics of the police power."¹⁵

Thus far as to the great Federal power which indirectly limits State activity. In its negative prohibitions the Constitution is a denial of State action as such. When the Fourteenth Amendment first came before the Court in the Slaughterhouse Cases,¹⁶ the four dissenting justices, under the lead of Mr. Justice Field, sought to pour into the general words of the Due Process Clause the eighteenth century "law of nature" philosophy. This attempt gradually prevailed and Mr. Justice Field's dissent in effect established itself as the prevailing opinion of the Supreme Court.¹⁷ In *Allgeyer v. Louisiana*,¹⁸ we reach the crest of the wave. The break comes with the *Lochner* case.¹⁹ Mr. Justice Holmes has given us the explanation for this attempt to make a permanent prohibition of a temporary theory.

"It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong. I think that we have suffered from this misfortune, in State courts at least, and that this is another and very important truth to be extracted from the popular discontent. When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear²⁰ was translated into doctrines

¹³ *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 616.

¹⁴ *Galveston, etc. Ry. v. Texas*, 210 U. S. 217, 225.

¹⁵ *Kansas Southern Ry. v. Kaw Valley District*, 233 U. S. 75, 79.

¹⁶ 16 Wall. (U. S.) 36.

¹⁷ See Dean Pound, "Liberty of Contract," 18 *YALE L. J.* 454, 470.

¹⁸ 165 U. S. 578.

¹⁹ 198 U. S. 45.

²⁰ That this fear has been an unconscious factor he has told us elsewhere: "When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the de-

that had no proper place in the Constitution or the common law. Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious — to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.”²¹

Against this subtle danger of the unconscious identification of personal views with constitutional sanction he has battled incessantly. Enough is said if it is noted that the tide has turned. The turning point is the dissent in the *Lochner* case. It still needs to be quoted.

“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the questions whether statutes embodying them conflict with the Constitution of the United States.”²²

His general attitude towards the Fourteenth Amendment at once reflects his whole point of view towards constitutional interpretation and is a clue to the hundreds of opinions in which it is applied. In all the variety of cases the opinions of Mr. Justice Holmes show the same realism, the same refusal to defeat life by formal logic, the same regard for local needs and local habits, the same deference to local knowledge. He recognizes that government necessarily means experimentation; and while the very essence of constitutional limi-

cisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.” “The Path of the Law,” 10 HARV. L. REV. 457, 467.

²¹ SPEECHES by Oliver Wendell Holmes, “Law and the Court,” Speech at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913, 98, 101-102.

²² *Lochner v. New York*, 198 U. S. 45, 75-6.

tations is to confine the area of experimentation, the limitations are not self-defining, and they were intended to permit government. Necessarily, therefore, the door was not meant to be closed to trial and error. "Constitutional law, like any other mortal contrivance, has to take some chances."²³ The ascertainment of the limitations must be, as recently put by Mr. Justice McKenna, through "a judgment from experience as against a judgment from speculation."²⁴ That means that opportunity must be allowed for vindicating reasonable belief by experience.

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."²⁵

"Again we cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a state."²⁶

"Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the State Legislature was wrong in its facts. *Adams v. Milwaukee*, 228 U. S. 572, 583. If we might trust popular speech in some States it was right — but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."²⁷

"If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens

²³ *Blinn v. Nelson*, 222 U. S. 1, 7.

²⁴ *Tanner v. Little*, Sup. Ct. Off., No. 224, decided March 6, 1916.

²⁵ *Noble State Bank v. Haskell*, 219 U. S. 104, 110.

²⁶ *Otis Co. v. Ludlow Co.*, 201 U. S. 140, 154.

²⁷ *Patson v. Pennsylvania*, 232 U. S. 138, 144-5.

of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.”²⁸

The application of the Fourteenth Amendment, as thus approached, falls, broadly speaking, into four great classes of cases: legislation called forth by the modern industrial system, regulation of utilities, eminent domain, and taxation. As to each of these classes an illustration or two will have to suffice.²⁹ To discuss Mr. Justice Holmes’s opinions is to string pearls.

In industrial and social legislation the fighting, of course, has been around the conception of “liberty.” Mr. Justice Holmes has been unswerving in his resistance to any doctrinaire interpretation. The effectiveness of his fight lies mostly in the acuteness with which he has disclosed when a claim is doctrinaire. Perception of the forces of modern society and persistent study of economics have enabled him to translate large words in terms of the realities of existence.

“If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real

²⁸ *Interstate Ry. Co. v. Massachusetts*, 207 U. S. 79, 87.

²⁹ Since his accession to the Supreme Court in 1902, Mr. Justice Holmes has written about 500 opinions; of these, about 200 involve constitutional law. In view of the increase of work before the Court in recent years, Mr. Justice Holmes has already participated in decisions extending considerably over one-fifth in volume of the decisions of the Court since 1789. One is reminded of his remarks at a dinner given him by the Boston Bar when he became Chief Justice of the Massachusetts Supreme Court: “I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole *corpus* with its roots in history and its justifications of expedience real or supposed!

“Alas, gentlemen, that is life. I often imagine Shakespeare or Napoleon summing himself up and thinking: ‘Yes, I have written five thousand lines of solid gold and a good deal of padding — I, who would have covered the milky way with words which outshone the stars!’ ‘Yes, I beat the Austrians in Italy and elsewhere: I made a few brilliant campaigns, and I ended in middle life in a *cul-de-sac* — I, who had dreamed of a world monarchy and Asiatic power.’ We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done.” From *SPEECHES* by Oliver Wendell Holmes, Speech at a dinner given to Chief Justice Holmes by the Bar Association of Boston on March 7, 1900, 82, 83.

difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state."³⁰

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. *Holden v. Hardy*, 169 U. S. 366, 397; *Chicago, Burlington & Quincy R. v. McGuire*, 219 U. S. 549, 570. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair v. United States*, 208 U. S. 161, and *Lochner v. New York*, 198 U. S. 45, should be overruled."³¹

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . .

"It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts."³²

What makes these opinions significant beyond their immediate expression is that they come from a man who, as a judge, enforces statutes based upon economic theories which he does not share, and of whose efficacy in action he is sceptical.³³ The judicial function here finds its highest exercise.

In the regulation of utilities we have an excellent illustration of the need of balancing interests and the delicacy of the task. Mr. Justice Holmes has both laid down the general considerations and illustrated their application.

³⁰ *Quong Wing v. Kirkendall*, 223 U. S. 59, 63.

³¹ *Coppage v. Kansas*, 236 U. S. 1, 26-7.

³² *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 161.

³³ (See, e. g., *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 411-412.)

"An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is naught. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit." ³⁴

"We express no opinion whether to cut this telephone company down to six per cent by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings $5\frac{1}{7}$ per cent with a reduction by the ordinance to $3\frac{6}{17}$ per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand." ³⁵

The cases arising under the power of eminent domain furnish a striking illustration of the element of relativity in constitutional law. It is settled that a State can take private property for "public purposes." What is "a public purpose"? The Supreme Court has refused to allow the States to be fettered by formula on this subject. Time and place and local need as determined by the local legislature must govern. Mr. Justice Holmes the other day again gave point to these considerations in sustaining the growing control by States over water power.

"In the organic relation of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say

³⁴ Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655-669.

³⁵ Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430, 436.

what is. The inadequacy of use by the general public as a universal test is established." ³⁶

One would expect Mr. Justice Holmes to allow no finicky or textual arguments to interpose the Constitution as a barrier to the States' taxing power. In his opinions on taxation matters there is an amiable appreciation of the tantalizing difficulty of statesmen to make taxation in any form palatable.

"In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expression of the Amendment must not be allowed to upset familiar and long established methods and processes by a formal elaboration of rules which its words do not import.

". . . The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the Court of Appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes substituting count for weight." ³⁷

"There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer v. Merchant*, 125 U. S. 345, it is more important for this court to

³⁶ *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30, 32.

³⁷ *Hatch v. Reardon*, 204 U. S. 152, 158, 159-60.

avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed.”³⁸

Throughout, these opinions recognize the pressure of diverse interests of the State, the problems that confront the effort to compose those interests, and the fruitful recognition that the Constitution was not meant to thwart such obligations of statesmanship. It is just this perception of statesmanship that is dominant. So, when the very foundation of the life of a State is challenged, when the trusteeship of the State in its natural resources is involved, we get at once an eloquent and profound support of such trusteeship.

“. . . it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute without compensation, in the exercise of police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

“We are of opinion, further, that the constitutional power of the state

³⁸ *Louisville v. Barber Asphalt Co.*, 197 U. S. 430, 433-4.

“Accidental inequality is one thing, intentional and systematic discrimination another.” *First National Bank v. Albright*, 208 U. S. 548, 552.

This leads him also to scrutinize shrewdly a contract of exemption from taxation:

“The construction of the statute by the Court of Appeals although not conclusive upon its meaning as a contract is entitled to great deference and respect. As a literal interpretation it is undeniably correct, and we should not feel warranted in overruling it because of a certain perfume of general exemption.” *Interborough Transit Co. v. Sohmer*, 237 U. S. 276, 284.

to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."³⁹

Only the shallow would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification. He has been imaginatively regardful of the sensibilities of the States, particularly in State controversies, and he has shown every deference, even as a matter of "equitable fitness or propriety,"⁴⁰ to agencies of the States. In thus manifesting every rightful regard for self-reliant individual States, he to that extent only the more sought to maintain, so far as the judiciary plays a part, the full vigor of our dual system. From his opinions there emerges a conception of a Nation adequate to its great national duties and consisting of confederate States, in their turn possessed of dignity and power available for the diverse uses of civilized people.

In their impact and sweep and fertile freshness, the opinions have been a superbly harmonious vehicle for the views which they embody. It all seems so easy, — brilliant birds pulled from the magician's sleeve. It is the delusive ease of great effort and great art. He has told us that in deciding cases "one has to try to strike the jugular," and his aim is sure. He has attained it, as only superlative work, no matter how great the genius, can be attained. "The eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials. 'The point of contact' is the formula, the place where the boy got his finger pinched; the rest of the machinery doesn't matter." So we see nothing of the detailed draughtsmanship. We get, like Corot's pictures, "magisterial summaries."

We get more: we get the man. Law ever has been for him one of the forces of life, a part of it and contributing to it. Back of his approach to an obscure statute from Oklahoma or Maine we catch

³⁹ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 356-7.

⁴⁰ *Prentiss v. Atlantic Boat Line Co.*, 211 U. S. 210, 228.

a glimpse of his approach to life. That glimpse each must get and treasure for his own. For me, another artist unawares has expressed the clue:

"Why is there a limited authority in institutions? Why are compromise and partial coöperation practicable in society? Why is there sometimes a right to revolution? Why is there sometimes a duty to loyalty? Because the whole transcendental philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostasized; because the will is absolute neither in the individual nor in humanity; because nature is not a product of the mind, but on the contrary there is an external world, ages prior to any *a priori* idea of it, which the mind recognizes and feeds upon; because there is a steady human nature within us, which our moods and passions may wrong, but cannot annul; because there is no absolute imperative, but only the operation of instincts and interests more or less subject to discipline and mutual adjustment; and finally because life is a compromise, an incipient loose harmony between the passions of the soul and the forces of nature, forces which likewise generate and protect the souls of other creatures, endowing them with powers of expression and self-assertion comparable to our own and with aims not less sweet and worthy in their own eyes; so that the quick and honest mind can not but practise courtesy in the universe, exercising its will without vehemence or forced assurance, judging with serenity, and in everything discarding the word absolute as the most false and the most odious of words." ⁴¹

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⁴¹ George Santayana, "German Philosophy and Politics," 12 J'L OF PHIL., PSYCHOL., ETC., 645, 649.

Note: Following is a list of constitutional decisions containing opinions by Mr. Justice Holmes, arranged according to topic:

FOURTEENTH AMENDMENT

Police Power: Social legislation, utility regulation, foreign corporations, procedural legislation, etc.

Otis v. Parker, 187 U. S. 606; Brownfield v. South Carolina, 189 U. S. 426; Anglo American Co. v. Davis Co., No. 1, 191 U. S. 373; Same v. Same, No. 2, 191 U. S. 376; Rogers v. Alabama, 192 U. S. 226; Central Stockyards v. Louisville Ry., 192 U. S. 568; Rippey v. Texas, 193 U. S. 504; Missouri, Kansas & Texas Ry. v. May, 194 U. S. 267; Aikens v. Wisconsin, 195 U. S. 194; Lochner v. United States, 198 U. S. 45, 74 (dissent); C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 595 (dissent); Otis Co. v. Ludlow Co., 201 U. S. 140; Soper v. Lawrence Brothers Co., 201 U. S. 359; Rawlins v. Georgia, 201 U. S. 638; Cox v. Texas, 202 U. S. 446; National Council v. State Council, 203 U. S. 151; Patterson v. Colorado, 205 U. S. 454; Interstate Ry. Co. v. Massachusetts, 207 U. S. 79; Hudson County Water Co. v. McCarter, 209 U. S. 349; Moyer v. Peabody, 212 U. S. 78; Louisville Railroad Co. v. Central Stockyards Co., 212 U. S. 132; Scott County Co. v. Hines, 215 U. S. 336; King v. West Virginia, 216 U. S. 92; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358; Northern Pacific Ry. v. North Dakota, 216 U. S. 579; Standard Oil v. Tennessee, 217 U. S. 413; Noble State Bank v. Haskell, 219 U. S. 104; Assaria State Bank v. Dolley, 219 U. S. 121; Engel v. O'Malley, 219 U. S. 128; Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; Blinn v. Nelson, 222 U. S. 1; Quong Wing v. Kirkendall, 223 U. S. 59; Collins v. Texas, 223 U. S. 288; Cedar Rapids Co. v. Cedar Rapids, 223 U. S. 655; Western Union Tel. Co. v. Richmond, 224 U. S. 160; Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430; Central Lumber Co. v. South Dakota, 226 U. S. 157; Abilene Bank v. Dolley, 228 U. S. 1; Madera Water Works v. Madera, 228 U. S. 454; Seattle, Renton & So. Ry. v. Linhoff, 231 U. S. 568; Hobbs v. Head & Dowst Co., 231 U. S. 692; Bacon v. Rutland Co., 232 U. S. 134; Patsone v. Pennsylvania, 232 U. S. 138; Chicago, Milwaukee Ry. Co. v. Polt, 232 U. S. 165; San Joaquin Co. v. Stanislaus County, 233 U. S. 454; Smith v. Texas, 233 U. S. 630 (dissent); International Harvester v. Kentucky, 234 U. S. 217; Keokee Coke Co. v. Taylor, 234 U. S. 224; Willoughby v. Chicago, 235 U. S. 45; Coppage v. Kansas, 236 U. S. 1, 26 (dissent); Grant Timber Co. v. Gray, 236 U. S. 133; Fox v. Washington, 236 U. S. 273; Frank v. Magnum, 237 U. S. 309, 345 (dissent).

Taxation

Blackstone v. Miller, 188 U. S. 189; Kidd v. Alabama, 188 U. S. 730; San Diego Co. v. Jasper, 189 U. S. 439; Missouri v. Dockery, 191 U. S. 165; Fargo v. Hart, 193 U. S. 490; Wright v. Louisville & Nashville R. Co., 195 U. S. 219; Seattle v. Kelleher, 195 U. S. 351; Coulter v. Louisville & Nashville R. Co., 196 U. S. 599; Louisville & Nashville R. Co. v. Barber Asphalt Co., 197 U. S. 430; Savannah Ry. v. Savannah, 198 U. S. 392; Union Transit Co. v. Kentucky, 199 U. S. 194, 211 (dissent); Carroll v. Greenwich Insurance Co., 199 U. S. 401; Minnesota Iron Co. v. Kline, 199 U. S. 593; New York Central R. v. Miller, 202 U. S. 584; Hatch v. Reardon, 204 U. S. 152; C. B. & Q. Ry. Co. v. Babcock, 204 U. S. 585; Martin v. District of Columbia, 205 U. S. 135; Chanler v. Kelsey, 205 U. S. 466, 479 (dissent); Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474; Raymond v. Chicago Traction Co., 207 U. S. 20, 40 (dissent); First National v. Albright, 208 U. S. 548; Paddell v. New York, 211 U. S. 446; Selliger v. Kentucky, 213 U. S. 200; Southern Railway Co. v. Greene, 216 U. S. 400; Louisville & Nashville R. Co. v. Gaston, 216 U. S. 418; Assessors v. New York Life Insurance Co., 216 U. S. 517; Hammond Packing Co. v. Montana, 233 U. S. 331; Wheeler v. New York, 233 U. S. 434; Pullman Co. v. Knott, 235 U. S. 23; Equitable Life Society

v. Pennsylvania, 238 U. S. 143; *Bi Metallic Co. v. Board*, 239 U. S. 441; *Gas Realty Co. v. Schneider Co.*, 240 U. S. 55.

Eminent Domain

Strickley v. Highland Boy Co., 200 U. S. 527; *West Chicago R. Co. v. Chicago*, 201 U. S. 506 (concurring); *Boston Chamber of Commerce v. Boston*, 217 U. S. 189; *McGovern v. New York*, 229 U. S. 363; *New York v. Sage*, 239 U. S. 57; *Mt. Vernon Cotton Co. v. Alabama*, 240 U. S. 30.

COMMERCE CLAUSE

Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611; *Hanley v. Kansas City Ry. Co.*, 187 U. S. 617; *Pullman Co. v. Adams*, 189 U. S. 420; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Northern Securities Case*, 193 U. S. 197, 400; *Swift & Co. v. United States*, 196 U. S. 375; *Chattanooga Co. v. Atlanta*, 203 U. S. 390; *Rearick v. Pennsylvania*, 203 U. S. 507; *The Employer's Liability Case*, 207 U. S. 463, 541 (dissent); *Adair v. United States*, 208 U. S. 161, 190 (dissent); *Galveston Ry. Co. v. Texas*, 210 U. S. 217; *Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612 (concurring); *Keller v. United States*, 213 U. S. 138, 149 (dissent); *Western Union v. Kansas*, 216 U. S. 1, 52 (dissent); *Pullman Co. v. Kansas*, 216 U. S. 56, 75; *Standard Oil Co. v. Tennessee*, 217 U. S. 413; *Southern Ry. v. King*, 217 U. S. 524, 537 (dissent); *Dozier v. Alabama*, 218 U. S. 124; *Engel v. O'Malley*, 219 U. S. 128; *Oklahoma v. Wells Fargo & Co.*, 223 U. S. 298; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160; *Southern Railway v. Burlington Lumber Co.*, 225 U. S. 99; *Darnell v. Indiana*, 226 U. S. 390; *Kansas City Ry. v. Kaw District*, 233 U. S. 75; *Western Union Tel. Co. v. Brown*, 234 U. S. 542; *Pipe Line Cases*, 234 U. S. 548; *United States v. Portale*, 235 U. S. 27; *Davis v. Virginia*, 236 U. S. 697; *Charleston & Car R. R. v. Varnville Co.*, 237 U. S. 597.

FIFTH AMENDMENT

United States v. Sing Tuck, 194 U. S. 161; *Kepner v. United States*, 195 U. S. 100, 134 (dissent); *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S. 8; *Matter of Moran*, 203 U. S. 96; *Ellis v. United States*, 206 U. S. 246; *Paraiso v. United States*, 207 U. S. 368; *Adair v. United States*, 208 U. S. 161, 190 (dissent); *Keller v. United States*, 213 U. S. 138, 149 (dissent); *Weems v. United States*, 217 U. S. 349, 413 (dissent); *Holt v. United States*, 218 U. S. 245; *Matter of Harris*, Bankrupt, 221 U. S. 274; *Hyde v. United States*, 225 U. S. 347, 384 (dissent); *Breese & Dickerson v. United States*, 226 U. S. 1; *Heike v. United States*, 227 U. S. 131; *Johnson v. United States*, 228 U. S. 457; *Tiaco v. Forbes*, 228 U. S. 549; *Norfolk & Western Ry. Co. v. Dixie Co.*, 228 U. S. 593; *Nash v. United States*, 229 U. S. 373; *Herbert v. Bicknell*, 233 U. S. 70; *Gompers v. United States*, 233 U. S. 604; *Pipe Line Cases*, 234 U. S. 548; *United States v. Portale*, 235 U. S. 27; *Brown v. Elliott*, 225 U. S. 392, 402 (dissent).

IMPAIRMENT OF OBLIGATION OF CONTRACT

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; *Muhlker v. Harlem R. R. Co.*, 197 U. S. 544, 571 (dissent); *Savannah Ry. v. Savannah*, 198 U. S. 392; *Tampa Co. v. Tampa*, 199 U. S. 241; *National Council v. State Council*, 203 U. S. 151; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370 (dissent); *Arkansas Ry. Co. v. Louisiana & Arkansas Ry.*, 218 U. S. 431; *Fisher v. New Orleans*, 218 U. S. 438; *Calder v. Michigan*, 218 U. S. 591; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655; *Pomona v. Sunset Tel. Co.*, 224 U. S. 330; *Murray v. Pocatello*, 226 U. S. 318; *Pittsburgh Steel Co. v. Baltimore Eq. Society*, 226 U. S. 455; *Madera Water Works v. Madera*, 228 U. S. 454; *Trimble v. City of Seattle*, 231 U. S. 683; *Hobbs v. Head & Dowst Co.*,

231 U. S. 692; *Alabama v. Schmidt*, 232 U. S. 168; *Interborough Transit v. Sohmer*, 237 U. S. 276.

DEPRIVATION OF PRIVILEGES AND IMMUNITIES (OTHER THAN V AND XIV AMENDMENTS)

Madisonville Traction Co. v. St. Bernard Co., 196 U. S. 239, 257 (dissent); *Chambers v. Baltimore & Ohio Railroad*, 207 U. S. 142, 151 (concurring); *Flaherty v. Hanson*, 215 U. S. 515, 527 (dissent); *United States v. Moseley*, 238 U. S. 383.

ADMIRALTY

The Blackheath, 195 U. S. 361; *The Hamilton*, 207 U. S. 398.

PATENT AND COPYRIGHT

Bleistein v. Donaldson Lithographing Co., 188 U. S. 239; *Kalem Co. v. Harper Bros.*, 222 U. S. 55.

SEPARATION OF POWERS

James v. Appel, 192 U. S. 129; *Prentiss v. Atlantic Coast Line*, 211 U. S. 210.

SUITS BETWEEN OR BY STATES

Missouri v. Illinois, 200 U. S. 496; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230; *Missouri v. Kansas*, 213 U. S. 78; *Virginia v. West Virginia*, 220 U. S. 1; *Virginia v. West Virginia*, 222 U. S. 17.

FULL FAITH AND CREDIT CLAUSE

German Savings Bank v. Dormitzer, 192 U. S. 125; *Jaster v. Currie*, 198 U. S. 144; *Louisville & Nashville Ry. Co. v. Deer*, 200 U. S. 176; *Haddock v. Haddock*, 201 U. S. 562, 628 (dissent); *Northern Assurance Co. v. Grand View Ass'n*, 203 U. S. 106; *Fauntleroy v. Lum*, 10 U. S. 230; *Bagley v. General Fire Extinguisher Co.*, 212 U. S. 477; *Fall v. Eastin*, 215 U. S. 1, 14 (concurring); *Michigan Trust Co. v. Ferry*, 228 U. S. 347; *Burbank v. Ernst*, 232 U. S. 162; *Hodd v. McGehee*, 237 U. S. 611.

MISCELLANEOUS CASES

Battle v. United States, 209 U. S. 36 (prohibition of bribery); *Selliger v. Kentucky*, 213 U. S. 200 (export clause, art. I, sec. 10); *Flaherty v. Hanson*, 215 U. S. 515, 527 (dissent — impairment of federal taxing power); *Strassheim v. Daily*, 221 U. S. 280 (state rendition); *Glucksman v. Henkel*, 221 U. S. 508 (extradition); *Abilene National Bank v. Dolley*, 228 U. S. 1 (state restrictions against national banks); *Kener v. La Grange Mills*, 231 U. S. 215 (bankruptcy); *Bailey v. Alabama*, 219 U. S. 219, 245 (dissent — Thirteenth Amendment).

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EDITORIAL

THE contributions gathered together in this issue of the REVIEW are offered as a tribute to Mr. Justice Holmes, on the happy occasion of his seventy-fifth birthday. That English, European, and American jurists should join this tribute, despite the sorrows and distractions of the great war, shows how deeply the legal philosophy of the civilized world feels itself indebted to him. In England and on the Continent, his immortal book, "The Common Law," has already brought him renown beyond that of any American jurist since Story. To Americans, perhaps, the creative labor of his twenty years on the bench, woven permanently into the fabric of our common law, a part of our life and of the life of coming generations, presents an even greater claim to gratitude and admiration.

Those who have been connected with the Harvard Law School have always felt a peculiar bond of friendship for Justice Holmes. As a student at the School, as teacher and lecturer, as president of the Harvard Law School Association, as an intimate friend and associate of the men whose names make up the history of the School, he has himself been

no small factor in its growth and progress. To many a student his luminous opinions, with their freshness and liberality of view, and their background of culture and philosophy, have given the first real appreciation of law as a genuine human science. To Oliver Wendell Holmes, LL.B. '66, judge, jurist, and philosopher, the Editors of the HARVARD LAW REVIEW gratefully dedicate this number.

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A COMPENSATION PLAN FOR RAILWAY ACCIDENT CLAIMS

I

CRITICISM of the administration of justice has been chiefly directed at matters of procedure; delay is the evil as to which complaint is traditional. Consideration of what questions should be handled by the courts is, however, even more important than the consideration of how court questions are handled. As to many cases, the true criticism is not that trials should take place sooner, but that trials should not take place at all. Certain conflicts of interest are being dealt with to-day upon principles bound to bring about court contests, which by appropriate legislation might be dealt with upon other principles permitting speedy adjustments without suits.

More numerous than any other single class of cases in most city courts are suits against railroad and street railway corporations for damages on account of personal injuries. In some cities from a third to a half of the time of jury sessions is occupied with these cases. The principles governing the rights and liabilities of the parties in such suits are well settled. Those rules are, however, such as to invite if not to necessitate the litigation of almost every accident claim of importance. Not only do the cases have to be fought out in the trial courts; there is also at least in many states strong reason for the defeated party to carry his case to the court of last resort. Had these rules been worked out for the express

purpose of encouraging litigation and multiplying suits they would reflect great credit upon their framers.

As the law now stands, it is not possible for a passenger who has been injured in a railway accident to learn without suit the amount of damages which can be recovered. Suppose, for example, that Mrs. Smith has sustained a fracture of an arm as the result of a sudden lurch of a street car in which she was riding. To become informed as to her rights against the company she must consult a lawyer. The lawyer will tell her that her right to recover damages from the company depends in the first place upon her ability to prove that the lurch was caused by some fault upon the part of an employee of the company. The fault might have been in the operation of the car, and to prove this it would be necessary to show how a car should have been operated under the conditions which prevailed at the time of the accident, and just how the motorman or conductor failed to observe the proper standard of conduct. Or the negligence might have consisted in the use of improper appliances, or in failing to keep up the equipment of a car or the condition of the road bed and tracks. To establish such negligence it would probably be necessary to call electrical engineers, civil engineers, or other experts.

Mrs. Smith would be further told that she must be prepared to show that she was looking out properly for her own safety or at least to meet any evidence of carelessness upon her part which might be put in by the company; for if she herself was even partially to blame she could not recover, no matter what was the carelessness of the employees. She would be informed that if she proved the negligence of an employee of the company, and her own freedom from blame, she would be entitled to damages, including not only her full monetary loss, in which would be included every expense, except her attorney's fees, but also indemnity for suffering and for any resulting physical defect or trouble.

Somewhat bewildered by these details Mrs. Smith might ask, "But just how much can I recover, and what certainty is there of a verdict in my favor?" The only honest answer in the majority of cases is: "Well, that all depends upon how you and your case will happen to strike the jury." If she inquires when she will be paid, the answer would probably be that to secure payment within a year would be remarkably fortunate, and that she might have to

wait two or more years before actually recovering. An expensive, uncertain, and tedious suit may thus be the only alternative to a small settlement.

Strange as it may seem, the situation of the company under the present law is almost equally unsatisfactory. It is true that the company has much better facilities and opportunity for getting evidence than has Mrs. Smith, but unless the company secures overwhelming evidence in its favor the case will be allowed by the judge to go to the jury for decision, and what the jury will do is likely to be based less upon the evidence than upon the natural feeling in favor of the injured individual as against the impersonal corporation. A modern lawyer, discarding ancient similes, would be likely to venture a restatement of a certain spiritual truth, as follows: "It is as difficult for a rich man to enter the Kingdom of Heaven as for a large corporation to obtain a verdict in a personal injury case."

Besides this natural prejudice there is for the company the constant menace of fraud. Stirring up and prosecuting personal-injury cases has become the trade of certain attorneys. The "ambulance chaser" is the tool that draws in their victims. In suits so instituted there is a premium upon perjury — perjury to establish liability, perjury to enhance damages. There are doctors who make a business of skilfully instructing plaintiffs in the simulation of injuries. To ward off verdicts often secured by such methods, it is almost inevitable that claim agents of companies should sometimes resort to sharp methods. A bad odor emanates from the whole field of this personal-injury litigation.

Facilities for the trial of these cases are provided by the state, at large expense. The cost of a single day's sitting of the jury session may be three hundred dollars, and the trial of an ordinary accident case may take three or four days. Under the system generally in force all this court expense is borne by the state. Large sums raised by taxation are thus expended in providing the machinery for carrying on these wearisome disputes.

There is no sound business reason for maintaining this system, cumbrous, trouble breeding, and costly in its operation. An altogether simpler method is available for the adjustment of such claims — a method based upon the ideas which have in recent years found beneficent expression in the workmen's compensation acts.

II

The idea underlying the present system is that fault is the true ground for the determination of tort as well as of criminal liability. If fault of the defendant caused the accident, the defendant is liable to the plaintiff; if there was no fault there is no liability; and if there was as a contributing cause fault on the part of the plaintiff, there is no liability. Once liability is established, the offender must do everything that money can do to wipe out the fault. The exact amount of damages, both financial and physical, must be determined by a jury and the offending defendant must pay the injured person the full sum.

At first blush this theory seems just and reasonable, although manifestly the attempt to apply it under present conditions results in uncertainty, trouble, and waste. The present rules, however, do not in fact possess even the meager merit of logical coherence, for the money which under the rule as now applied goes in reparation for the fault is not the money of those guilty of the fault. Fault is always personal — it is that of an engineer, of a motorman, of an inspector — but the money that goes in these cases to make good the fault is the money of the stockholders who constitute the company. The conduct of the stockholders, or even of the directors who immediately represent the stockholders, is not even an issue in the suits. Under the present rules the conduct of one man or set of men is elaborately investigated in order to determine and fix the liability of another man or set of men.

An insurance system for dealing with accident claims would be based upon two distinctive principles and a distinctive method. The first principle is, of course, that of liability irrespective of negligence, liability which would be absolute except when the injury was caused by gross or wilful carelessness of the passenger. This rule is founded upon conviction that the cost of the transportation service should include the expense of insuring the passenger against all risks peculiar to the service for which he pays his fare. Its application would largely eliminate difficult and costly investigation of the causes of each accident.

The second principle would be that of limited liability, that is, liability for a fixed reasonable sum for each injury or loss, instead of for such amount as a jury may happen to assess as representing the full money equivalent of the injury. This principle is founded

upon the belief that exact money compensation for physical injury, now supposed to be determined by juries, is impossible, and that if companies are held as insurers and not as wrongdoers there is no reason why the entire risk involved in the transportation service should be borne by the transportation agency. If the company provides a reasonable but prompt and sure compensation, persons who believe that the statutory amount of damages is insufficient to offset losses which they may sustain may well utilize the accident insurance companies to furnish them with additional protection. Application of this rule would greatly simplify trials of the nature and extent of injuries. The method of administration of the system would be by a commission, which with its own inspectors and experts would make such investigation of each accident as is necessary within a very short time after it occurred — a few days at most, instead of many months or even years.

The substitution of statutory damages for jury damages of course presents practical difficulties. Medical expenses and loss of earnings are, however, helps to a definite basis in many cases, although the latter test cannot be followed as largely as it is under the workmen's compensation acts. Arbitrary sums will have to be allotted for different injuries — a broken leg will command one sum, a severed hand or a nervous shock another sum. It is not in fact possible to estimate bodily injury in terms of money, yet that is precisely what the jury is supposed to do to-day. Each jury flounders about, takes off something from the size of the verdict because of doubts about liability, perhaps averages the estimates of different members, and blunders to a result.¹ A table worked out in advance by a commission, after the study of each general type of case, would seem to be likely to be at least as satisfactory as the haphazard results reached by juries.

III

The handling of railroad and street railway accident claims upon an insurance basis instead of upon the present fault basis would result in prompt and sure payment to the persons injured of amounts fixed by law and not dependent upon the energy and skill of counsel. If Mrs. Smith should be injured she could learn from a public officer the amount which she was entitled to receive from the company.

¹ See elaborate notes upon jury verdicts in 58 L. R. A. (N. S.) (1915), pp. 30-516.

She would receive the entire amount which the company paid out on account of her claim without paying tribute to intermediaries. Payments would begin to come in shortly after the accident, at the time when she most needed the money.

At first sight this plan seems to have the defect that characterizes so many schemes of reform — somebody else must pay for it. Railroad and street railway companies are not very prosperous to-day; undue burdens upon them will mean less satisfactory service. But the handling of accident claims upon the basis here suggested need not increase the outlay of the companies — it should in fact decrease it. As already suggested, if passengers who are injured are to receive their damages without contest, the amount payable in individual cases should be considerably less than the amount of the verdicts which may be assessed under the present system. Furthermore, the companies would be relieved of heavy expense in the investigation and settling of claims and in the defending of suits. The portion of the total outlay under the present system that goes for mere expense of administration is astonishingly large. There should also be a reduction if not an elimination of payments which are secured by fraud; for with the amount of possible recovery limited there would be less inducement for fraud, and with prompt and impartial investigation of cases by a body with full powers, the chances for recovery upon dishonest claims would be slight.

Seven or eight years ago such a plan might have been called radical; to-day it must be regarded as merely an extension of tried methods. In that interval has taken place the development in this country of the workmen's compensation plans, which are simply an application of insurance principles to accidents sustained by workmen in the course of employment. This system, at first opposed by many employers, is now generally recognized to have improved the relations between employer and employee, to have operated powerfully toward the lessening of accidents, and to have eliminated much bitter litigation.

Under our constitutional system, a new plan for the money adjustment of controversies of course presents legal issues. Does the plan here suggested fall under the ban of the Fourteenth Amendment, as involving a taking of property without due process of law, or a denial of the equal protection of the laws? Can a system be legally enforced which takes away the right to a jury trial assured

by state constitutions? It is submitted that without conflicting with constitutional limitations (1) railway companies may be made liable to injuries to passengers sustained by accident in the course of transportation although not caused by negligence; (2) passengers may be required to accept a fixed or limited compensation for such injuries; (3) commission awards may be substituted for jury awards; and (4) if passengers cannot be compelled to accept the statutory plan, they may be placed in such a legal position that they will voluntarily accept it.

IV

Negligence cannot be said to be the only basis for tort liability at common law. It is a familiar historical fact that according to primitive legal conceptions in England, as in Rome and elsewhere, one was liable for all the consequences of his acts, irrespective of the care with which the acts were performed.² To early lawgivers it seemed just to visit the results of an act upon the source of the act; the instrument of harm, either animate or inanimate, was held responsible for the harm. By slow steps English courts came to recognize that as it was necessary for each individual to act in order to live and carry on his business, all who lived in society must in return for freedom to act take the chance of sustaining harm through acts of others performed with ordinary care. Courts ceased to hold that a man acts at his peril; losses unintentionally caused were, in the absence of negligence on the part of the doer, to lie where they fell.²

This principle covered such a wide field that it has, at times, been spoken of as the only principle of tort liability known to common law in its maturity.³ Yet the idea that liability may properly be imposed on grounds other than that of fault has always persisted. Thus the owner of domestic animals which escape and do damage to the land of others is held liable for such damage, even though he exercises

² Professor J. H. Wigmore, *Responsibility for Tortious Acts*, 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 474; also in 7 *HARV. L. REV.* 315; HOLMES, *COMMON LAW*, Lecture III, pp. 86-94; Professor Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 *HARV. L. REV.* 235, 344.

³ Nelson, C. J., in *Harvey v. Dunlop, Hill and Denio (Lalor)* 193 (N. Y., 1843) and quoted by HOLMES, *COMMON LAW*, pp. 94, 95, "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part."

every possible precaution to prevent such escape,⁴ and since the leading case of *Rylands v. Fletcher*⁵ it has been recognized that at common law one who creates an unusual situation or employs a force which may endanger others may be held liable for injuries which he exercised every precaution to avoid.

Much the most striking case of liability irrespective of fault is, however, the very rule under which accident claims such as are here discussed are daily enforced — the rule of *respondeat superior*. It is according to this rule that the master or employer is held to answer for the fault of his servant or employee, even though he himself is entirely free from blame. This liability of the employer is usually accepted without question as an instance of liability without fault, of "absolute" liability.⁶ Professor Smith quotes a remark of Augustine Birrell in regard to the first workmen's compensation act under which employers were made absolutely liable for injuries to employees: "*Respondeat superior* is a dogma which holds in its arms the new dogma of the new bill."⁷ According to Professor Smith's thinking, this classification of the rule of *respondeat superior* is wholly erroneous — not only is there not "a short step from one of these propositions to the other, . . . there is a chasm between them."⁷ The thought uppermost in Professor Smith's mind was apparently that the rule of *respondeat superior*, far from imposing a liability to a plaintiff where the injury was caused without negligence, merely requires the employer to answer for the negligence of the employee. But the controlling truth which Mr. Birrell had in mind was that in cases falling under the rule, the negligence on account of which the defendant is held is not *his* negligence, but the negligence of another person. The chain of liability is no stronger than its weakest link, and as, under the rule, the employer may be held where he is not himself at fault, the basis of *his* liability cannot be said to be negligence or fault.

The rule of *respondeat superior* has been generally accepted as just, but little has been attempted by the courts in the way of an explana-

⁴ *Wells v. Howell*, 19 Johns. (N. Y.) 385 (1822); *Holladay v. Marsh*, 3 Wendell (N. Y.) 142 (1829).

⁵ *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868).

⁶ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 310, 94 N. E. 431, 446 (1911). Cf. HOLMES, COMMON LAW, p. 6.

⁷ Professor Jeremiah Smith, 27 HARV. L. REV. 254-56.

tion of its logical basis. Ordinarily the judges are content to say, "The act of the servant is the act of the master—*respondeat superior*." This, of course, is not to explain the rule, but merely to assert it in other language.⁸ It is sometimes suggested that the reason for the liability is a necessary assumption that the action would not have happened had the employee been selected with due care;⁹ yet the conduct of the employer in selecting the employee has never been allowed to become an issue in such cases. Lord Brougham stated that the reason was that the master "set the whole thing in motion."¹⁰ But between the act of the master in starting "the thing in motion" and the harm, comes the negligent act of a responsible human being. The law might be satisfied with the legal liability of the responsible human agent who was the immediate cause of the harm. The reason that it is not so satisfied may be the practical one that the employee would not ordinarily be able to pay the damages, and that it is only the employer's liability that prevents a substantial failure of justice.¹¹

⁸ This fiction is of the class which we use because we "lazily prefer to evade accounting for [it] openly and rationally." Wigmore, 7 HARV. L. REV. 399.

⁹ HOLMES, COMMON LAW, p. 6; Wigmore, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, pp. 474, 536, 537.

¹⁰ Duncan v. Findlater, 6 CL. & F. 894, 910 (1839).

¹¹ "In all cases it" (the phrase *respondeat superior*) "points to a merely subsidiary liability of the superior, which can only be enforced against him when it is proved or patent that the inferior cannot pay for his own misdeed. This indicates, as we believe, what has first and last been one of the main causes of 'employer's liability.' Should we now-a-days hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do? We do not answer the question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of large classes of men 'from whom no right can be had' has raised difficult problems for politics and for jurisprudence ever since the days of Æthelstan." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., p. 533. See also Wigmore, 7 HARV. L. REV. 393. Yet Sir Frederick Pollock in discussing the ground for employer's liability passes over the view that the reason is to prevent wrongs from going without practical redress as being "too crude and formless to be a starting-point of fruitful discussion." POLLOCK, ESSAYS IN JURISPRUDENCE, p. 119. Sir Frederick goes on to state: "The liability of an employer to the public for injuries caused by the acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others. The man who conducts an undertaking of any kind, or has it conducted by persons subject to his directions, is held answerable for all operations incident to it being performed with reasonable care." (*Ibid.*, p. 128.) This apparent explanation begs the whole question for the reason that in the latter case the harm is caused not by the use of things or forces by the defendant himself, but by the uncommanded acts or defaults of responsible human beings

The true explanation of the rule may involve the two latter suggestions — the fact that the business in which the accident occurs is carried on for the employer and that he is probably able to indemnify himself out of the proceeds makes it not unjust that he should bear at least a considerable part of the risk of causing injuries to persons in carrying on the business; and the fact that as a class employees have been lacking in financial ability makes it socially expedient that the employer be required to pay. Whatever the explanation of the rule, the fact is that under it the employer is, at common law, held in a way as an insurer: without fault on his own part he is required, by reason of his relations to the parties, to pay damages for injuries caused by the acts of others. True, he happens to be required to answer only for damages that are caused through fault, but the fact that he is held as an insurer only against this limited class of risks should not obscure the true basis of his liability. A *quasi* insurer's liability, absolute liability, or liability without fault it is, and liability of this character may, without doing violations to the body of principles of the common law of which this principle forms a part, be extended to cover harm occurring in the carrying on of the employer's enterprise through causes other than the single mischance of provable negligence.

V

Rules of law are by no means unchangeable; the courts may and do alter the doctrines which they have promulgated. It is the special function of the legislature to make such changes in the laws, whether judicial or legislative in origin, as are needed to meet altered conditions.¹² Constitutional protection of property rights does not in

other than the defendant, and the whole problem is to find why the law is not satisfied with the responsibility of those persons, without making the employer liable also.

¹² *Bertholf v. O'Reilly*, 74 N. Y. 509, 524 (1878). In this decision the court sustained a statute which provided that a landlord who knowingly leased his premises for saloon purposes should be liable for all losses resulting from the intoxication of any person through the sale of liquor by his lessee. The court said: "The act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The Legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the Legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief,

general extend to rules of law. The fellow-servant doctrine, the doctrine of assumption of risk, and of contributory negligence sharply limited the liability of employers for industrial accidents. These rules operated to protect his property to an important degree from liability for claims of employees. Yet in passing upon the employers' liability acts, and the workmen's compensation acts the courts have unhesitatingly held that such rules could be changed or abolished.¹³ What some courts have not recognized is that rules creating new grounds for liability need no higher sanction than rules removing limitations upon liability; rules of each class merely form part of the sum total of the law fixing the legal consequences of acts or events.¹⁴

The requirement of negligence as an essential of liability in tort is little more firmly embodied in the structure of the law than was the doctrine that contributory negligence on the part of the plaintiff is a bar to liability. The question of the legal incidence of losses unintentionally caused was settled not according to unchanging principles of right but largely according to the judges' convictions of social expediency.¹⁵ What was a wise rule under earlier conditions has ceased to be a wise rule, at least in its application to certain well-

in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it." For a more recent declaration to the same effect, see the strong opinion of Sloss, J., in *Western Indemnity Co. v. Pillsbury*, 151 Pac. 398 (Supreme Court of California, 1915). *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1 (1912).

¹³ *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205 (1888); *Hawkins v. Bleakley*, 220 Fed. 378 (Dist. Ct. S. D. Ia., 1914); *Western Indemnity Co. v. Pillsbury*, 151 Pac. 398 (Cal. 1915); *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211 (1914); *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308 (1911); *Mackin v. Detroit-Timken Axle Co.*, 153 N. W. 49 (Mich., 1915); *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71 (1914); *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554 (1911); *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451 (1913); *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911); *Jensen v. Southern Pacific Co.*, 109 N. E. 600 (N. Y. Ct. of App., 1915); *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602 (1912); *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911); *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645 (1913); *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101 (1911).

¹⁴ The decision in the *Ives* case was of course to the effect that to require an employer to answer in damages for injuries not caused by the negligence of an employer constituted a taking of property without due process of law. But see the note upon this case in 24 HARV. L. REV. 647 and the reasoning in *Western Indemnity Co. v. Pillsbury*, *supra*; *State v. Clausen*, *supra*; and *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

¹⁵ *Western Indemnity Co. v. Pillsbury*, *supra*; *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

marked classes of cases, and it is suggested that there is no constitutional reason why the rule should not now be changed. The legislature cannot of course ordain that one man shall answer to another because of some act or event for which he is in no sense responsible; but if a man chooses to perform acts or to have acts performed for his benefit which may even without fault upon his part endanger another, the law may decree that the doer of the act shall assume the risk of resulting damage, at least in part; it may fix the legal consequences of his acts.

In supporting the workmen's compensation acts the courts have not been inclined to sustain the authority of the legislature on the broad ground above suggested. They have rather assumed that the enforcement of liability without negligence involved a taking of property of defendants requiring and finding justification under the police power.¹⁶ They have held that the establishment of a system for the more expeditious and equitable awarding of compensation for industrial accidents with resulting improvement in working conditions was a proper and legitimate exercise of the police power. In the class of cases here dealt with, however, the defendants affected may upon other grounds be subjected to such liability.

VI

Because of the *quasi* public character of their business railroad and street railway companies may be required to pay damages for all injuries happening to passengers, other than those caused by the wilful negligence of the passengers. The absolute liability of carriers for damages to goods which they undertake to transport has long been established. This doctrine may be merely an anomaly in the law, as Professor Beale has maintained,¹⁷ but becoming firmly established in England in the 18th century¹⁸ it was universally accepted in American jurisdictions, the question as to the carriers' right to contract away this liability forming one of the most copious

¹⁶ See particularly *State v. Clausen*, *supra*; *State v. Mountain Timber Co.*, *supra*; *Western Indemnity Co. v. Pillsbury*, *supra*; *Borgnis v. Falk Co.*, *supra*; *Cunningham v. Northwestern Improvement Co.*, *supra*; *Jensen v. Southern Pacific Co.*, *supra*; *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

¹⁷ Beale, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, p. 148.

¹⁸ *Coggs v. Bernard*, 2 Ld. Raymond 909 (1703); *Forward v. Pittard*, 1 T. R. 27 (1785).

sources of litigation.¹⁹ The rule applicable in cases of injuries to passengers, although not settled until well into the 18th century, came to be that the carrier should be held liable only if the injury was caused by some negligence of an employee.²⁰ As the law has stood, therefore, a passenger riding upon a train which also carried his baggage might, if the train were wrecked, recover for the loss of the baggage by mere proof of such loss, while in order to recover for personal injuries sustained in the same accident he would have to prove that the accident was caused by negligence. It would be rather surprising for the courts to hold that this striking difference cannot be eliminated by statute.

Railway transportation is ordinarily carried on by corporations, and the charters of the corporations are generally subject to reasonable amendment. But without resorting to this power the business of transportation may be directly and extensively regulated because it is "affected with a public interest." The defendant in the Ives case happened to be a railway company, and the court in its opinion, holding the Wainwright Compensation Act to be unconstitutional, took occasion to remark that had it applied to railway companies only the result might have been different.²¹ In the second employers' liability act case the court sustained the federal employers' liability law establishing absolute liability for all injuries to employees under the power of Congress to regulate commerce.²²

Statutes imposing liability upon railroads irrespective of negligence on account of damages peculiar to the business, have been repeatedly sustained; the familiar instance is of course that of the laws imposing liability for fires caused by sparks.²³

The United States Supreme Court has indeed already upheld the power of a state to require that railroads shall be absolutely liable for injuries to passengers, except such as are caused by the gross negligence of the passengers or by disregard of known rules of the company.²⁴ And this result was reached even though the statute which

¹⁹ Professor E. C. Goddard, *Liability of the Common Carrier*, 15 COL. L. REV. 399, 475.

²⁰ 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 963, 966, 977; *Ingalls v. Bills*, 9 Metc. 1 (Mass., 1845); *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379 (1869).

²¹ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 305, 310 (1911).

²² *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

²³ 3 ELLIOTT ON RAILROADS, § 1223 and cases cited.

²⁴ *Chicago, Rock Island and Pacific Ry. Co. v. Zernecke*, 183 U. S. 582 (1902).

thus extended the carriers' liability afforded the companies no offsetting limitation of damages or improvement in procedure in damage cases. If the legislature can thus subject companies to absolute liability for unlimited damages irrespective of negligence, it would seem clear that it may require them to pay reasonable fixed sums for all injuries to passengers.

The establishment of such liability would have a direct tendency to make transportation more safe²⁵; it has been found that since employers have been absolutely liable for accidents to employees the number of such accidents has decreased. Such a regulation would relate directly to the character of the service, for the protection of the passenger through compensation against financial losses from injury is as clearly part of the service as protection from the injury itself.

VII

The more difficult question is whether passengers can be required to accept limited statutory damages and to forego the chance of receiving such sums as a jury might award. But if the companies may be subjected to a commission administered statutory compensation plan, it would seem that passengers might be required to accept the plan. The right to regulate springs primarily from the character of the business, not from the character of the person who happens to be affected by the regulations. Companies may be subjected to regulations merely because and in so far as they are engaged in a business affected with a public interest. Why may not persons who use a business which is regulated for their benefit be themselves required to submit to the regulations? If the state can say to the companies, "You must in form or in effect insure your passengers to the extent prescribed by statute against the risks of your service," may it not also say to the passengers, "If you choose to use the service you shall be deemed to have thereby accepted the statutory basis for any injury you may sustain through such service"? The passenger's surrender or loss of the uncertain prospect of jury damages may well be regarded as his contribution to the statutory plan designed to secure him prompt and sure though limited compensation. A similar line of reasoning has been relied

²⁵ See *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

upon in sustaining compulsory workmen's compensation acts under the police power.²⁵

VIII

If passengers cannot be required to accept a statutory compensation plan by following a course similar to that adopted in establishing workmen's compensation acts, they might perhaps be induced to accept it. In order to avoid the question as to the right of the legislature to compel employers to pay for injuries not caused by negligence most of the states which enacted such legislation, after the decision in the Ives case, made their acts elective. In theory the employer could elect either to provide compensation under the act or to pay damages at law as before, but the three defenses — the fellow-servant doctrine, contributory negligence, and assumption of risk — which constituted the bulwark of defense, were abolished by the acts as to employers not electing to come under them, although retained as to actions brought by employees not accepting the statutory compensation. This change, sustained by the courts against attack on constitutional grounds as above indicated,²⁷ had the practical effect of causing employers and employees both to accept the acts. Vigorous attack has been made upon this plan as a piece of legislative trickery,²⁸ but this is by no means the first instance in the development of the law in which fiction has done beneficent service.

For the support of the proposed railway-compensation plan a

²⁵ *State v. Clausen*; *State v. Mountain Timber Co.*; *Western Indemnity Co. v. Pillsbury*; *Jensen v. Southern Pacific Co.*, *supra*. Note 13.

"It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but, if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. . . . He is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive. In return for those benefits, he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyer's fees." *Jensen v. Southern Pacific Co.*, *supra*, at pp. 603, 604.

²⁷ See particularly *Borgnis v. Falk Co.*, *supra*; *Opinion of Justices*, *supra*; *State v. Creamer*, *supra*. See also *Assaria State Bank v. Dolley*, 219 U. S. 121 (1911).

²⁸ Professor Ernst Freund, *Constitutional Status of Workmen's Compensation*, 6 ILL. L. REV. 432.

similar course is open. The right to recover for damages and to have damages assessed by a jury is of little practical value unless it can be enforced against the company itself by means of the doctrine *respondeat superior*, and that doctrine may be modified or abolished.

The rule of *respondeat superior* is a mere doctrine of the common law worked out by the courts in the same manner as such doctrines, as, for example, the fellow-servant, assumption of risk, and contributory negligence doctrines. The phrase is said to have originated in the Statute of Westminster II, but the liability under the statute was purely subsidiary; it could be enforced only when it was proved or patent that the inferior could not pay for his misdeed.²⁹ In the 16th and 17th centuries masters were apparently held for the torts of servants only when they commanded or ratified them.³⁰ In the 18th century, when the employment of large groups of men in occupations in the course of which others might be injured became more general, the courts came to hold that there was an implied command by the master to the servants for the commission of such acts. Later we find the rule flatly laid down that the master or employer is liable regardless of command or ratification, express or implied, for the torts of his servant or employee committed while acting in the scope of their general employment. The rule thus fixing liability slowly worked out by the courts maturing at a comparatively late date, has no higher sanction than any other common-law rule.

No man has a property right in a mere legal doctrine.³¹ When an accident or other event happens existing legal rules give rise to property rights entitled under our system to constitutional protection, but no such rights spring from mere potential accidents or events. As already stated, this general principle was strikingly enunciated by the courts in passing upon the abolition of defenses by the workmen's compensation acts. In a recent decision the New York Court of Appeals has expressly recognized that the rule of *respondeat superior* may be altered or abolished like the rules as to

²⁹ POLLOCK AND MAITLAND, 2 HISTORY OF ENGLISH LAW, 2 ed., p. 533.

³⁰ Wigmore, Responsibility for Tortious Acts, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, pp. 520, 535.

³¹ *Munn v. Illinois*, 94 U. S. 113, 134 (1876); *Martin v. Pittsburg & Lake Erie R. Co.*, 203 U. S. 284 (1906); *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*. See also cases cited in note 13, *supra*.

the common-law defenses.³² In the instance here suggested the application of the principle will operate to restrict the rights of the plaintiffs, while in former cases it has operated to increase them; but the soundness of the principle does not depend upon the result of its application in the particular instance.

Blameworthiness became established as the chief basis of tort liability before the development of modern industrial conditions under which large groups of men of limited financial resources are employed in conducting operations which may cause injury. To meet the changed conditions courts worked out the doctrine of the liability of employers for the faults of employees. This was but a crude device; it imposed unlimited liability, difficult of determination, upon persons not themselves at fault, for a very limited class of the hazards to which the business exposed others. If the legislature now makes a thoroughgoing attempt to meet the necessities and equities of the situation by a frank application of a basis of liability having nothing in common with blameworthiness, then the peculiar doctrine of *respondeat superior* by which the courts roughly met the situation may be abandoned. In a sense the change proposed would be a partial reversion to the earliest principles of liability and there would be no need of preserving a rule which would have become a mere relic of an intermediate stage of development.

Nor is there any sound objection to abolishing the rule of *respondeat superior*, so far as it applies to railway accident cases, while leaving it in full force in its application to other classes of cases. An arbitrary attempt to refuse to apply to some cases a rule applied to all others would constitute a denial of the equal protection of the laws, but no such denial is involved if the cases differently treated fall within a distinct class, as to which the application of a different rule has a logical basis.³³ This is, of course, a well-settled doctrine,

³² *Jensen v. Southern Pacific Co.* *supra*, at p. 604.

"In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of others under the doctrine of *respondeat superior*. That doctrine has been developed by the courts. . . . No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the Legislature."

³³ *Miller v. Wilson*, 236 U. S. 373 (1915) and cases cited; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 209 (1888).

"The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not

and it has been applied even to the abolition of the defense of due care of the defendant in railway negligence cases. Under it the abolition of the three defenses above referred to in employers' liability cases, while leaving them in effect as to other cases, has been sustained.³⁴ It would seem that the courts would hardly fail to hold that accidents to passengers form a special class of cases, and that, if the claims so arising are dealt with under a compensation or insurance plan, the common-law rule of liability in such cases may be restricted even to the point of abolishing the liability of employers for negligence not the result of command or assent of the employer.

IX

The right to a jury trial in actions at law is expressly guaranteed by state constitutions and the elimination of this right which is essential to the success of the plan presents more difficulty than the change as to the rules of liability. The above discussion is intended to suggest grounds for meeting this difficulty. Such express guaranties have not operated to prevent the sustaining of the workmen's compensation acts. Where the act is elective in form as to the employee as well as to the employer there is no difficulty, for the right of a jury trial may of course be waived,³⁵ and is waived by choosing a remedy not enforced by such a trial. In sustaining the compulsory acts under the police power, courts have held that the right to establish the plan necessarily carried with it a right to make it effective by requiring plaintiffs to accept it.³⁶ Some courts have relied upon the ground that the guaranties do not cover remedies administered by commissions, and have held that where the compensation was to be paid from an insurance fund the right to enforce collection was not in any event a controversy at law, such as is contemplated by the guaranty.³⁷ For railway cases it would seem readily possible in shaping the details of the legislation to give

open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

³⁴ See cases cited under note 13, *supra*.

³⁵ *Foster v. Morse*, 132 Mass. 354 (1882).

³⁶ *State v. Clausen, supra*; *State v. Mountain Timber Company, supra*; *Jensen v. Southern Pacific Co., supra*.

³⁷ *Mackin v. Detroit-Timkin Axle Co., supra*; *Borgnis v. Falk Co., supra*; *State v. Creamer, supra*; *Cunningham v. Northwestern Improvement Co., supra*.

plaintiffs such a right against an insurance fund, rather than anything which could be called an action against the company.

The foregoing is not submitted as an exhaustive consideration of any of the practical or legal questions involved, but in the hope of starting a discussion which may lead to the working out and adoption of a plan having the supreme merit of creating another great class of cases in which the remedy is simple, prompt, and effective. In establishing such a plan for the adjustment of claims for injuries to passengers it may be possible to provide similar compensation for injuries caused by railways to persons other than passengers; but such an extension presents certain issues not discussed in this article.

Arthur A. Ballantine.

BOSTON.

WAIVER OR ELECTION

REFERRING to a recent South Carolina case¹ in which a defending insurance company pleaded forfeiture of the policy by breach of a condition, and the plaintiff replied that the condition had been waived, the HARVARD LAW REVIEW commentator on "Recent Cases" wrote as follows:

"The principal case can only be supported on the theory that the insurer has merely an election to avoid the policy, which can only be taken advantage of by promptly displaying an intent to do so. See *Provincial Ins. Co. v. Leduc*, 6 P. C. 224, 243. This theory, which removes from the insured the burden of proving a waiver, has been ably supported. See J. S. Ewart, "Waiver in Insurance Cases," 18 HARV. L. REV. 364. Its application to a case where the breach of condition occurred, or was first known to the insurer, after the loss, and where there was no possible prejudice to the plaintiff in the defendant's failure to act, is not only novel but against authority."²

J. S. Ewart begs leave to offer three submissions: First, election is not a theory but a fact. The erection of a house by a contractor is not properly denominated a theory. Its legal elements are (1) a contract, and (2) something done in pursuance of the contract. In election, there are the same elements — (1) by a contract (say a policy), one party is given a right, under certain circumstances, to elect between continuing and canceling it, and (2) in pursuance of the contract, the right of election is exercised.

The second submission is, that the application of election to every case in which a contract provides for its exercise may possibly be not only novel but against all authority (although I do not think it is), but it is indisputably right.

And the third submission is, that waiver can have no application to such cases.

The policy in the South Carolina case provided that it should be void

¹ *Scott v. Liverpool, etc. Ins. Co.*, 86 S. E. 484.

² 29-HARV. L. REV. 458, 9.

"if the subject of insurance be a building on ground not owned by the insured in fee simple."

"If this policy shall become void . . . the premium having been actually paid, the unearned portion shall be returned on surrender of this policy . . . this company retaining the customary short rate."

After holding that the insured was not the owner in fee simple of the ground, the court said:

"The insurance was effected in June; the fire occurred in August; the company had notice in a week thereafter. It discovered the defect in title. It kept the premium and keeps it now. . . . It has not followed the letter of the policy, but has waived the letter, and the policy stands with the forfeiture clause eliminated by the choice of that party who made it."

The court recognized (and the REVIEW commentator agrees) that, by proper construction, the policy was not void *ab initio* — that it would become void only at the election of the company. No one doubts that; and the whole trouble in such cases arises from the fact that, while everybody concurs in that view, very few carry it into their reasoning.

We are agreed then that the policy, by construction, provided that if the ground was

"not owned by the insured in fee simple, the company should have a right to elect between continuing and avoiding the policy."

If we stick to that, we shall have no trouble. Observe the following:

1. The clause ought not to be spoken of as a "forfeiture" clause. If a contract of sale of real estate contain a provision enabling the vendor to elect to rescind in the event of difficulties arising as to title, nobody would call it a "forfeiture clause." The provision in the policy is precisely the same as familiar provisions in these and many other contracts, namely, one containing an election to rescind.

2. It is wrong to say, as in the South Carolina case, that the company

"has not followed the letter of the policy, but has waived the letter, and the policy stands with the forfeiture clause eliminated . . ."

for such language is based upon the erroneous idea that the lack of title worked a "forfeiture" of the policy. It did not. It gave

the company a right to elect. If the company elected to terminate the policy, it would be following, not waiving, the letter of the policy. And so far from the clause being by election eliminated, it would remain as the only justification of the company's action.

3. Mistake arises from forgetting that nothing happens to a policy until the company elects to terminate it, and that when such election has been made, its validity is derived from the clause in the contract authorizing the election. The clause is not waived — it is acted upon.

4. There can be no "waiver," for there is no "forfeiture" to waive.

5. And so the question in all these cases is not one of "forfeiture" and "waiver of the forfeiture," but simply, whether or not the company has elected to rescind (sometimes to terminate) the policy.

6. But if this be true, what becomes of all those acts of the company which have been held to be "waivers of forfeitures" — acts which indicate intention on the part of the company to overlook deviations by the insured from specified conditions? Are they to have no effect? Do they give no rights to the assured?

The answer is, that not only are they important, but that, when properly applied, they are of greater service than when pleaded as "waivers." For example, in the South Carolina case, the court said that by retaining the unearned premium, the company had waived the forfeiture clause — had eliminated the clause from the contract. With submission, it would be better to say that the same fact — the retention of the money — was some evidence of an election to continue the contract. If the company had elected to rescind, it ought to have returned the money. If it had elected to continue, it would keep the money. It kept it. And that is some evidence of election to continue. All those customary acts of "waiver" are, or may be, evidence of election favorable to the insured.

7. Observe the effect upon the form of the pleadings by the substitution of election for "waiver." According to usual practice (elsewhere than in Indiana), the company pleads two things: (1) that the policy provided that, if the insured did so-and-so, the policy should be void, and (2) that the insured did so-and-so. But the plea is wrong. The policy ought to be pleaded accord-

ing to its real meaning, and in that case the plea must contain three allegations: (1) the policy provided that if the insured did so-and-so, the company should have the right to elect to rescind it, (2) the insured did so-and-so, and (3) thereupon the company elected to rescind. Without the third allegation, the plea would be manifestly bad, for, until such election, the policy remained unaffected.

8. According to present methods, the insured, instead of quarreling with the company's plea, assents to its sufficiency; agrees that the policy had been "forfeited" (without the right of election having been exercised); and replies that the company "waived the forfeiture." But that is wrong, for without an election by the company (which the company has not alleged), the policy has remained unaffected, nothing has happened, and there is nothing to "waive." The policy is canceled, if at all, by the act of the company — by the exercise of its election — and not by the act or omission of the insured.

9. If the company pleaded properly — made the three allegations — the issue which it would tender would be whether or not it had elected (as it alleges) to rescind the policy. And to that there could be no thought of replying "waiver of forfeiture." The plaintiff would join issue, and, upon the trial, all those circumstances which are now said to be "waivers of forfeiture" would be urged as evidence of election to continue the contract.

10. The effect upon the *onus* of proof is obvious. The assumptions at present being that the policy has become canceled ("forfeited") by the act of the insured (instead of, as in truth, by the election of the company), and that the only way that the insured can obtain judgment is by showing "waiver of forfeiture" by the company, the *onus* is upon him to prove (1) some act of "waiver," (2) by somebody who had authority for the company to "waive" — proof which the company, by the terms of its policy, has endeavored to make impossible. On the other hand, if the company must plead not only (1) the clause in the policy, and (2) the breach by the insured, but also (3) "that thereupon the company rescinded the policy," the *onus* is on the company to prove (1) election, (2) by someone authorized to elect.

11. And now, with reference to the view that the application of all this to

"a case where the breach of condition occurred, or was first known to the insurer, after the loss, and where there was no possible prejudice to the plaintiff in the defendant's failure to act, is not only novel but against authority."

Two cases are cited by the REVIEW commentator.³ In neither of them is there any reference to election, but they may be referred to in elucidation of some of the foregoing points. They are cases in which the mere retention of unearned premiums (under circumstances somewhat similar to the South Carolina case) was held not to affect the right of the company to rely upon forfeiture caused by breach of some condition. In one of them, a California court said:

"Nor can the mere retention of the premium after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such a waiver or estoppel by the action or non-action of the insurer, after the loss, it is essential 'that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.'"

That is certainly true as to estoppel. As to "waiver," I know very little — as will appear in a few minutes. But let us apply election. The clause providing for the company's right of election is not limited to a period prior to loss. Nothing in it suggests that the company's right to rescind terminates with the fire. Its right commences with knowledge of the fact giving the right to elect, and that, in the case in hand, was after the fire. And, observe, it is only by the exercise of the company's right to elect that it can escape payment. The policy furnishes no other ground of defence. There is no provision for "forfeiture" in it.

12. Moreover, if it be true that election has no application after the loss, neither has forfeiture or "waiver." For either the clause providing that the policy shall be void, etc., is, or is not, in force after the loss. If it is, it provides for election, and the right to elect therefore exists. And if it is not in force, then the only ground upon which forfeiture can be suggested has vanished.

13. Of "waiver," all I know (or, rather, believe) is that, apart from what the old books tell us about a pursued thief throwing

³ *Aetna Ins. Co. v. Mount*, 90 Miss. 642, 44 So. 162; *Goorberg v. Western Ass. Co.*, 150 Cal. 510, 89 Pac. 130.

away the stolen goods, every case of "waiver" may be put under one or other of four headings — Election, Estoppel, Contract, and Release. "Waiver" in insurance cases is sometimes estoppel, but almost always election. When you "waive" protest of a note, that is contract. When you "waive" a clause in a contract, that is either a new contract or estoppel. When you "waive" a right of action, that is release, or contract, or nothing at all.

14. The word "waiver" is as useful and as misleading as is "suction" in physics; and just as, apart from such other forces as atmospheric pressure, muscular action, flow of water, etc., there is no such force as suction, so there is not in law any such concept as "waiver," apart from the subjects above mentioned.

15. "Waiver" ought not to be confused with these other subjects. For, if it is anything at all, it is a purely unilateral act, its favorite definition being "an intentional relinquishment of a known right"; whereas effective legal action in the other classes of cases is always, at the least, bilateral. For example, relinquishment of a right to sue for a debt will not be effectual unless it amounts to a release, or is embodied in contract, for both of which the coöperation of another party is necessary. For the somewhat general confusion of "waiver" with estoppel there is no excuse. An example of it appears in the last of the above quotations, and the digest headings are "Waiver or Estoppel." But waiver, if anything, as has been said, is unilateral; whereas for estoppel there must be conduct by one party, acted upon by somebody else. Election is based upon contract. And contract is, of course, at the least, bilateral.

16. My article of some years ago (that to which the commentator referred) proceeded somewhat upon the same lines as the present. Since that time the Indiana courts have adopted the views there advocated. They hold that the company must plead not merely (1) the condition in the policy, and (2) breach by the insured, but also (3) "that thereupon the company elected to cancel the policy." In the judicial opinion in one of the cases my article was referred to in this way:

"The misuse of the word 'waiver' in this connection is clearly shown by a recent writer in an illustrative article: *Waiver in Insurance Cases* (Ewart), 18 HARV. L. REV. 365."⁴

⁴ *Modern Woodmen, etc. v. Vincent*, 40 Ind. App. 711, 714, 80 N. E. 427, 429 (1907).

17. I have prepared for the press a dissertation with the title "Waiver distributed into Election, Estoppel, Contract, and Release," but four publishing firms have declined it. It is said to be "highly meritorious," and so on, but it is only 350 pages, and a small book is as bothersome as one yielding larger returns. The encyclopedias and the stenographers are rapidly depriving lawyers of any claim to be members of one of the learned professions.

John S. Ewart.

OTTAWA, CANADA.

PROPERTY IN CHATTELS

III

PROPERTY IN THE BAILEE

IT was hard for the lawyers of the Year Books to reconcile themselves to the use by the bailee of the general writ of trespass. The goods which had been bailed were the goods of the bailor and not his, and it was hard for them to allow him to allege that "his goods" had been taken. They urged that he should have a special writ *in custodia sua*, but those in Chancery would give no such writ.¹ The general forms of trespass were hardening² and the bailee could no longer count in the natural way that had been possible in the time of Bracton. There are numerous examples of appeals in his time where the appellor did allege, not that the goods were "his," but that they were in his *custodia*.³

If we are to judge from Bracton's text and the case law of his time it was necessary for such an appellor to allege in addition that he had entered into an agreement to be accountable for the goods,⁴ and we have one case⁵ where Bracton says the appeal was not allowed because no such allegation was made.⁶ The common allegation was that the appellor had entered into an agreement with his lord, and evidently had in mind the case of a servant or villein,⁷ and it has been supposed that the effect of such an agreement was to make the servant a bailee,⁸ and that in the case of one who was not a servant no such allegation would have been neces-

¹ Y. B. 48 EDW. III, 20-8; Y. B. 11 HEN. IV, 17-39, 23-46.

² See *supra*, pp. 382, 392.

³ SEL. PL. CR. (S. S.), pl. 126; BRAC. NO. BK., pl. 723, 824, 1664; BRAC. (TWISS) fol. 146.

⁴ BRAC. & AZO, pp. 179, 183; BRAC. (TWISS), fol. 103 b, 146; SEL. PL. CR. (S. S.), pl. 88, 126.

⁵ BRAC. NO. BK., pl. 1664. See *supra*, p. 512.

⁶ TWISS, fol. 146.

⁷ See *supra*, n. 4.

⁸ Such seems to have been Professor Ames' opinion. He cites the two cases from the SEL. PL. CR. (*supra*, n. 4) as involving bailees, History of Trover, 3 SELECT ES-SAYS, 424, n. 4. And see *ibid.*, p. 425, n. 6, 7.

sary.⁹ Bracton, however, expressly includes the case where goods other than those of a lord are involved,¹⁰ and the line between the servant and the bailee was so hazy at this time, if it existed at all,¹¹ that it does not seem possible that the lawyers of the time had in mind that such an agreement would convert a servant into a bailee. They may have thought of such an agreement as imposing a like responsibility on the servant, or say a gratuitous bailee, as was imposed on a hirer or borrower, by the nature of his undertaking, and if such were the case, it may have been sufficient for the appellor to allege the hiring or borrowing without more. But if the responsibility imposed by such an agreement was an absolute responsibility, it is doubtful whether at this time any bailees were subject to such a responsibility without express agreement.¹²

However general the requirement of the allegation of such an agreement may have been, the fact that it had become a common form would indicate a general acceptance of responsibility as a reason for giving an appeal and would make it extremely likely, even though a hirer or borrower need not have made such an allegation, that such responsibility as he had was generally accepted as a reason for giving him the action. On the other hand, the only authority in Bracton's time which gives possession or seisin as a reason for giving him the action in such case is the *Mirror of Justices*.¹³ In the other authorities¹⁴ custody is used where, if the appeals had been thought of as distinctly possessory, we should expect seisin or possession. Custody in itself denotes a care or responsibility or trust which we would not associate with possession. And even if possession had been used it is very likely that the action would have been thought of as given for such responsibility as the possession of chattels carried with it,¹⁵ rather than on the now accepted

⁹ Maitland would seem to think that such an allegation was required only of servants. BRACTON & AZO, p. 183. And see 2 P. & M., 2 ed., 172, n. 2.

¹⁰ Fol. 146. See *supra*, pp. 511, 512.

¹¹ See 2 P. & M., 2 ed., 172, n. 2, and *supra*, p. 502, n. 9.

¹² See *infra*, p. 735 *et seq.*

¹³ SEL. SOC. Bk. II, c. 16, p. 57; *supra*, p. 509.

¹⁴ *Supra*, p. 501, p. 509 *et seq.*, and see 2 P. & M., 2 ed., 176.

¹⁵ Professor Ames gives as one reason why the bailee was allowed trespass and the appeals and at the same time the assize denied the termor, "the fact that an actual possessor of personal property being accountable therefor to the true owner needs a remedy to protect himself: whereas the land could not be carried off." LECTURES, p. 221. See also the argument of Brian, C. J., *infra*, p. 741 *et seq.*

theory that possession gives title as against strangers. The ready acceptance of responsibility as a basis for both trespass to chattels and trespass to land in the later law¹⁶ would confirm the impression from what authority we have in the 1200's that the notion of responsibility as the basis for an action was deep-rooted.

The tendency in Bracton's text and the case law of Bracton's time "to require of the bailee who brings an appeal of larceny or an action of trespass something more than mere possession, some interest in the thing, some responsibility for its safety,"¹⁷ is pointed out by Pollock and Maitland, but as yet they thought it had not gone very far.¹⁸ It is true that most of the authorities in which responsibility is emphasized as the reason for the action are somewhat later.¹⁹ But there was no occasion in the earlier law to account for the right of the bailee to recover full damages against a stranger, and it was in this connection that the attribution of the bailee's right to general trespass to his responsibility over gained such general currency.²⁰ The earlier authorities on the point are meager, but so far as they go they strengthen the impression that the bailee's right of action was associated with his responsibility from the first.

This impression that the bailee's right to an action was attributed at a very early time to his responsibility is further strengthened by the fact that it was not long after Bracton wrote that the same explanation was made on the Continent by Beaumanoir.²¹ Mr. Justice Holmes has argued that Beaumanoir's explanation was an inverted one, and that the bailee did not have the action because of his responsibility, but that his responsibility was due to the fact that he and he alone had the action.²² That he had the action was ascribed to the importance of fresh pursuit in the executive procedure of the old Germanic action for cattle stealing.²³ But that the importance of fresh pursuit was the cause and that the liability of the bailee was the consequence of giving the action to the bailee would seem to be an entire assumption. Professor Ames gives them

¹⁶ *Infra*, p. 737 *et seq.*, p. 749 *et seq.*

¹⁷ 2 P. & M., 2 ed., 172.

¹⁸ *Ibid.*

¹⁹ See *infra*, p. 737 *et seq.*

²⁰ See *infra*, p. 734.

²¹ *Coutumes du Beauvoisis*, XXXI, 16, cited by HOLMES, *COMMON LAW*, p. 167.

²² *Ibid.*

²³ *Ibid.*, p. 165 *et seq.* See also *supra*, p. 505.

as concurring causes²⁴ and Pollock and Maitland say that "perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action."²⁵

The liability Mr. Justice Holmes and the others had in mind was an absolute liability on the part of the bailee for goods taken from him, and if such a liability did exist it mattered little to the bailee whether his right of action was based on possession or on his responsibility to the bailor. In either case he would have the action. If, however, he was not liable to the bailor where the goods were taken from him without his fault, as in the case of robbery, the insistence on his responsibility to entitle him to the action would lead to a denial of the action where he was not at fault or to giving him the action in such a case, not because he was liable in the case at hand, but because of his general liability as bailee, whatever that might be. It must have been this general accountability on which his right to trespass was based by those who, notwithstanding the repudiation in *Coggs v. Bernard*²⁶ of the absolute liability of the bailee, continued to place his right of action on his responsibility to the bailor. But while this general accountability might have been a satisfactory explanation of his right to an action and even to the specific recovery of the goods, it could not have been a satisfactory explanation of the recovery by the bailee of the full value of the goods. If his recovery depended on his responsibility, the damages to which he was entitled must have been measured by his responsibility, and unless he had been at fault, his damages would have been nominal, beyond the value of his interest. If the judges of the Year Books wished to allow the bailee the full recovery allowed in general trespass, they had to abandon the notion that his right of action was based on his responsibility over and place it squarely on the ground that the possessor was owner as to third parties, or to retain it and make that responsibility absolute. Such great judges as Littleton and Brian chose the latter course.²⁷ Their equally eminent companion, Choke, chose the former,²⁸ and in the end his view was to prevail. But it shows how vital Littleton and Brian thought something beyond mere possession was to support

²⁴ LECTURES, p. 221.

²⁶ 2 Ld. Raym. 909 (1703).

²⁸ *Ibid.*

²⁵ 2 P. & M., 2 ed., 171.

²⁷ Y. B. 9 EDW. IV, 33-9; *infra*, p. 741.

general trespass that the absolute liability which they assumed found little support in the English authorities,²⁹ and that their assumption of such a liability was the main foundation for the argument of Mr. Justice Holmes³⁰ in support of the two judges in Southcote's case³¹ that such absolute liability was once a part of the law of the English courts.

The measure of the liability of the bailee and his right of action are so closely connected that they will be considered together. This involves going over the ground traversed by Coke in Southcote's case,³² by Lord Holt in *Coggs v. Bernard*,³³ and in our own day by Mr. Justice Holmes³⁴ and Professor Beale;³⁵ but the cases are approached from a somewhat different angle, and it is hoped that their reëxamination will shed some light not only on the early liability of the bailee but also on the foundation of his right of action.

The borrower was held by Glanvill to be absolutely bound to restore the thing or its value,³⁶ and was held to an almost equal degree of liability by Bracton,³⁷ but as to other bailees Bracton followed the more liberal tenets of the Roman law.³⁸ In 1200³⁹ a plaintiff who had delivered two charters to the defendant for custody was allowed to recover although the defendant had pleaded that the charters had been stolen and burned when his house was burned and that he was appealing the burners whereof the plaintiff was one. But after pleading, the defendant had made default and the plaintiff had craved that it be allowed in his favor that the defendant had admitted that the charters had been lost after action brought. If the case is one of a loss after demand and refusal, it has not such significance as to the absolute liability of the bailee. In the other case (1299) cited by Pollock and Mait-

²⁹ See *infra*, p. 744.

³⁰ See COMMON LAW, p. 177 *et seq.*, and especially the notes on p. 178. That the cases in question were Mr. Justice Holmes' principal English authorities, see Beale, *Carrier's Liability*, 3 SELECT ESSAYS, 152, and *infra*, p. 736 *et seq.*

³¹ Cro. ELIZ. 815 (1601); 4 Co. 83 b.

³² 4 Co. 83 b.

³³ 2 Ld. Raym. 909 (1703).

³⁴ COMMON LAW, p. 175 *et seq.*

³⁵ *Carrier's Liability*, 3 SELECT ESSAYS, 148.

³⁶ Lib. X, c. 13, cited 2 P. & M., 2 ed., 171, and HOLMES, COMMON LAW, p. 175.

³⁷ Fol. 99 b; BRACTON & AZO (S. S.), p. 147.

³⁸ Fol. 62 b, 99; 2 P. & M., 2 ed., p. 171.

³⁹ SEL. CIV. PL. (S. S.), pl. 8, cited 2 P. & M., 2 ed., 171.

land⁴⁰ the defendant in detinue for charters tendered the charters without the seals and alleged that robbers had cut off the seals, and on the admission that this had been so the action was dismissed. Pollock and Maitland cite this case in illustration of their summary "that already in his [Bracton's] day English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them, and that some bailees should perhaps be absolved if they have attained a certain standard of diligence."⁴¹

The authorities on the right of action of the bailee and the extent of his liability in the 1300's are scanty. Attention has already been called to the case in 1374⁴² where trespass was given to both the bailee and the bailor, to the one on account of his custody, to the other on the ground of his property, and to the remark of counsel in 1344⁴³ in an action for the recaption of beasts against the peace brought by one who claimed that the one from whom the beasts had been taken was his villein, that "a writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the goods are taken." In 1315⁴⁴ in detinue the defendant pleaded that the chattels had been locked in a chest to which the plaintiff had the key and that the chest had been broken open by thieves and the chattels carried away by them together with the defendant's own goods. The reports are conflicting as to the issue finally taken. Fitzherbert's account, on which the older authorities rely, says that the plaintiff was driven to take issue on the theft, and this has been taken to mean that it was the plea of a delivery in inclosure that had made theft a valid defense;⁴⁵ but the printed Year Book says that the plaintiff replied that the chattels were delivered out of inclosure and that issue was taken on this allegation. A most probable explanation of Fitzherbert's remark,⁴⁶ and one that in part reconciles the two reports, is that the plaintiff pleaded tentatively as in the Year Book,⁴⁷ but

⁴⁰ Page 171 (N. 6).

⁴¹ Page 171.

⁴² Y. B. 48 Edw. III, 20-8; *supra*, p. 508.

⁴³ Y. B. 18 & 19 Edw. III, 508; *supra*, p. 509.

⁴⁴ Y. B. 8 Edw. II, 275; FITZ. ABR., Detinue 59.

⁴⁵ 4 Co. 83 b.

⁴⁶ As to the expression *chacé outre*, see Maitland's Introduction, Y. B. 3 Edw. II (S. S.), vol. iii, p. lxx.

⁴⁷ As to tentative oral pleading in the time of Edward II, see *ibid.*, p. lxx *et seq.*

that the report in the Year Book is incomplete⁴⁸ and that instead of issue being taken on this plea,⁴⁹ the plaintiff was driven over to take issue on the theft. If this explanation is correct the case is a strong authority that theft was available to the general bailee as a defense. In a case in 1354 or 1355⁵⁰ the goods had been pledged to the defendant. He pleaded that he had put them with his own goods and that they had been stolen, to which the plaintiff replied a tender and refusal before the theft on which issue was taken. This is the first of the cases in which any statement of the liability of the bailee is made. W. Thorpe, B., said: "If one bails me goods to keep, and I put them with mine [*enter les mains*] and they are stolen, I will not be charged."

In the Michaelmas term of 11 Henry IV (1409) we have two of the cases where the defendant urged that the bailee should have brought a special writ *de averiis in custodia sua existantibus*.⁵¹ In the first case,⁵² which was a general replevin, Thirning, C. J., dismissed the matter with a curt "Plead no more about this matter, for against you he has property." In the second case⁵³ general trespass was brought by one who had hired certain beasts for a year from his servant, for a taking during the term. In his replication the plaintiff first alleged that the servant had taken them and sold them to the defendant. His counsel urged in his favor the holding in the replevin case, but Hankford, J., said:

"and so he has entered on the action as of his own goods, because they were taken within the term and this he will not have for then he would recover the value of the beasts against him who has the property in the beasts and it is not reason and I agree that in a certain case one will have a general writ of trespass although the beasts are another's, but if I allow certain beasts to you for a certain time and take the beasts within the term you will not have a writ of trespass as of your own goods for

⁴⁸ For abundant illustrations of just such variance in the different reports of a case at this time, see *ibid.*, p. lxxii *et seq.*

⁴⁹ It seems to have been possible at this time to traverse the bailment in detinue without responding to the tortious detainer (Y. B. 3 Edw. II, 78; Y. B. 6 Edw. II, 192; Ames, 3 SELECT ESSAYS, 432), but in another case in the same term the judges had little patience with an attempt to take issue on the kind of bailment and the party was "driven over" to a more substantial defense. See Y. B. 8 Edw. II, 270.

⁵⁰ 29 Ass. 163, pl. 28. See Beale, Carrier's Liability, 3 SELECT ESSAYS, 152, n. 2.

⁵¹ *Supra*, p. 731.

⁵² Y. B. 11 HEN. IV, 17-39.

⁵³ Y. B. 11 HEN. IV, 23-46.

then you would recover damages against me for the true value of the beasts and this is not reason but you will have a writ of trespass on the case for the loss of the manurance and compesture."

To the argument of counsel that they were in the case supposed because the action was against a stranger, Hankford replied:

"In effect you are in the same case, for he who had the property sold them to the defendant and that is the effect of his justification, and that is the reason that you will not recover damages for the value against him and also you are not chargeable against him who loaned you the beasts for he has sold them to the defendant, but if a stranger who has nothing to do with them take beasts in my custody, I shall have writ of trespass against him and shall recover the value of the beasts, because I am charged with the beasts against him who bailed them to me and who has the property but here the case is wholly otherwise,"

which Hill and Culpeper conceded. Counsel for the plaintiff then shifted his plea and alleged that the defendant himself had taken the goods a long time before the sale. It was admitted that in such a case the plaintiff had at one time had an action. The only question was as to whether it had been affected by the subsequent sale. Culpeper urged that in trespass the return of the goods would be considered in mitigation of damages. This Hankford and Hill denied. Hankford said that a plea that the plaintiff was possessed of the goods would discharge the action, and Hill that if the defendant had pleaded not guilty the court could do nothing on the record but award full damages.⁵⁴

It is believed that it was the difficulty of allowing anything less than a full recovery in general trespass as shown in this case rather than any theory of possession that accounts for the rule allowing the bailee the full recovery of damages. The general writ of trespass for the taking and carrying away of chattels gave the value of the chattels, and the judges felt loath to allow it where that was not a reasonable measure of damage. They felt that if less than that was the proper measure of damage that a special writ should be used. But the writ in which the full value of the property was given had come to be more and more the general form and it was hard to obtain any other, and it was allowed as against the third hand.

⁵⁴ Later Culpeper's view came to prevail. (See Ames, *History of Trover*, 3 *SELECT ESSAYS*, 426.) But the part played by procedural limitations in the modern rule allowing in general a full recovery for a conversion is not likely to be exaggerated.

The judges drew the line, however, when its use was attempted against the bailor and reconciled the two cases by the statement that in the former case the bailee was responsible to the bailor. It is by no means clear that Hankford meant to impute an absolute liability to the bailee,⁵⁵ but in making the recovery of damages dependent on responsibility he was making it necessary to impute an absolute liability to the bailee, if it was to be the rule that the bailee was to be entitled to general trespass against the third hand. There can be little doubt that some of the judges in following him did mean to impute an absolute liability to the bailee⁵⁶ and it is their apparent assumption of such liability that is the principal ground for Mr. Justice Holmes' contention that the absolute liability of the bailee was a part of the law of the Year Books.⁵⁷

In 1431,⁵⁸ in reply to the statement of counsel that theft would excuse a bailee, Cotesmore, J., said:

"If I grant goods to a man to keep to my use, if the goods by his misguard are stolen, he will be charged to me for the goods, but if he be robbed of the goods, he is excusable by the law."

In 1455⁵⁹ debt on a statute was brought against the marshal of the King's Bench for an escape. Choke pleaded that a great multitude of enemies of the king had broken open the jail and liberated the prisoner. Choke said:

"If enemies of France or other enemies of the King were here the marshal would be discharged, or if they had burned a house of the tenant for term of life he would be discharged of waste, or otherwise by sudden tempest the house were burned he would be discharged, so here."

Neither of the judges thought the plea sufficient, and Choke finally pleaded otherwise. Danby, J., said:

"In your case of enemies of the king and of sudden tempest there is reason, for then there is remedy against no one, but it is otherwise where the lieges of the king so act, for there you have action against them."

⁵⁵ He does not use the expression "chargeable *over*" which later became current. There would seem to be an implication of liability in the case at hand in this expression that there would not be in "chargeable" alone. The latter might well be used as equivalent to accountable or liable to account.

⁵⁶ Y. B. 2 EDW. IV, 15-7; Y. B. 8 EDW. IV, 6-5; Y. B. 9 EDW. IV, 33-9; Y. B. 9 EDW. IV, 40-22; HOLMES, COMMON LAW, 177-78; Beale, *Carrier's Liability*, 3 SELECT ESSAYS, 152.

⁵⁷ *Supra*, p. 735, n. 30.

⁵⁸ Y. B. 10 HEN. VI, 21-69.

⁵⁹ Y. B. 33 HEN. VI, 1-3.

Prisot, C. J., emphasized the difference between alien enemies and traitors and said that if, say twelve or twenty persons, lieges of the king, should in the night break open the prison and take the prisoners out,

"in this case the marshal would be charged for so negligently guarding and so here. But if by a sudden adventure of fire the prison were burned and they escaped, peradventure otherwise."

Choke's argument was entirely from the law of waste. No reference was made by anyone to bailments.

In the reign of Edward IV we find Hankford's reason for giving the bailee general trespass against the third hand working out to its logical result in an imputation of responsibility *over* to the bailor.⁶⁰ Littleton went even further than Hankford's reason made necessary and imputed a like responsibility over in case of robbery.⁶¹ Danby also made an express statement that the bailee was liable in case of theft.⁶² This statement of Danby's played an important part in Coke's report of Southcote's case⁶³ and in the imposition on the common carrier of his extraordinary liability.⁶⁴

In 1462⁶⁵ trespass was brought by one apparently a servant sent to collect his master's tithes. Littleton was counsel for the plaintiff. Objection was made that the plaintiff had done all in the right of the abbot, his master, and that the property was entirely in the master. The report reads:

"Littleton: I understand there is no diversity where I tell my servant to bring me goods which are in such a place and as he is bringing them they are taken out of his possession and where I give goods to one to keep and they are taken out of his possession. Danvers: Here they are not his goods but he is only charged to the abbot for them. Danby: For that he ought rather to have trespass and in so far as he is chargeable by writ of detinue to the abbot. Littleton: If he be robbed and despoiled, I say that he will have an appeal of robbery because he is chargeable over, which was conceded."

Six years⁶⁶ later trespass was brought by the wardens of a church, in which damage to the parishioners was alleged. It was objected

⁶⁰ *Supra*, p. 734; *infra*, p. 741 *et seq.*

⁶¹ Y. B. 9 EDW. IV, 40-22; *infra*, p. 742 *et seq.*

⁶² *Infra*, pp. 746, 747.

⁶³ Y. B. 8 EDW. IV, 6-5.

⁶⁴ Y. B. 2 EDW. IV, 15-7; *infra*.

⁶⁵ *Infra*, p. 746.

⁶⁶ Y. B. 2 EDW. IV, 15-7.

that the writ ought to have read to the damage of the plaintiffs, but Littleton distinguished the case from that of the bailee in that the latter was chargeable to the bailor.

In 1469⁶⁷ we have a remarkable discussion of the foundation of the right of the bailee to trespass by Needham and Choke and Brian and Littleton. Needham and Choke argued that the right was based on possession, but Brian and Littleton denied this and placed it on the bailee's liability to the bailor. It was Littleton that had the last word. The discussion arose over a question of "color" in an action brought by a prior for goods of the house taken away in the time of his predecessor. In the plea a bailment by the defendant had been alleged, but this had not been to the predecessor and the latter was rather in the position of a finder. Needham urged that when the predecessor

"had possession of the goods by that possession he was able to maintain an action if they were taken out of his possession against anyone except him who had right."

Brian to the contrary said:

"If I bail certain goods to a man to guard if they are carried off, he will have a writ of trespass on the possession for he is chargeable over to me. But if goods bailed to a prior are carried off, the successor will not have an action for he is not chargeable and so to no mischief."

Choke came to Needham's support with the case of the finder.

"Sir, if I lose a bundle of cloth in the road and a man finds it he can take it to keep it to my use, and may justify this, for it is a good deed to guard safely or otherwise they are lost, and he who has the goods will have an action against anyone except him who has right if they are carried off."

Littleton repeated Brian's argument that the prior would not be chargeable on the bailment to his predecessor, to which Choke replied that he would be if the bailment were under seal. Littleton:

"Then he would have an action. But it is otherwise of a simple bailment. And so in this case the successor is not charged over by this possession so as to give him color of title by such possession that is sufficient. But if it be said that the predecessor took them *damage feasant* such color is good, for he ought to have detained them until he had made

⁶⁷ Y. B. 9 Edw. IV, 33-9.

amends, and these amends would have been in right of the church. And so if the predecessor had taken the goods for rent in arrears." ⁶⁸

This ended the discussion.

The question was as to whether there had been color of "property" in the house in the time of the predecessor. If the right of the predecessor to bring his action had been based on the theory that possession gave him "property" as to wrongdoers then there was strong ground for arguing that this property was in right of his house, but Littleton and Brian denied that the bailee's right of action was due to any "property" against strangers arising from possession, but affirmed that it was due to his responsibility over. This seems to have been the first battle between the responsibility theory and the possession theory for supremacy in the field of trespass to chattels. The opportunity was favorable to the possession theory, for the case was really one of finding. No question of the recovery of the full value of the property was involved as in the case before Hankford, and although detainee lay for a finding, in such a case no contract would be involved to suggest accountability. And Choke, J., was a judge to make the most of such an opportunity. That the possession theory went down to defeat is evidence of how firm the hold of the responsibility theory was. Later, in *Armory v. Delamirie*,⁶⁹ the possession theory was to succeed in winning the ground that it had failed to gain here, that of the finder, and finally in the case of *The Winkfield*,⁷⁰ with the able help of Mr. Justice Holmes, to overcome the responsibility theory in its favorite field, that of the bailee. But this was long afterwards.

In the same term ⁷¹ occurred the remark of Danby to which we have already referred. In an action of account against a receiver the latter pleaded that the money had been robbed from him. This was held not to bar an account, but that if it were excusable he should show this in discharge before the auditors. After the report of the holding of the court is added the following:

⁶⁸ That the custody of the distrainor should have been considered by Littleton to give greater "color" of property to support trespass than mere possession would indicate that the denial of trespass to him in the later law was due not to the insufficiency of his interest, but to the fact that he had other remedies. But see Ames, *Disseisin of Chattels*, 3 SELECT ESSAYS, 551, and *History of Trover*, 3 SELECT ESSAYS, 425, n. 5.

⁶⁹ 1 Str. 505 (1722).

⁷⁰ [1902] L. R. P. Div., 42.

⁷¹ Y. B. 9 EDW. IV, 40-22.

"Genney, If I bail goods to a man and they are stolen, he will be excused. Danby, If he receive them to guard as his own goods, he will be excused and otherwise not."

The stress laid on responsibility over as the basis of trespass was beginning to have its effect where liability was itself in issue.

This is seen in three cases from the reign of Henry VII in which the bailee's liability for goods taken from him by way of trespass is assumed and the attempt is made to differentiate robbery and theft from trespass. In *detinue*⁷² it was considered as to whether if one bailed goods to the defendant to guard at the plaintiff's jeopardy it would be a good plea that such a one had taken the goods.

"Rede: It seems that it is no plea for the defendant can have an action against him who took the goods and so he is not damaged."

And

"it was suggested that if the goods are robbed from the bailee he is not chargeable over. But if they are taken by a trespasser of whom the bailee has cognizance he will be charged to his bailor and himself will have an action against the trespasser. Brian to Rede: You plead a general bailment and he has pleaded a special bailment and I ask you what damages the bailee will recover against him who took the goods. Rede: The value that he will be charged to the bailor. Brian: And that is nothing upon the matter."

This case is a good example of the vicious reasoning in a circle which was characteristic of the responsibility theory.

Keble, the opposing counsel to Rede in the above case, advanced this distinction between liability for trespass and liability for felony in two subsequent cases against sheriffs for escapes. He urged that there was no remedy over against the felon "for when he is attainted his goods and lands are lost and his body hung." To this Fineux replied:

"In case of the bailee and the stolen goods, I understand that the bailor will have an action of *detinue* for the bailee is able to have his remedy over. For I understand that the lessee for term of years is not excused in waste because felons did the waste, on which account he will have an action of trespass over against them and so he has his remedy over."⁷³

⁷² Y. B. 3 HEN. VII, 4-16.

⁷³ Y. B. 6 HEN. VII, 11-9.

In the second case Keble said:

"If I bail deeds and evidences to a man to guard generally, if his own goods are robbed he will be excused against the party as I understand, for this guard is chargeable to him to all intents as reason expounds as I would guard my own goods."

The report proceeds with Keble's argument and then continues as follows:

"Fineux to the contrary and denies the case of the bailment of goods and says that the bailee will be charged as he understands though his own goods are robbed. Fisher to the same effect and says that if an inn-keeper has the charge of goods he will be liable notwithstanding that they are robbed from him and he has no remedy over, and so here."⁷⁴

These are the authorities leading up to Southcote's case on which the claim is based that the absolute liability of the bailee was once the law of the English courts. Their tendency to fix an absolute liability on the bailee in order to account for his right of action or for his recovery of full damages finds a modern parallel in the case of the tenant. In the case of *Dix v. Jaquay*⁷⁵ a tenant for life was allowed to recover from a third party damages to the full extent of the injury although it was only the estate of the remainderman that had suffered. This was on the ground that the tenant was absolutely liable for the damage to the lessor. If any such liability does exist, it shows a reaction from what Professor Kirchwey states had become the law already in Littleton's day that "tenants for life and for years are liable for waste, however occasioned, which results from their default, and not otherwise"⁷⁶ and can be traced directly to placing the right of the tenant to recovery on his responsibility over.⁷⁷ But it is believed that such liability on the tenant's part has long ceased to be a part of the law⁷⁸

⁷⁴ Y. B. 10 HEN. VII, 25-3.

⁷⁵ 94 App. Div. 554, 88 N. Y. Supp. 228, cited 2 TIFFANY, LANDLORD AND TENANT, p. 2103.

⁷⁶ Kirchwey, Liability for Waste, 8 COL. L. REV. 627.

⁷⁷ See the cases cited in 1 TIFFANY, LANDLORD AND TENANT, p. 738, n. 841. *Attersol v. Stevens*, 1 Taunt. 183 (1808); *Cook v. Champlain Transportation Co.*, 1 Denio (N. Y.) 91 (1845); and *Austin v. Hudson River R. Co.*, 25 N. Y. 334 (1862) are the leading cases. The statement of the absolute liability of the tenant in these cases was incidental to allowing him a full recovery against a stranger.

⁷⁸ See Kirchwey, Liability for Waste, 8 COL. L. REV. 425, 624. That ordinarily the lessee can recover only the loss to his interest, see 1 SEDGWICK ON DAMAGES

and that the same thing was true of the absolute liability of the bailee at the time these cases were decided. The authority of the cases in *detinue*⁷⁹ where the liability of the bailee was directly involved is certainly against any such absolute liability and in account robbery might be shown in discharge before the auditors.⁸⁰ The extraordinary liability of the marshal was not placed on any analogy to the law of bailments, but to that of waste,⁸¹ and the remarks of Fineux in the two cases against the sheriff⁸² were in reply to an argument against the absolute liability of the sheriff drawn from the law of bailments. There was reason to hold the sheriff to an extraordinary liability in debt for an escape for the execution creditor in such a case had no one but him to look to,⁸³ but it had long been the rule that the bailor could look to the wrongdoer.⁸⁴

A new turn was given to the right of the bailee to sue by Fineux, J., in 1506.⁸⁵ Brian and Littleton had insisted on the responsibility of the bailee as the ground of his action, but denied that this responsibility was in the nature of "property." It was a liability and not an asset. Such liability Littleton contrasted with the lien of the distrainer which he thought might properly be called "property." Needham and Choke, on the other hand, had argued for a property as against third parties arising from possession.⁸⁶ Fineux confused the two theories, ascribed the "property" against a stranger to the responsibility of the bailee to the bailor, and spoke of the "special property" which had thus been "conveyed" to the bailee. The term "special property" stuck and came to be used in contradistinction to the "general property" of the bailor.⁸⁷

9 ed., § 71. Tiffany regards the tenant as liable in waste for injuries by third persons, but considers such liability wrong on principle. 1 TIFFANY, LANDLORD AND TENANT, p. 740.

⁷⁹ *Supra*, p. 735 *et seq.*

⁸⁰ *Supra*, p. 742.

⁸¹ *Supra*, p. 739.

⁸² *Supra*, pp. 743, 744.

⁸³ See the argument of Keble, Y. B. 10 HEN. VII, 25-3.

⁸⁴ See *supra*, p. 513.

⁸⁵ Y. B. 20 HEN. VII, 1-1.

⁸⁶ *Supra*, p. 741.

⁸⁷ Y. B. 21 HEN. VII, 14-23; Heydon and Smith's Case, 13 Co. 67, 69 (1610), and see the cases cited in 1 GRAY, CASES ON PROPERTY, 266, n. 1. "Special property" has also been used to indicate the greater intensity of the right of the pledgee over that of the distrainer or lienholder, *Mores v. Conham*, Owen 123 (1609); *Coggs v. Bernard*, 2 Ld. Raym. 909, 916 (1703); especially to indicate the assignability of the pledge as compared with the personal character of the lien, *Owen* 123; *Donald v. Suckling*, L. R. 1 Q. B. 585 (1866).

Southcote's case,⁸⁸ decided in 1601, was the decision of but two judges, Gawdy and Clench, and was an action in detinue on a bailment to keep safe where the defense was that the goods had been robbed or stolen. According to Croke, the court held that "it is not any plea in detinue to say that he was robbed by one such; for he hath his remedy over by trespass, or appeal to have them again." The only authority cited is the Marshal's case.⁸⁹ It was not the case itself, so much as Coke's report of it, that made it important. As in all his reports Coke made himself the reconciler of everything that had been said in the Year Books on the point. He took Danby's statement in 9 Edward IV⁹⁰ as the general rule subject to certain exceptions, as in case of a pledge or delivery in a locked chest. Such authority as the case ever had was destroyed by Lord Holt in *Coggs v. Bernard*.⁹¹

A word may here be allowed as to the extraordinary liability of the common carrier. In Woodlife's case,⁹² some four or five years prior to Southcote's case, Gawdy had said that it was no plea before auditors any more than the case was in 9 Edward IV for a carrier to say that he was robbed, to which Popham, C. J., had replied:

"There is a difference between carriers and other servants and factors; for carriers are paid for their carriage, and take upon themselves safely to carry and deliver the things received."⁹³

Inconsistent as the principle of this was with the absolute liability of the general bailee, Coke adopted it in his report of Southcote's case and enlarged upon it:

"But a ferryman, common innkeeper or carrier, who takes for hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves."

Henceforth the carrier was a marked man. That he was liable beyond the liability of others, seems to have been accepted without

⁸⁸ 4 Co. 83 b; Cro. ELIZ, 815 (1601).

⁸⁹ *Supra*, p. 739.

⁹⁰ *Supra*, p. 743.

⁹¹ 2 Ld. Raym. 909 (1703). See Beale, *Carrier's Liability*, 3 SELECT ESSAYS, 149, 153.

⁹² Moore 462; Owen 57 (1596).

⁹³ Owen 57 (1596).

question; but whether to place this liability on his hire,⁹⁴ on the custom of the realm,⁹⁵ or on his public calling,⁹⁶ there seems to have been no settled conviction. Equally it seems to have been accepted that the measure of his liability was that old liability that had filtered through the Marshal's case from the law of waste.⁹⁷ For act of God⁹⁸ or the public enemy⁹⁹ he was alone excused.¹⁰⁰ Lord Holt fixed on his public calling as the secret of his liability¹⁰¹ and henceforth it was the *common* carrier who was to be thus burdened. How extended that burden was to be depended on the meaning to be given to act of God.¹⁰² Lord Mansfield gave it the old interpretation it had had in waste and made the common carrier an insurer.¹⁰³ It is not believed that the liability is a survival of an older liability in the general bailee due to a confusion between detinue and case.¹⁰⁴ Doctor and Student had started the idea of a special responsibility in the carrier.¹⁰⁵ Gawdy seized on the case of the carrier to argue to the general liability of bailees and factors which he saw in Danby's statement in 9 Edward IV.¹⁰⁶ Popham, C. J., distinguished between the carrier and others¹⁰⁷ and although Gawdy's reaffirmation of his opinion in Southcote's case was to be practically still-born,¹⁰⁸ the distinction by Popham which it had originally drawn forth was to survive. It would appear to be a striking example of the eccentricities of case law.

But to return to the right of action of the bailee. It still remains to explain why, if trespass was not distinctly possessory, it seemed so natural to give the bailee an action that the judges in order to

⁹⁴ See Beale, Carrier's Liability, 3 SELECT ESSAYS, 156, n. 2.

⁹⁵ Rich v. Kneeland, Hobart 17 (1613); Matthews v. Hopkins, 1 Sid. 244 (1665).

⁹⁶ Rich v. Kneeland, Cro. Jac. 330 (1613).

⁹⁷ As to the influence of the Marshal's case, see HOLMES, 176, n. 6, and Beale, Carrier's Liability, 3 SELECT ESSAYS, 156.

⁹⁸ For "act of God" in waste, see Y. B. 12 HEN. IV, 5-11; 1 GRAY, CASES ON PROPERTY, 630.

⁹⁹ For "public enemy" in waste, see FITZ. ABR., Waste, pl. 30; 1 GRAY, CASES ON PROPERTY, 629.

¹⁰⁰ Kirchwey, Liability for Waste, 8 COL. L. REV. 436, 624.

¹⁰¹ Coggs v. Bernard, 2 Ld. Raym. 909, 917 (1703).

¹⁰² Beale, Carrier's Liability, 3 SELECT ESSAYS, 159.

¹⁰³ Kirchwey, Liability for Waste, 8 COL. L. REV. 436, 624.

¹⁰⁴ As argued by Mr. JUSTICE HOLMES, COMMON LAW, Lecture V.

¹⁰⁵ C. 38. See Beale, Carrier's Liability, 3 SELECT ESSAYS, 156.

¹⁰⁶ *Supra*, p. 746.

¹⁰⁷ *Ibid.*

¹⁰⁸ See Beale, Carrier's Liability, 3 SELECT ESSAYS, 153.

support the action imputed to him a liability which at best would seem to have been long obsolete. Why did not the insistence on responsibility over instead of leading to the imputation of an absolute liability to the bailee lead to the denial of the action to the bailee or at least to the denial of his right to a full recovery?¹⁰⁹ How explain the bias of the judges in the bailee's favor? Mr. Justice Holmes' explanation is that it was a survival of the old Germanic scheme according to which the bailee and the bailor alone had an action, and in turn was absolutely liable for the goods.¹¹⁰ We have attempted to show that of two parts of that scheme there is very little evidence in the English authorities, the denial of the action to the bailor,¹¹¹ the absolute liability of the bailee.¹¹² It is possible that one part of the scheme did survive after the rest had become obsolete. It is possible that the bailee's right to general trespass had its origin in the fresh pursuit and the absolute liability of the primitive law. It is not necessary, however, to resort to the primitive law to account for the bailee's action.

It will be remembered that Bracton in one place seems to deny the bailee the appeal of larceny, but to allow him the appeal of robbery,¹¹³ and that Maitland wondered¹¹⁴ at this, for it was contrary to Mr. Justice Holmes' theory and was without foundation in the Roman law. Whether or not such distinction did exist, Bracton's statement confirms the view previously expressed¹¹⁵ that it is in the appeal of robbery rather than in the appeal of larceny that the explanation of the right of the bailee to trespass is to be found. Now robbery involved a taking from the person. It was violence to the person that distinguished it from larceny. The person from whom goods had been robbed had suffered a personal wrong whether the goods taken from him were his or those of another. He had been robbed and it must have been a temptation

¹⁰⁹ The difficulty of procuring a special writ in trespass and the further difficulty of recovering less than full damages in general trespass has already been pointed out as an explanation of the rule allowing a bailee full recovery. (*Supra*, p. 738.) What follows is rather an explanation of his being allowed trespass at all and of its final attribution to his possession.

¹¹⁰ COMMON LAW, Lecture V.

¹¹¹ Property in the Bailor, *supra*, p. 501 *et seq.*

¹¹² *Supra*, p. 735 *et seq.*

¹¹³ TWISS, fol. 103 b; BRACTON & AZO, p. 179; *supra*, p. 510.

¹¹⁴ BRACTON & AZO, p. 182; *supra*, p. 511.

¹¹⁵ *Supra*, p. 507.

to the judges to give him the appeal of robbery even though they had to resort to a doubtful liability to do so. And the highly criminal character of the appeal would work to the same end.

The importance of the fact that general trespass was an action for a personal wrong has been seen in Brian's, C. J., reason for denying trespass against the second trespasser¹¹⁶ and in the denial by some of trespass to a disseisee after reëntry for a trespass committed during the disseisin because it was not a trespass as to him.¹¹⁷ That it did not lead to a denial of trespass to the bailor would seem to be due to the fact that the bailee held under and not adversely to him.¹¹⁸

General trespass then, like the appeal of robbery, was an extension of the protection thrown around the person and was in that sense possessory.¹¹⁹ It did not purport to be based on possession, however, and in that respect was not an analogue to the assize of novel disseisin. And the right of the bailee to trespass was placed by Brian and Littleton, not on his possession, but on his responsibility over.¹²⁰ It was not therefore a distinctly possessory action. It was trespass to land that first became such. Trespass for an ouster seems to have been first allowed the termor.¹²¹ In 1372 we find him allowed trespass *quare clausum*.¹²² His right to the action is there coupled with his responsibility over. Tenants at will, according to the custom of the manor¹²³ and possibly *cestuis que use* in possession,¹²⁴ were likewise accorded trespass in the next century. So

¹¹⁶ Y. B. 21 EDW. IV, 74-66; *supra*, p. 383.

¹¹⁷ Y. B. 13 HEN. VII, 15-11; *supra*, p. 384, n. 64.

¹¹⁸ *Supra*, pp. 514, 516.

¹¹⁹ See 2 P. & M., 2 ed., 41; *supra*, pp. 384, 516.

¹²⁰ *Supra*, p. 741.

¹²¹ What appears to be an early reference to trespass by a termor for an ouster occurs in an action of debt for rent where after disposing of the case of an ouster by the lessor, it is said that the lessee will be liable for the rent during the time he was tortiously ousted and that for such tort he is able to recover against him who ousted him. Y. B. 9 EDW. III, 7-16. For comment on this case, see AMES, LECTURES, p. 222, n. 7. See also *ibid.*, p. 226.

¹²² Y. B. 47 EDW. III, 5-11; AMES, LECTURES, p. 226.

¹²³ Y. B. 2 HEN. IV, 12-49. See AMES, LECTURES, p. 227.

¹²⁴ Prior to the Statute of Uses, tenant at sufferance seems to have been used to indicate the *cestui que use* in possession. (1 SANDERS, USES, p. 65.) In 1489 it was said that if such a one brought trespass and the defendant did not raise the issue as to the title but pleaded not guilty the plaintiff might succeed. (Y. B. 4 HEN. VII, 3-6.) But see the cases cited in AMES, LECTURES, p. 227, n. 7, 8.

strong was the feeling that the copyholder should have some remedy in the king's court that he was allowed trespass even against his lord.¹²⁵ This "exploit" has been attributed to Danby and Brian¹²⁶ and could hardly have been based on possession as a root of title or as in itself a foundation for trespass, for it was these judges who had combated such notions in trespass to chattels; but Brian had emphasized the idea of trespass to property as a personal wrong, and as an action to redress a personal wrong it was the natural instrument for the protection of hitherto unrecognized interests until finally those interests should come to be recognized as the basis of the action itself. This is believed to have been the history of trespass as a possessory action. In 1603¹²⁷ it was said that the lessor for a term would have case during the term but not trespass, "it being found merely on the possession," and in the following century we get the broad sweeping statements as to the possessory character of trespass to which we are accustomed but which cannot with accuracy be read into its past.¹²⁸

Trespass to chattels could hardly help being influenced by the increasing importance attached to possession in trespass to land. In 1722, in *Amory v. Delamirie*,¹²⁹ it was said that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such an property as will enable him to keep it against all but the rightful owner." As late as 1840,¹³⁰ however, we find Baron Parke saying that it was unnecessary in the case at hand "to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evi-

¹²⁵ LITTLETON, TENURES, § 77. Littleton probably did not write this passage. (Ed. by Wambaugh, p. 35.)

¹²⁶ See 1 P. & M., 2 ed., 359.

¹²⁷ *Bedingfield v. Onslow*, 3 Lev. 209 (1685). See *supra*, p. 517.

¹²⁸ Willes, C. J.: "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question." *Lambert v. Stroother*, Willes 218, 221 (1740). Mansfield, C. J.: "Whoever is in possession, may maintain an action of trespass, against a wrongdoer to his possession." *Harker v. Birkbeck*, 3 Burr. 1556, 1563 (1764). Kenyon, C. J.: "Any possession is a legal possession against a wrongdoer." *Graham v. Peat*, 1 East 244, 246 (1801). See also *Osway v. Bristow*, 10 Mod. 37 (1711); *Johnson v. Barret*, Al. 10 (1670); and AMES, LECTURES, p. 227.

¹²⁹ 1 Str. 505 (1722).

¹³⁰ *Elliot v. Kemp*, 7 M. & W. 306, 312.

dence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels." Finally in the case of *The Winkfield* in 1901¹³¹ the question which Baron Parke had raised was answered as Choke had argued it should be answered so long before and the postmaster-general was allowed to recover the full value of the thing bailed to him although he would not have been responsible for its loss.

Percy Bordwell.

STATE UNIVERSITY OF IOWA.

¹³¹ [1902] L. R. P. Div., 40.

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RECOVERY UNDER WORKMEN'S COMPENSATION ACTS WHERE PREVIOUS ILLNESS CONTRIBUTED TO THE INJURY. — Workmen's compensation legislation has not so completely done away with litigation as some of its proponents once predicted it would. There are certain problems of frequent recurrence that furnish the courts a fruitful source of trouble. Two of these are raised again by recent cases. One case holds that a person suffering from heart disease, which has become suddenly more acute as a result of ordinary work, can recover the statutory payments. *In re Madden*, 111 N. E. 379 (Mass.). Another holds that a hack driver who falls off his hack in a fit of dizziness induced by causes peculiar to himself can recover for the injury resulting.¹ *Carroll v. What Cheer Stables Co.*, 96 Atl. 208 (R. I.).

It is the fashion to preface the investigation of a problem under a work-

¹ This does not state the case quite accurately. There was evidence, relied on by the court, which seemed to show that the fall was partly due to sudden lurching of the hack. But this evidence was rather slight (see the opinion of Vincent, J., dissenting, at 96 Atl. 208, 212), and the court below had found that the fall was "probably due to dizziness or unconsciousness induced by a disease from which he was suffering." It is believed therefore that the finding in favor of the workman involves necessarily the proposition stated. That the court was prepared to go as far as this is further indicated by a long quotation, apparently approved, from *Wicks v. Dowell & Co., Ltd.*, [1905] 2 K. B. 225, a case standing flatly for this proposition. For other such cases, see *Frith v. Owners of S. S. Louisianian*, [1912] 2 K. B. 155; *Owners of S. S. Swansea Vale v. Rice*, [1912] A. C. 238; *Butler v. Burton on Trent Union*, 5 B. W. C. C. 355; *Milliken's Case*, 216 Mass. 293, 103 N. E. 898; *Claim of Clements*, Op. Sol. Dep. Com. & Lab. 190. For cases similar to the first principal case, see *Ismay, Imbrie & Co. v. Williamson*, [1908] A. C. 437; *Dotzauer v. Strand Palace Hotel Co.*, 3 B. W. C. C. 387;

men's compensation act by a discussion of the purpose and philosophy of those acts generally. That is a subject that has now lost much of its fresh interest. We may take it as established that the purpose of the acts is to remedy a situation thought to be unjust to workingmen, to enable them when injured to live without the aid of charity and to keep their families at home, to do away with a peculiarly wasteful sort of litigation, and to promote peace and good feeling in the industries; that the compensation or insurance payments are awarded, not for a wrong done, but for injury as such; and that they are to be regarded, from the employer's standpoint, as costs of operation.² The industry is now to bear the cost of broken men, as well as that of broken wheels and pulleys. But when a wheel of bad quality is broken, the industry can recover for the loss from the man who furnished it the wheel; there is no warranty of the quality of men. Must the industry then pay when the man is broken in it partly by reason of his own infirmity? Apparently it must. "Personal injury"³ is the act's criterion. This does not mean every injury to an interest of personality:⁴ damage to the structure of the body is all that is intended.⁵ But when a body which was able to work suffers a change and ceases to be able, such damage has occurred. If then the change can be attributed to the work, the act inquires no farther. The loss of earning power is just as real, if not as great,⁶ as when the man

O'Hara v. Hayes, 44 Ir. L. T. R. 71, 3 B. W. C. C. 586; Clover, Clayton & Co., Ltd. v. Hughes, [1910] A. C. 242; Borland v. Watson, Gow & Co., Ltd., 49 Sc. L. R. 10, 5 B. W. C. C. 514; Brightman's Case, 220 Mass. 17, 107 N. E. 527. And see generally an article by P. Tecumseh Sherman, in 64 PA. L. REV. 417 (March, 1916).

² This has become the usual statement. The question has been discussed with frequency in most of the legal, economic, and popular periodicals since 1908, with some scatterings before. Especially instructive are some of the provisions of the acts themselves. See the "Declaration of Police Power" in the insurance act of Washington (LAWS, 1911, ch. 74, § 1), the provision of the New Jersey act regarding commutation of the payments (PUB. LAWS, 1913, ch. 174, § 6), and the first section of the act of Oregon (GEN. LAWS, 1913, ch. 112, § 1).

³ This is the standard phrase. Some acts require only an "injury." See ILL. LAWS, 1913, p. 338, § 1; NEB. R. S. 1913, § 3650; N. H. LAWS, 1911, ch. 163, § 3. It is conceived the meaning is the same. There is frequently added, following the English acts of 1897 and 1906, a requirement that the injury shall be "by accident" or "accidental." This phrase was present in the act under which the second of the two principal cases was decided (R. I. PUB. LAWS, 1912, ch. 831, art. 2, § 1); it was not present in the first (MASS. ACTS, 1911, ch. 751, part 2, § 1). In the first case it might have made a difference, but very likely not. See Clover, Clayton & Co., Ltd. v. Hughes, [1910] A. C. 242. The phrase raises questions which we need not here consider. See Professor Bohlen's article, "The Drafting of Workmen's Compensation Acts," in 25 HARV. L. REV. 328, 338.

⁴ See the opinion in the principal Massachusetts case, 111 N. E. 379, 381.

⁵ This does not mean that the physiological damage is all that is considered in fixing the amount of compensation. Loss of earning power and other factors are frequently ordered to be taken in. But no liability exists at all until the physiological damage can be shown.

⁶ In the principal cases it was also as great, for the employees' failings were apparently not known, and they were getting ordinary wages. In such a case the question will arise whether the employer should pay for all of the loss actually suffered, when it came partly from the previous condition. In perhaps the majority of cases this will not arise, for the employee's weakness will be known, and he will be receiving smaller wages on account of it. And when it does arise, the hardship on the employer, if it is one, seems to be one for which provision is not made. Surely as the acts now stand a court would not be justified in reading in a clause apportioning the loss. See the principal Massachusetts case, 111 N. E. 379, 382.

was strong; the danger of pauperism just as serious. If this means a dead loss for the industry, then that is a loss which the consumers of its product ought to bear. The protection of the act extends to anyone able-bodied enough to be employed in one of the trades covered.⁷

But as said before, the injury for which recovery is sought must be one which can be attributed to the work. The acts do not create a general system of debility insurance at the expense of the employer. The injury for which compensation may be had must be one "arising out of and in the course of the employment."⁸ For our present purposes the first branch of the definition is the important one. The injury must arise out of the employment. That rather vague phrase has been taken to mean that the injury must be caused by an agency, force, or situation for the existence of which the employment is responsible. The harm must be caused by the employment.⁹ So our question becomes the ever-recurring question of causation.

Causation in a question under a workmen's compensation act is no different from what it is in any other legal situation. If in other relations we must look for a particular kind of "legal cause," then that is the kind of cause that we must look for here. For the reason that the law refuses to investigate all the causes of the results it deprecates is simply one of practical necessity.¹⁰ Accurate investigation of all the antecedents of a happening takes too much time; other suitors must be served.¹¹ These reasons are as valid in workmen's compensation cases as in any other.

It is now pretty commonly admitted that when a force in fact directly produces an effect, the effect is always proximate:¹² that antecedent of

⁷ See the cases cited as under the principal Massachusetts case in note 1, *supra*, especially *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A. C. 242; *Ismay, Imbrie & Co. v. Williamson*, [1908] A. C. 437; and the principal Massachusetts case itself, 111 N. E. 379, 382. On reasoning very analogous to this it has been held that where a workman having one hand loses that one, he may recover as for "total disability." *Schwab v. Emporium Forestry Co.*, 153 N. Y. Supp. 234. *Contra*, *Weaver v. Maxwell Motor Co.*, 152 N. W. 993 (Mich.). See 29 HARV. L. REV. 104.

⁸ This language, taken from the English acts, is used in a majority of the statutes so far enacted in this country. In others it is required only that the injury arise "in the course of the employment." See, for instance, OHIO LAWS, 1913, p. 82. Under such statutes the work need not have caused the injury for which recovery is sought, and the principal Rhode Island case would not need much discussion. *Claim of Clements*, Op. Sol. Dep. Com. & Lab. 190.

⁹ See *Fitzgerald v. Clarke*, [1908] 2 K. B. 796, 799; *McNicoll's Case*, 215 Mass. 497, 498, 102 N. E. 697. The cases are full of similar remarks, and it is more frequently assumed than stated.

¹⁰ The other reason often given, that it is fair to hold a man only for consequences which he might by diligence have foreseen as likely to follow from his conduct, is probably exploded. Its application to cases where liability was based on something else than negligence was always very doubtful. See *Malone v. Cayser, Irvine & Co.*, [1908] Sess. Cas. 479, 481; *Milwaukee v. Industrial Comm.*, 160 Wis. 238, 245, 151 N. W. 247, 248, and other cases noticed by Judge Smith in 25 HARV. L. REV. 223, 236. But its chief trouble is that the rule of non-liability for improbable results, which follows from it necessarily, is pretty much discredited. See authorities cited in notes 13 and 14, *infra*.

¹¹ Lord Bacon said this long ago: "It were infinite for the law to judge the causes of causes, and their impulsions one of another." MAXIMS, Reg. 1.

¹² "Proximate" used of a cause, is used to mean simply a cause which the law will take into consideration in fixing liability. Of an effect, it is used to mean simply an effect which the law will ascribe to the cause in question, and consider the result of it.

a happening which gives the immediate motive power for its production strikes the intelligence at once and is comparatively sure and easy of investigation. The fact that the effect is unexpected and unusual will not render its causation by the force remote.¹³ The same is true when the material on which the force operates and in which it produces its effect is particularly predetermined by weakness or other peculiarity of structure to receive the effect which is produced.¹⁴ This really disposes of the first of the two principal cases. Of course the work, and not merely the previous disease, must cause the injury, and whether it did or not may be a peculiarly difficult question of fact; but when it was found, as it was here, that the work which the employee was doing "so aggravated and accelerated a weak heart condition as to incapacitate her for work," the investigation is concluded.¹⁵

The other case is harder. The fall there cannot be traced directly to a push for which the employment is responsible,¹⁶ for it was the driver's dizziness that threw him from the hack, and his employment did not make him dizzy. But the employment put him in a place where if he happened to be dizzy he would be more seriously hurt than if he were dizzy on the ground. Is this chance of extra harm enough to justify the statement that the employment caused the injury? The answer to this question will depend on what we mean precisely by "injury." If the injury to which causation must be traced is the contact of the plaintiff's body with the ground, we must say that the employment was not even a necessary antecedent of the injury, for he would have struck the ground just as certainly if he had been dizzy anywhere, except in bed. But if the injury to which causation must be traced is the plaintiff's broken rib, the employment comes into the direct and active causal sequence, for it was the potential energy of his position on the hack which, translated into kinetic energy during his passage to the ground, was the force that broke his rib. It is believed that the second possibility is preferable. Workmen's compensation looks not at what the defendant did, but at what the plaintiff suffered; it is the actual change in the condition of the claimant's body that founds the liability. That then ought to be the point of departure for all purposes; it is to that that causation should be traced.

DOES EXECUTION BY ONE JUDGMENT CREDITOR GIVE A PREFERENCE OVER EQUAL JUDGMENT LIENS? — Judgment liens were unknown at common law¹ and, though very general to-day, they are based entirely

¹³ *Smith v. London & Southwestern Ry. Co.*, L. R. 6 C. P. 14; *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585. See *Christianson v. Chicago, etc. Ry. Co.*, 67 Minn. 94, 96, 69 N. W. 640, 641; and Judge Smith's article, "Legal Cause in Actions of Tort," in 25 HARV. L. REV. 103, 114, 223, 303.

¹⁴ *State v. O'Brien*, 81 Iowa 88, 46 N. W. 752; *McCahill v. New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 616, and the cases collected in 16 L. R. A. 268.

¹⁵ See the cases cited in note 1 as under the principal Massachusetts case, especially *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A. C. 242.

¹⁶ This is taking the facts of the case most unfavorably to the petitioner. See note 1, *supra*. If it was a jolt of the hack that threw him from the box, the case is very easy.

¹ See *Hutcheson v. Grubbs*, 80 Va. 251, 254; PRIDEAUX, LAW OF JUDGMENTS 4 ed., 1; 1 BLACK ON JUDGMENTS, 2 ed., § 397.

upon statutes.² The ordinary statute creating a judgment lien provides that the lien dates from the rendering, entering, or docketing of the judgment.³ The simultaneous rendering, entering, or docketing of judgments⁴ or the acquisition of realty by a debtor against whom there have been rendered, entered, or docketed judgments which are unsatisfied and outstanding⁵ creates a situation where there are "equal judgment liens." By the great weight of authority the holder of one of these judgments may, by execution on the realty of the debtor, prefer his judgment lien over the other equal judgment liens.⁶ A recent New York decision reaches a contrary result, overruling two prior New York decisions⁷ which the majority opinion professed to distinguish, and holding that in spite of the prior execution under one of the judgments the property must be divided *pro rata* among the possessors of the equal judgment liens. *Hulbert v. Hulbert*, 216 N. Y. 430, 111 N. E. 70.

The cases representing the weight of authority were influenced, presumably, by a fancied analogy to the equitable principle that a creditor who has pursued into equity property of the debtor which cannot be reached at law is entitled to a preference as a reward of his diligence,⁸ for they continually talk of diligence creating a preference among equal legal claims.⁹ The analogy is inapt in that the execution reaches no assets which are in danger of extinction by an act of a third party. It subjects no property to the payment of this judgment which is not already irrevocably bound to the satisfaction of all judgments against the owner. It is in no way beneficial to the remaining creditors of the debtor but can benefit only the creditor who causes the execution to issue. Furthermore, any talk of diligence is confusing. Judgment liens are vested legal claims and the idea that among equal claimants the law prefers the diligent is a strange one. The preferable manner of attacking the problem is to concede that the statute may have created only an incomplete right which, to be perfected, may require further action by the lienholder, whether that action be diligent, hasty, or fortuitous. So it would seem that the effect of an execution in pursuance of a judgment lien would depend upon the true nature of the lien rather than upon the quality of the lienor's action.

² 1 BLACK ON JUDGMENTS, 2 ed., § 398.

³ 1 BLACK ON JUDGMENTS, 2 ed., § 443.

⁴ 2 FREEMAN ON JUDGMENTS, 4 ed., § 369.

⁵ *Matter of Hazard*, 73 Hun. (N. Y.) 22; *Moore v. Jordon*, 117 N. C. 86, 23 S. E. 259.

⁶ *Adams v. Dyer*, 8 Johns. (N. Y.) 347; *Smith v. Lind*, 29 Ill. 24; *Bruce v. Vogel*, 38 Mo. 100; *Elston v. Castor*, 101 Ind. 426; *Cook v. Dillon*, 9 Ia. 407. See 2 FREEMAN ON EXECUTIONS, 3 ed., § 203; 1 BLACK ON JUDGMENTS, 2 ed., § 455. In Iowa the general rule, though applied to judgments entered on the same day, is not applied to judgment liens on after-acquired property. *Kisterson v. Tate*, 94 Ia. 665, 63 N. W. 350. Contrary to the general rule, *Metzler v. Kilgore*, 3 P. & M. (Pa.) 245; *Matula v. Lane*, 22 Tex. Civ. App. 391, 399; *Rockhill v. Hanna*, Fed. Cas. 11980. But cf. the last case on appeal, 15 How. (U. S.) 189.

⁷ *Adams v. Dyer*, *supra*, 8 Johns. (N. Y.) 347; *Waterman v. Haskin*, 11 Johns. (N. Y.) 228.

⁸ No doubt that is a well-settled principle of equity. *Corning v. White*, 2 Paige (N. Y.) 567; *Pullis v. Robison*, 73 Mo. 201; *Bradley v. United Wireless Telegraph Co.*, 79 N. J. E. 458, 81 Atl. 1107.

⁹ See *Smith v. Lind*, 29 Ill. 24, 30; *Bruce v. Vogel*, 38 Mo. 100, 106; *Elston v. Castor*, 101 Ind. 426, 439; *Cook v. Dillon*, 9 Ia. 407, 414.

Now a judgment lien confers upon the judgment creditor the right to levy execution on the land of the debtor to the exclusion of all subsequent encumbrances.¹⁰ But it seems to be settled that a judgment lien constitutes no property in the land itself.¹¹ Consequently a judgment lienor cannot, prior to levy, enjoin waste on the land of the debtor.¹² Nor can a senior judgment lienor claim a share in the proceeds of a sale under a junior judgment lien, but is compelled to be satisfied with his still existent right to levy on the land itself.¹³ Obviously, then, the equal judgment liens, since they cannot vest as proportionate estates, create conflicting rights. On the one hand it might be said that each of these judgment lienors has the right to levy to the exclusion of all except prior encumbrancers and that an execution by one is a seizure of what he has a legal right to take and keep. On the other hand it might be said that each judgment lienor has the right to levy to the exclusion only of subsequent encumbrancers, that the exercise of no one of those equal rights may defeat the others, and therefore that the equal lienors must eventually share *pro rata*. Of course these are mere statements of conclusions. The propriety of one or the other depends upon the interpretation of the statute creating the judgment lien in the light of its proper purpose. Though it is difficult to say which of these two constructions is correct, the principal case seems to lay down the preferable rule. A hasty execution is not always desirable, and it may be very beneficial to the debtor class as well as comforting to the creditors to give to the latter rights which may be rested upon securely. In most respects execution is not necessary to protect the creditor in his rights against the land of the debtor. To make it necessary in this one instance may have an evil and disquieting effect. The judgment lien is an encumbrance the existence of which may be easily ascertained and there would seem to be no policy requiring its prompt enforcement. The first statutory judgment lien, the "eligit,"¹⁴ gave to the judgment creditor class rights against the realty of the debtor, and those rights could not be defeated by fraudulent conveyances.¹⁵ But within the class a preference could

¹⁰ *Howard v. Ry.*, 101 U. S. 837; *Rankin v. Scott*, 12 Wheat. 177; *Stewart v. Perkins*, 110 Mo. 660, 19 S. W. 989; *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457.

¹¹ In *Conard v. Atl. Ins. Co.*, 1 Peters (U. S.) 386, 443, the court, *per* Story, J., says, "Now, it is not understood that a general lien by judgment on land, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment. . . . In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by execution and levy on the land." This language is universally approved. See *Dail v. Freeman*, 92 N. C. 351, 356; *Walton v. Hargroves*, 42 Miss. 18, 26; *Young v. Templeton*, 4 La. Ann. 254, 257. See also 1 BLACK ON JUDGMENTS, 2 ed., § 400; 2 FREEMAN ON JUDGMENTS, 4 ed., § 338.

¹² *Independent School District v. Werner*, 43 Ia. 643. See *Lanning v. Carpenter*, 48 N. Y. 408, 412. But a judgment lienor may bring a bill in equity to remove a cloud on the title to the debtor's land. *Scottish Am. Mortgage Co. v. Follansbee*, 14 Fed. 125.

¹³ *Dysart v. Brandreth*, 118 N. C. 968, 23 S. E. 966; *Commercial Bank of Manchester v. Yazoo Co.*, 7 Miss. 530.

¹⁴ The writ of "eligit" was authorized by the STATUTE OF WESTMINSTER, II., 13 Edw. I, c. 18.

¹⁵ The courts early held that the right to reach the land by "eligit" could not be defeated by act of the debtor. See PRIDEAUX, LAW OF JUDGMENTS, 4 ed., 9.

be gained by prompt action.¹⁶ Under modern statutes this is changed and judgments are ranked according to the date when they became liens.¹⁷ It seems reasonable to say that the purpose of these modern statutes is to make a creditor secure in his rights the moment his judgment becomes a lien, irrespective of execution, thereby protecting him against all except prior encumbrancers.

THE CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT. — The Supreme Court bids fair to be called upon soon to pass on the validity of the Federal Reserve Act of 1913,¹ now in operation for something over two years.² Section 11 (K)³ by which the Federal Reserve Board is empowered "to grant, by special permit to banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe," has been declared by the Supreme Court of Illinois to be unconstitutional. *People v. Brady*, 271 Ill. 100, 110 N. E. 864. And the same issue is now before the Supreme Court of Michigan.⁴ The question considered by the court to be of principal importance was whether Congress has constitutional power to erect a banking corporation with the additional powers of a trust company. Unfortunately, the language of the opinion⁵ would seem to indicate that the court decided against the statute for want of an affirmative showing of such existing conditions as would justify it. If this means that the court disregarded the presumption in favor of the validity of a statute, the authority of the decision is shaken at the outset; for no proposition is better settled.⁶ On the other hand the court quite properly, as it seems, dismissed the contention that the act is bad as involving an unconstitutional delegation of legislative power.⁷

Assuming that it is necessary to decide the present limits of the power of Congress to charter a corporation, some interesting questions are raised. It is clear that there is in the federal government no general incorporat-

¹⁶ See *Rowe v. Bant*, 1 Dick. (Ch.) 150. And see PRIDEAUX, LAW OF JUDGMENTS, 4 ed., 55.

¹⁷ *Rankin v. Scott*, *supra*, 12 Wheat. 177; *Andrews v. Wilkes*, 7 Miss. 554.

¹ U. S. COMP. STAT. (1913), § 9785, 38 STAT. AT L. 251.

² The act was approved Dec. 23, 1913.

³ U. S. COMP. STAT. (1913), § 9794, 38 STAT. AT L. 262.

⁴ *Atty.-Gen. v. First National Bank* (No. 26853, *quo warranto*).

⁵ 110 N. E. 864, 868.

⁶ See *Butterfield v. Stranahan*, 192 U. S. 470, 492; *County of Livingston v. Darlington*, 101 U. S. 407, 417; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478.

⁷ The distinction between legislation and administration, though in theory clear, in practice presents in each case a question of degree. As defined, the line is a plain one, the function of administrative officials being to determine and act upon issues of fact. See *Cincinnati, Wilmington, etc. R. Co. v. Commissioners*, 1 Ohio St. 77, 88; *Locke's Appeal*, 72 Pa. 491, 498, 499. Yet conclusions as to reasonableness and propriety are now commonly recognized as within their sphere of decision. See *Field v. Clark*, 143 U. S. 649, 693; *Chicago, B. & Q. R. v. Jones*, 149 Ill. 361, 378. So far as the present statute is concerned it seems sufficiently evident that the powers conferred on the Federal Reserve Board are less extensive in this regard than those now exercised by the Interstate Commerce Commission. See *Houston and Texas Ry. v. U. S.*, 234 U. S. 342, 355.

ing power.⁸ But that Congress may, in the furtherance of its power to establish a uniform currency, incorporate a bank, is too well settled for argument.⁹ Moreover, it was long ago agreed that such a bank may properly, for the sake of its general efficiency as an institution, and so as a federal organ, exercise the usual private powers of a bank for private gain, including such as have no direct connection whatever with its federal functions.¹⁰ Accordingly, the national banks have enjoyed a wide activity;¹¹ and have even with judicial approval in isolated instances acted in a trust relation.¹² Since the justification for such powers is found in the necessity of having the bank exist as an influential and capable institution,¹³ the question whether conditions now demand the addition of the powers here in question seems to resolve itself into one of fact; of how far the financial activity of trust companies has encroached upon that of the banks; and of how far, as a result, state banks, with which the federal ones must compete, are now permitted to exercise such powers. On this point, some authoritative statistics are available, indicating the rapid growth of trust companies, as compared with that of the banks.¹⁴ An examination of the recent state statutes, moreover, reveals the significant fact that to-day in practically every state institutions may be incorporated with the combined powers of bank and trust company.¹⁵

⁸ See *McCulloch v. Maryland*, 4 Wheat. 316, 406, 411.

⁹ *McCulloch v. Maryland*, 4 Wheat. 316. *Farmers', etc. Bank v. Dearing*, 91 U. S.

29. See *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283.

¹⁰ See *Osborn v. Bank of United States*, 9 Wheat. 738, 860, 861, 862, 864.

¹¹ For example, a national bank may borrow money (see *Aldrich v. Chemical National Bank*, 176 U. S. 618, 627); become pledgee of stock (*National Bank v. Case*, 99 U. S. 628); improve property owned (*Cockrill v. Abeles*, 86 Fed. 505); make collections for others (*Exch. Nat. Bank v. Third Nat. Bank*, 112 U. S. 276); guarantee commercial paper (*Thomas v. City Nat. Bank*, 40 Neb. 501); take a mortgage of chattels as additional security for a preëxisting debt (*Gaar Scott & Co. v. First Nat. Bank*, 20 Ill. App. 611).

¹² *National Bank v. Graham*, 100 U. S. 699; *American Can Co. v. Williams*, 178 Fed. 420; *Boone County Nat. Bank v. Latimer*, 67 Fed. 27.

¹³ In *Osborn v. Bank of United States*, 9 Wheat. 738, 861, 862, the court said, "It [the bank] is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? . . . Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute." These principles apply equally to the present system of national banks. See *Easton v. Iowa*, 188 U. S. 220, 229.

¹⁴ The report of the Comptroller of the Currency for 1915 shows that during the period from 1875 to 1915 the total deposits in trust companies throughout the United States increased from \$85,025,371 to \$4,216,017,244, or about fifty times. During the same time the total deposits in national banks increased from \$696,652,020 to \$6,611,218,000, or about nine and one half times. These figures show that during this time trust company deposits have risen from 12 to 66 per cent of the total of the bank deposits.

¹⁵ In many states the statutes expressly so provide. See, for instances, CONN. LAWS, 1913, ch. 194, § 8; IND. LAWS, 1915, ch. 97; OHIO ANN. CODE, § 9723; ORE. LAWS, 1911, ch. 354, § 4. Similar provisions in fifteen or twenty other states might be cited.

In other states substantially the same situation obtains through a liberal enunciation of the powers of trust companies. See, for instances, KAN. LAWS, 1907, ch. 425, § 2; MASS. REV. LAWS, 1902, ch. 116, §§ 12-14; N. J. LAWS, 1899, ch. 134, § 6, 4 COMP. STAT., p. 5656; N. Y. BANK. LAW, 1914, § 185, 9 CONSOL. LAWS, p. 146.

Other statutes, though somewhat more narrowly restricting the powers of the trust

Accepting *McCulloch v. Maryland* as a premise, it would seem that if the constitution is to keep pace with the changing times, a thoughtful study of considerations such as these is imperative. They indicate a commercial situation which should have a direct practical bearing on an interpretation of the powers of Congress in this connection. Yet it is questionable whether it should be necessary as the act stands for a court to consider these and similar factors. No doubt they would be vital were the federal government attempting to create corporations with these powers in defiance of state law. The clause, "when not in contravention of state or local law," however, seems to render it possible for a state at any time to deny by an appropriate statute the power of the bank so to proceed.¹⁶

If this is so — and it is difficult to read the clause in any other way — the meaning of section 11 (K) comes merely to this: that the sovereign power which erected the corporation and which could therefore destroy it for the unauthorized assumption of trust company power, hereby formally waives its right to do so. To paraphrase it, the federal government in effect agrees that if the bank chooses to exert this power, and the state, which could object, does not do so, the federal government, which could also object, will not do so either. In this there is no pretense that Congress can authorize such power. That such authority inheres in the states is, indeed, expressly affirmed by the words of the section; and if (as we must suppose) the latter is to have a meaning, it follows that the utmost that it attempts is to operate upon the federal government's undoubted power of attack by *quo warranto*. It is clear that the sovereign may by legislation waive this right;¹⁷ and that the words of the section are sufficient to effect a waiver seems evident. On this view, which, it is submitted, represents the preferable interpretation of the section, the question of extending the doctrine of *McCulloch v. Maryland* is not raised, and the statute may be sustained without adverting to the constitutional difficulties discussed by the state court.

A NEW VARIETY OF UNDUE DISCRIMINATION UNDER THE INTERSTATE COMMERCE ACT.—Once it has properly taken jurisdiction, a rate fixed by the Interstate Commerce Commission will not be disturbed by a reviewing court unless it plainly falls outside a wide range of administrative discretion.¹ Before the Commission can assume jurisdiction, however, it must find a clear violation of law. It is not enough that the

companies, exhibit the same tendency. See COLO. REV. STAT., 1912, § 305; MINN. GEN. STAT., 1913, §§ 6409, 6416, 6417; N. H. LAWS, 1915, ch. 109, §§ 14 and 34; KIRBY'S DIG. (Ark.), 1904, § 888.

In a few states no such provisions seem to exist, namely, Delaware, Maryland, Michigan, Nebraska, Pennsylvania, and Wisconsin. In two of these unauthorized assumption of banking powers is expressly made illegal. Michigan, 5 HOWELL'S STAT., §§ 14861-69; Nebraska, GEN. L., 1909, § 3710.

¹⁶ Thus, New Hampshire has a statute prohibiting any corporation, national or state, from acting as administrator or executor. N. H. LAWS (1915), ch. 109, § 34.

¹⁷ *People v. Ulster & D. R. Co.*, 128 N. Y. 240, 28 N. E. 635; *People v. Los Angeles Electric Ry. Co.*, 91 Cal. 338, 27 Pac. 673.

¹ *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U. S. 441.

rate as finally determined be reasonable; there must be an express finding, based on evidence, that the preëxisting rate is unreasonable.² Where discrimination is the ground of complaint, jurisdiction must be based on a clear finding that one rate is unduly higher than another rate for a similar service.³

How seriously this jurisdictional limitation may hamper the Commission is shown by the recent decision of the Supreme Court, in *Philadelphia & Reading Ry. Co. v. United States*, 240 U. S. 334.⁴ The complainant was one of several neighboring and competing cement works. It relied exclusively on the defendant railroad for connection with the principal consuming centers of the east. Other railroads served the competing producers. As to Jersey City, these other railroads had joined in establishing a flat 80-cent rate, but the defendant railroad persisted in charging \$1.35. As to the other large consuming centers, the defendant had joined in equalizing rates with other carriers. The result was to drive complainant's cement from the Jersey City market. Without passing on either the intrinsic reasonableness of the \$1.35 rate, nor on its relative reasonableness as compared with the rate charged by the defendant carrier to the other consuming centers, the Commission found the refusal to equalize rates to Jersey City a discrimination against that city, and ordered the defendant to desist. This order, affirmed by the District Court, the Supreme Court has set aside.

Considering, for the moment, only the Jersey City rates, the case presents the elementary situation of several producers competing for a common market, and complaint by one of them that his rates, when compared with those of his competitors, are discriminatory. Ordinarily this would be a typical case for relief. But here the same carrier did not control both rates. Where independent carriers contribute to a discriminatory situation, can it be said that any one is guilty of discrimination?⁵ *Damnum* there clearly may be: but is there *injuria*? It is clear that there is no inherent impossibility in prohibiting such two-carrier discrimination; the railroads can be regulated as a single system at least as well as they can be individually.⁶ But jurisdiction for the Interstate Commerce Commission must be found, in this case, in a violation of section 3 of the act. In the ordinary sense of the word, discrimination is made up of two necessary parts — favor on the one hand and prejudice on the other, and you can no more discriminate without being responsible for both than you can cut with scissors without using both blades. But the word "discriminate" is not found in section 3. "It shall be unlawful for any common carrier . . . to . . . give any undue

² See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 92. Cf. *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544.

³ See *Interstate Commerce Commission v. Chicago, etc. Ry. Co.*, 218 U. S. 88.

⁴ See the opinion in the District Court, s. c., 219 Fed. 988, for a more complete statement of the facts. See also s. c., 27 I. C. C. 448, and, on a rehearing, 31 I. C. C. 277.

⁵ For a holding that such a carrier is not guilty, see *Central Pine Ass. v. Vicksburg, etc. R. Co.*, 10 I. C. C. 193, 201. See the statement in 1 *DRINKER, THE INTERSTATE COMMERCE ACT*, 282.

⁶ That the Commission does not now regulate the railroads as a single system, see *Chicago Lumber, etc. Co. v. Tioga, S. E. Ry. Co.*, 16 I. C. C. 323, 332.

... advantage to any particular ... locality, or to subject any particular ... locality ... to any undue ... disadvantage in any respect whatsoever."⁷ This separation of the two parts and the use of the word "or" instead of "and" seems to require the guilty carrier to be responsible for only one and not both. "Or" may be construed as "and" if the statutory purpose so requires,⁸ but section 3 struck at discrimination in all its forms⁹ and must be construed expansively. Nevertheless, a statute must be construed also in the light of the power delegated to enforce it as well as in the light of its purpose, and the Commission has been denied power over minimum rates.¹⁰ Although not necessary to the punishment of two-carrier discrimination, this power has been recognized as indispensable to its effective prevention.¹¹

Under either construction, however, if one of the two rates is a constant, the carrier in control of the other could be held guilty of any undue difference, just as one can use scissors by pressing one blade on the table. An absolutely constant rate is impossible until the Commission has power to set minimum rates, but a rate may become practically a constant for some such reason as water competition, or even, as in the principal case, a continuing readiness in the other carrier to agree to equal rates. It is submitted that the Commission would be justified in finding such practical constancy as a fact, conclusive on a reviewing court.¹²

In the principal case, however, the Commission relied on the further fact that as to all the other great consuming centers, Baltimore, Philadelphia, New York, etc., the defendant had joined the other carriers in equalizing rates. Assuming that it was not guilty of discrimination where only one consuming center was concerned, the argument was that by participating in equal rates to these other centers it was conferring an advantage on them which it refused to confer on Jersey City, thus discriminating against the latter.¹³ The argument requires a further analysis of the elements of discrimination.

The simplest discriminatory situations are, first, two similarly circumstanced producers serving a common market, and second, two similarly circumstanced markets served by a common producer. An undue discrepancy in rates would, on the one hand, drive one producer from the market, and, on the other, deprive one market of the service of the producer. The situation in the principal case was nothing more than a combination of these two; several producers each served several markets. In respect to each producer, the situation was like the first above; in

⁷ It is found elsewhere in sections 2 and 13, but only as a compendious phrase, and therefore only in a technical sense.

⁸ See 2 LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION, § 397.

⁹ See *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342, 356.

¹⁰ *Interstate Commerce Commission v. Cincinnati, etc. Ry. Co.*, 167 U. S. 479; TWENTY-FIFTH ANNUAL REPORT OF THE COMMISSION, 1911, p. 38. The amendment of section 15 in 1906 extended the Commission's power only over maximum rates.

¹¹ See the doubt in the minds of the Commission when they attempted it in *Eau Claire Board of Trade v. Chicago, etc. Ry. Co.*, 5 I. C. C. 264, and also *W. Z. Ripley, Railroads: Rates and Regulations*, p. 254, 624.

¹² *Baltimore & Ohio R. Co. v. Pittcairn Coal Co.*, 215 U. S. 481, 494; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361.

¹³ See the order of the Commission in 27 I. C. C. 448.

respect to each market, like the second. The Commission's finding that Jersey City was discriminated against must, then, rest on the proposition that a disparity between rates from several producers, to one market, is a prejudice not only to the producer who gets the higher rate, but to the market. If this disparity, with respect to Jersey City, is a disadvantage, then equality, with respect to New York, is an advantage, and a case under the wording of the act is made out. It does not seem to be an unreasonable conclusion that such a prejudice in fact exists. If the market is a distributing as well as a consuming center, it may be distinctly prejudiced by a loss in the number of producers using it as such. If it be only a consuming center, the shorter supply might well cause prices to rise. At the least, it would seem to be a fair question of fact, upon which the finding of the Commission would be conclusive.

As neither this question of prejudice by causing an unequal ratio of rates nor the problem of two-carrier discrimination was discussed by the Supreme Court, one may hope that the decision will not stand as a precedent on either point.

THE RELATION OF THE TECHNICAL TRADE-MARK TO THE LAW OF UNFAIR COMPETITION. — The law relating to infringements of technical trade-marks was fully developed before the growth of the law of unfair competition.¹ However, from an analytical viewpoint, unfair competition is the genus, and the infringement of the technical trade-mark a species.² In each case the redress is based upon the right to be protected in the goodwill of a trade or business. The essence of the wrong consists in the palming off of his own goods by one manufacturer or vendor as the goods of another.³ Three recent decisions⁴ of the United States Supreme Court bring out the close relation between these two branches of the law relating to piracy of goodwill.

It was at one time thought that the right in a trade-mark was without territorial limits.⁵ However, such a limit has been set by the Supreme Court in the cases of *Hanover Star Milling Co. v. Metcalf* and *Allen and Wheeler Co. v. Hanover Star Milling Co.*, considered together on writs of *certiorari*.⁶ In the first case, the dispute was between two parties who adopted the same trade symbol subsequent to appropriation by another in a different territory, and the determination of their rights *inter se*,

¹ See HOPKINS, TRADE-MARKS, 2 ed., § 1.

² See ROGERS, GOODWILL, TRADE-MARKS AND UNFAIR TRADING, 127. "In fact, the common law of trade-marks is but a part of the broader law of unfair competition." Pitney, J., in *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 413.

³ See *Canal Co. v. Clark*, 13 Wall. 311, 322; *McLean v. Fleming*, 96 U. S. 245, 251; *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604; *Stix, Baer & Fuller, etc., Co. v. American Piano Co.*, 211 Fed. 271, 279; *Reddaway v. Banham*, [1896] A. C. 199, 209.

⁴ For statements of these cases, see RECENT CASES, pp. 792, 793.

⁵ See *Kidd v. Johnson*, 100 U. S. 617, 619; *Derringer v. Plate*, 29 Cal. 292, 295; HESSELTINE, TRADE-MARKS AND TRADE NAMES, 111. However, the infringements in these cases were in territory into which the goodwill of the owner had already extended. Compare *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139, in which case the infringement was in territory to which complainants' goodwill would naturally expand.

⁶ 240 U. S. 403.

upon well-settled principles of unfair competition, was possible without regard to the question of technical trade-mark.⁷ In the second case it was necessary to determine whether the original user had, by prior use in Ohio and Pennsylvania, acquired a valid trade-mark in Alabama.⁸ The court found that it had not and held that the alleged infringer in Alabama had there acquired a valid trade-mark. On similar facts, a recent Circuit Court of Appeals case reaches the same result.⁹ The determination of the boundaries to be set upon the territorial limits of the trade-mark presents serious difficulties.¹⁰ In a concurring opinion in the principal case, Mr. Justice Holmes suggests that the limits coincide with the boundaries of the sovereignty that gives its sanction to the right, thus avoiding "all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them."¹¹ But this suggestion does not accord with the doctrine that the trade-mark is protected as incident to the goodwill, and under such a doctrine the right to a technical trade-mark would not be coextensive with the goodwill. Furthermore, in the analogous case of unfair competition, the contest is often confined to the limits of a single state, and in such a case, the extent of the goodwill must be determined without regard to artificial lines.¹² In fact the decision in the principal case brings the law of technical trade-mark upon this point in coincidence with the general law of unfair competition, basing relief upon the ground of protection to the goodwill of the trader, which must be found as a fact in each case.¹³

Another phase of the law of unfair competition is presented by the case of *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,¹⁴ by which the law is not left so clear. In that case the defendants, with full knowledge of the plaintiffs' prior use of the mark "American Girl," used the mark "American Lady" upon a similar brand of ladies' shoes. The Circuit Court of Appeals allowed an accounting of profits, upon the ground of unfair competition, on all shoes not marked with the defendants' name as maker. In affirming this decision, the Supreme Court found that a technical trade-mark infringement was involved.¹⁵ Two jus-

⁷ See Pitney, J., in principal case, 240 U. S. 403, 422, 424.

⁸ See discussion of this case in the lower court in 27 HARV. L. REV. 399.

⁹ *Theodore Rectanus Co. v. United Drug Co.*, 226 Fed. 545. The court appears to go upon the ground of an "estoppel by negligence," and there is talk of estoppel in the principal case, p. 419. But there is no real estoppel in either case, and in fact a limit is set on the territorial extent of the trade-mark. Although earlier cases may be explained upon some ground of abandonment, acquiescence, lack of sufficient use to acquire any trade-mark rights, or that the mark was not subject of a valid trade-mark, in so far as the courts treated them as competing trade-marks, they forecast the result of the principal case. See *MacMahan Pharmacal Co. v. Denner Chemical Co.*, 51 C. C. A. 302, 113 Fed. 468; *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Levy v. Waitt*, 10 C. C. A. 227, 61 Fed. 1008; *Carroll v. McIlvaine*, 171 Fed. 125. The cases apparently *contra* have been explained in note 5, *supra*.

¹⁰ In the principal case, there was no need to determine the boundaries within more definite bounds than state lines.

¹¹ 240 U. S. 403, 424.

¹² See the recent case of *Kaufman v. Kaufman*, 111 N. W. 691 (Mass.).

¹³ *Cohen v. Nagle*, 190 Mass. 4, 76, N. E. 276. See 27 HARV. L. REV. 190.

¹⁴ 240 U. S. 251.

¹⁵ A technical trade-mark must be capable of appropriation to the exclusion of all others; it cannot therefore be descriptive or geographic; it cannot be a proper name.

tices¹⁶ dissented upon the ground that the phrase "American Girl" was not a valid trade-mark and that an accounting of profits was not a proper remedy in a case of mere unfair competition.¹⁷ This difference of opinion seems to be based upon the idea that the right to a trade-mark is a property right.¹⁸ Granting this to be true, there is no reason for a different treatment upon that ground alone, for if the invasion of a property right is a necessary prerequisite to an accounting of profits, such is found in the case of unfair competition, where the injury is to goodwill as a valuable property interest. In fact it is often said that the technical trade-mark is but an appendage to the goodwill.¹⁹ And as a matter of authority, an accounting of profits has been granted as readily in the case of unfair competition as where a technical trade-mark was involved.²⁰ This recovery of profits has been justified as being based upon principles analogous to those adopted in patent and copyright cases.²¹ The infringer has made a profit out of the use of another's property and as the proceeds are confused and apportionment impossible or impracticable, he must disgorge the whole.²² Since the courts require proof of an intentional invasion of the plaintiffs' rights before granting an accounting, it is not surprising that they grant the relief prayed without much inquiry as to whether the intentional wrongdoer is thereby made to suffer unduly for his wrong.²³ It was therefore unnecessary, in affirming the decree of the Circuit Court of Appeals, for the Supreme Court to make this distinction between trade-mark infringement and unfair competition. There is however one situation in which a complete accounting of profits should be denied in unfair competition, that cannot arise in the technical trade-mark case, namely, where the unfair competition injures the goodwill of two or more persons using the same proper or geographical name. Clearly the wrongdoer should not be

See HOPKINS, TRADE-MARKS, 2 ed., § 40. The result of this finding of the Supreme Court is that the plaintiff would also be entitled to profits upon the shoes marked with the defendants' name as maker as well as upon the other classes for which accounting was allowed on the basis of unfair competition. For where there has been an infringement of a technical trade-mark, it is no defense that the infringer's name accompanied the mark. That is only an aggravation of the wrong. See *Menendez v. Holt*, 128 U. S. 514, 521; *Bass, Ratcliff & Gretton v. Feigenspan*, 96 Fed. 206, 212.

¹⁶ Chief Justice White and Mr. Justice Van Devanter.

¹⁷ 240 U. S. 251, 263.

¹⁸ See *P. E. Sharpless Co. v. Lawrence*, 213 Fed. 423, 426; *Oakes v. Tousmierre*, 49 Fed. 447, 453.

¹⁹ See HOPKINS, TRADE-MARKS, 2 ed., § 81; ROGERS, GOODWILL, TRADE-MARKS, AND UNFAIR TRADING, 127.

²⁰ An accounting of profits was granted in *Edelsten v. Edelsten*, 1 De G. J. & S. 185; and *Oakes v. Tousmierre*, 49 Fed. 447 (where technical trade-marks were involved); in *Benker v. Feder*, 34 Fed. 534; *Graham v. Plate*, 40 Cal. 593; and *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 915 (where cases of unfair trade were treated as infringements of technical trade-marks); and in *Lever v. Goodwin*, 36 Ch. D. 1; *W. R. Lynn Shoe Co. v. Auburn Lynn Shoe Co.*, 100 Me. 461, 62 Atl. 499; *Gulden v. Chance*, 182 Fed. 303; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 204 (where no technical trade-marks were involved). See, however, *Baker v. Baker*, 115 Fed. 297.

²¹ See *P. E. Sharpless v. Lawrence*, 213 Fed. 423, 426.

²² See *Pitney, J.*, in principal case, 240 U. S. 251, 261.

²³ *Benker v. Feder*, 34 Fed. 534. And even at law, the granting of punitive damages in such cases was common. See HOPKINS, TRADE-MARKS, 2 ed., § 152.

punished to the extent of a full accounting to each one whose rights have been invaded.²⁴

There are two distinct situations in which resort to a court of equity may be had in unfair competition cases, whether involving a trade-mark or not. In one it is to secure compensation for harm already done, as well as an injunction against a continuance of the injury, and in the other it is merely to prevent a threatened destruction or impairment of the complainants' goodwill by a possible confusion in the future. This distinction has not always been kept in mind, and in some of the cases where there had been no present pecuniary injury to the goodwill, an accounting has worked extreme injustice.²⁵ Such a situation was presented in *Straus v. Notaseme Hosiery Co.*,²⁶ where the relief sought was protection from future harm. Two hosiery companies obtained their labels, of similar design, but bearing different names, from the same designer and used them on goods that did not as yet compete. The prior user was given injunctive relief, but an accounting of profits was properly denied for the short reason that the plaintiff had suffered no loss. If, as is intimated in the case of *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,²⁷ there must be a technical trade-mark to warrant an accounting, this case may be placed upon that ground, but to dispose of the case in this manner involves the needless perpetuation of a distinction in the laws of cognate subjects that are gradually merging into one.²⁸

MORTGAGES GIVEN MORE THAN FOUR MONTHS BEFORE BANKRUPTCY BUT RECORDED WITHIN THAT PERIOD. — Whether a mortgage given more than four months before the filing of a petition in bankruptcy, but recorded within that period, may be set aside by the trustee¹ depends

²⁴ *Clark Thread Co. v. Wm. Clark Co.*, 56 N. J. Eq. 789, 40 Atl. 686. In such case the wrongdoer should not fare better because he has harmed several instead of one, and in an appropriate action, he could no doubt be made to disgorge his entire profit.

²⁵ See George Cunningham and Professor Joseph Warren, "A Phase of Accounting in Trade-Mark Cases," 20 HARV. L. REV. 620, criticising *Regis v. Jaynes*, 191 Mass. 245, 77 N. E. 774, where an accounting of profits was allowed, though the defendant had never sold a single article in the territory then occupied by the plaintiff's business. This situation must be distinguished from cases where the defendant merely attempts to show that the public has not been deceived by his use of the plaintiff's mark in the same territory with the plaintiff. See *Saxlehner v. Eisner & Mendelson Co.*, 138 Fed. 22. But see *J. & C. Merriam Co. v. Saalfeld*, 198 Fed. 369, 377.

²⁶ 240 U. S. 179.

²⁷ *Supra*, notes 14 and 17.

²⁸ See ROGERS, GOODWILL, TRADE-MARKS, AND UNFAIR TRADING, 127, "There is no real difference except in the matter of evidence between a case of unfair competition and technical trade-mark." Actual fraud is not necessary in technical trade-mark cases. See *Scrinen v. North*, 134 Fed. 366, 375; *HOPKINS, TRADE-MARKS*, 2 ed., § 99. However, it is usually said that fraud must be shown in order to get relief in a case of unfair competition. See *Church & Dwight Co. v. Russ*, 99 Fed. 276, 279; *Chas. E. Hires v. Villepigue*, 116 C. C. A. 452, 196 Fed. 890; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 551. However, this probably means only that unfair conduct must be clearly shown. See *Cellular Clothing Co. v. Maxton*, [1899] A. C. 326, 334.

¹ An agreement to withhold from record for the purpose and with the effect of securing credit not justified by the debtor's financial condition is evidence of fraud.

upon § 60 of the Bankruptcy Act of 1898, as amended in 1903, and again in 1910.² Under the original act such a mortgage was not voidable.³ Even after the 1903 amendment⁴ some courts held that it could not be set aside if it was not a preferential transfer at its inception.⁵ But under the law as it stands now, it is clear that a mortgage given to secure a preëxisting debt, even though not voidable when executed, may be set aside when recorded within the four months' period, if the necessary elements of a preference exist at the date of recording, and such recording is required.⁶ It would seem from the amended language of § 60 *b* that this should also be true even though the mortgage was originally given for a present consideration.⁷ For obviously the purpose of the amendment is to allow the transfer to be considered as taking place at the date of the recording, when recording is required, and at that date the consideration given when the mortgage was executed has ceased to be contemporaneous.⁸ Nevertheless some courts have reasoned that such a mortgage would cause no diminution of the bankrupt's estate⁹ and therefore could not be a voidable preference.¹⁰ It seems probable that the Supreme Court will take this view, since it has recently so decided in the analogous case of a contract of conditional sale, executed in a state which regards such a sale as a reservation of title, rather than as

Blennerhassett v. Sherman, 105 U. S. 100. See *In re Hunt*, 139 Fed. 283, 291. And a fraudulent conveyance is voidable by the trustee, regardless of its date. *BANKRUPTCY ACT*, § 70 *e*; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545. See *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582. However, the mere failure to record promptly is not of itself fraudulent, where there is no proof of fraudulent intent. *Bean v. Orr*, 182 Fed. 599; *In re Roberts*, 227 Fed. 177.

² Section 47 *a* (2), providing that the trustee in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings," has no effect when the recording precedes the filing of the petition, since the trustee takes the status of such a creditor as of the time when the petition is filed. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50.

³ *Humphrey v. Tatman*, 198 U. S. 91. See *Rogers v. Page*, 140 Fed. 596, 599.

⁴ This amendment added to § 60 *a* a provision that the four months' period should not expire "until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

⁵ *In re Sturtevant*, 188 Fed. 196; *Debus v. Yates*, 193 Fed. 427; *In re Klein*, 197 Fed. 241. But see *English v. Ross*, 140 Fed. 630; *First National Bank v. Connett*, 142 Fed. 33; *In re Hickerson*, 162 Fed. 345; *McElvain v. Hardesty*, 169 Fed. 31; *In re Beckhaus*, 177 Fed. 141; *Mattley v. Giesler*, 187 Fed. 970. In the case last cited, Hook, Circuit Judge, said, at p. 972: "Under the amended section an instrument of transfer required to be recorded or registered speaks at the time the requirement is complied with, and not at the time of its execution."

⁶ This result was reached, even before the 1910 amendment, in *In re Beckhaus*, 177 Fed. 141. Section 60 *b*, as amended in 1910, provides that transfers required to be recorded are voidable when recorded within the four months' period, if either at the time of the transfer or at the time of recording "the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby . . . shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference."

⁷ So held in *Brigman v. Covington*, 219 Fed. 500. Cf. *McElvain v. Hardesty*, 169 Fed. 311.

⁸ See 2 REMINGTON, BANKRUPTCY, 1240.

⁹ In *New York County National Bank v. Massey*, 192 U. S. 138, 147, decided before the 1910 amendment, the Supreme Court laid down the rule that there could be no preference unless there was a diminution of the bankrupt's estate.

¹⁰ *In re Watson*, 201 Fed. 962; *Anderson v. J. O. and N. B. Chenault*, 208 Fed. 400.

an absolute sale with a mortgage back. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50.¹¹

It is not entirely clear whether the court's decision in this case is based on the narrow ground that there was no "transfer" by the bankrupt, or on the broader ground that there was no diminution of the bankrupt's estate. If the Supreme Court means to rely on the broad ground, as the opinion seems to indicate,¹² it must logically decide the case of a mortgage given for present consideration and the case of a conditional sale in the same way. For in the case of a mortgage for a present consideration there is a transfer but no diminution of the bankrupt's estate. But if it abandons this test, or, regarding the transaction at the date of recording (as the amended language of § 60 *b* seems to require), it finds that there was at that time a diminution of the estate, it may then distinguish the cases on the ground that in one there is, and in the other there is not, a "transfer" by the bankrupt. Unless a line is thus to be drawn between a mortgage and a conditional sale,¹³ a further amendment to § 60 will be necessary in order to reach the result which seems desirable.¹⁴

When recording is not required, the amendments to § 60 have no application,¹⁵ so that preferential mortgages not required to be recorded still cease to be voidable four months after they are delivered, even though actually recorded within four months of bankruptcy.¹⁶ It becomes im-

¹¹ For a more complete statement of this case, see RECENT CASES, p. 776.

¹² Mr. Justice Van Devanter, in giving the opinion of the court, said, at p. 53: "It therefore is plain that § 60 *b* refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. . . . So, there was no diminution of the bankrupt's estate."

¹³ Of course no such line can be drawn in jurisdictions which regard a conditional sale as equivalent to an absolute sale with a mortgage back. And even where such a distinction is technically possible, the result reached in the case of the conditional sale seems undesirable.

¹⁴ In *First National Bank v. Connett*, *supra*, Hook, Circuit Judge, said, at p. 41: "The withholding of a chattel mortgage from record assists the debtor to practice a false pretense. It enables him to maintain a financial standing to which he is not honestly entitled. That is generally the actuating purpose, and it is invariably the result. It induces prior creditors to forbear and other persons to extend credit. A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious." The results are equally objectionable, whether the mortgage was given for a preëxisting debt or for a contemporaneous consideration.

¹⁵ Section 3 *b* of the Bankruptcy Act provides that "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer . . . if by law such recording or registering is required or permitted. . . ." The 1903 Amendment to § 60 *a*, as it passed the House of Representatives, also contained the clause "if by law such recording or registering is required or permitted." But the Senate struck out all that followed "required," thus limiting the operation of the amendment, as subsequently adopted by Congress, to cases where recording is "required." CONG. REC., 57th Cong., 1st Sess., vol. 35, pt. 7, pp. 6938, 6943.

¹⁶ *Martin, Jr. v. Commercial National Bank*, 36 Am. B. R. 25; *In re Roberts*, 227 Fed. 177.

portant, therefore, to determine when recording is "required" within the meaning of this section. On this question there has been considerable diversity of opinion in the federal courts. To adopt a literal construction and hold that recording is not "required" unless an unrecorded mortgage under state law is invalid as to every one, would defeat the purpose of the amendment to prevent secret preferential transfers, for under every recording statute an unrecorded mortgage is good as against the mortgagor and as against some classes of persons having actual notice. For this reason it has been held by some courts that recording is "required" under § 60 unless an unrecorded mortgage is good as against every one.¹⁷ In other words, it was thought that "the word 'required,' as used in the amendment, refers to the character of the instrument giving the preference or making the transfer,"¹⁸ without regard to the persons in whose favor the requirement is imposed. For the sake of uniformity it might well be argued that this should be the law.¹⁹ But as a matter of statutory construction, such an interpretation seems unsound. Accordingly other courts have held that "required" means "required as against general creditors."²⁰

This dispute has finally been settled by the Supreme Court in the recent case of *Carey v. Donohue*, Sup. Ct. Off. No. 179.²¹ Mr. Justice Hughes, in giving the opinion of the court, said: "The natural and, we think, the intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take." The result of this construction is that a mortgage which would be invalid as against the trustee under § 47 *a* (2), if unrecorded when the petition in bankruptcy is filed, will be voidable under § 60 *b* if recorded within four months of that date. The purpose of the amendment in question was to indicate under what circumstances the four months' period during which the trustee may avoid a preferential transfer begins to run from the time of recording, rather than from the time of the transfer. When an unrecorded mortgage is good as against that class of persons with whose "rights, remedies, and powers" the trustee is deemed to be vested, the date of recording would seem to be immaterial. But when recording is required to make the mortgage good as against that class, the four months should naturally begin to run at that time, rather than when the mortgage was given. The construction which the Su-

¹⁷ *First National Bank v. Connett*, 142 Fed. 33; *Loeser v. Savings Deposit Bank and Trust Co.*, 148 Fed. 975; *In re Beckhaus*, 177 Fed. 141; *Ragan v. Donovan*, 189 Fed. 138. In *In re Beckhaus*, *supra*, Baker, Circuit Judge, said, at p. 145: "The primal canon of statutory construction is that the language actually used be given its full and fair meaning, that unqualified words be taken without qualification, and that in the absence of ambiguity extraneous matters be not considered. Under this canon probably nothing more can profitably be said than, if recording is required, it is required. If required for any purpose, or without purpose, how can it be said to be not required?"

¹⁸ *Loeser v. Savings Deposit Bank and Trust Co.*, 148 Fed. 975, 979.

¹⁹ See 27 HARV. L. REV. 481.

²⁰ *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396; *In re Hunt*, 139 Fed. 283, 286; *In re McIntosh*, 150 Fed. 546; *In re Jacobson & Perrill*, 200 Fed. 812; *In re Roberts*, 227 Fed. 177.

²¹ For a more complete statement of this case, see RECENT CASES, p. 776.

preme Court has adopted, therefore, as the opinion points out, "gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act."

DECREE FOR SPECIFIC PERFORMANCE AS A WARRANTY DEED. — A recent Kansas case shows an interesting and novel application of the statutes permitting equitable action *in rem*. The court, having personal jurisdiction of the defendant, decreed specific performance of a contract for the sale of land within the state, under a statute¹ giving such a decree, if not obeyed, the same effect as the deed which should have been executed in accordance therewith. No deed was executed, but the vendor was held liable on a warranty against incumbrances on the ground that the decree had the same effect as the warranty deed the defendant should have given. *Paris v. Golden*, 153 Pac. 528.²

At common law, it was well established that equity acted *in personam*, on the conscience of the defendant, and could enforce its decree only by contempt proceedings. But the growing prejudice against imprisonment for contempt, the obvious helplessness of the court if the defendant proved contumacious,³ and the frequent failure of justice resulting from the difficulty of getting personal jurisdiction over the defendant, led to the adoption of statutes, in England, and almost all the states, giving the courts of equity certain powers to act *in rem*, on service by publication.⁴ Such statutes, so far as they concern the specific performance of a contract for the sale of land, are of two types: either the court orders a trustee to make the deed, or the decree itself will operate as a conveyance; in many states the court may use either method in its discretion.⁵ The courts of California have reached the same result without the aid of statutes.⁶ A corresponding development has taken place in the Civil Law.⁷ The French Code provides that the person to whom an obligation is due may obtain the authority of the court to carry out the undertaking at the cost of the obligor.⁸ Similar provisions are found in the German Code;⁹ and, moreover, when the obligor is bound to make declaration of

¹ KAN. GEN. STAT., 1909, § 5993. "When a judgment shall be rendered for a conveyance . . . and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance . . . had been executed conformably to such judgment; or the court may order such conveyance to be executed in the first instance by the sheriff."

² See RECENT CASES, p. 782.

³ See REPORT OF ROYAL COMMISSION ON CHANCERY PRACTICE, I, 8, 107.

⁴ See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 13-25.

⁵ See statutes collected in the appendix to Mr. Huston's book, *supra*. The position of the federal courts is treated in HUSTON, 25-38. There is no federal statute covering the point, and, as it is a question of procedure and not of substantive law, state statutes would not ordinarily control the federal courts. But the federal courts, realizing the defects of the procedure *in personam*, are inclined to take advantage of the statute of the state in which they are sitting. *Single v. Scott Paper Mfg. Co.*, 55 Fed. 553; *Deck v. Whitman*, 96 Fed. 873.

⁶ *Rourke v. McLaughlin*, 38 Cal. 196; *Wait v. Kern River Mining, etc. Co.*, 157 Cal. 16, 106 Pac. 98.

⁷ See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 39-53.

⁸ FRENCH CIVIL CODE, § 1144.

⁹ ZIVILPROZESSORDNUNG, § 883-88.

will, that declaration will be considered as made as soon as the decree has become final.¹⁰ There is an obvious analogy here to our statutes making a decree pass title, but the German provision has a much more comprehensive application.

The principal case, however, seems a logical step toward a broader application of our statutes. Kansas holds with the majority of states that an agreement to convey implies an obligation to give a warranty deed.¹¹ Thus, a deed executed in accordance with the court's decree would be a warranty deed. Where a conveyance is made in different terms from the decree, the decree controls;¹² and, if no conveyance is made, since the statute gives to the decree the same effect as a proper conveyance would have had, the decree will operate as a warranty deed. In other words, the court has conclusively determined that the defendant has a duty to enter into an agreement of warranty. By force of the statute, then, the result is the same as if he had entered into that agreement. This method seems entirely analogous to that prescribed in § 894 of the German Code, quoted above.¹³

It is clear, however, that this result could not be reached unless the decree were based on personal jurisdiction of the defendant, for a court having jurisdiction only *in rem* can in no way adjudicate the personal obligations of the parties, or impose personal liability upon them.¹⁴ Thus, a judgment *quasi in rem* is not conclusive evidence of the existence of the debt in a personal suit in another jurisdiction, in spite of the full faith and credit clause, for there was no jurisdiction to pass upon the defendant's personal obligations.¹⁵ Similarly, in divorce proceedings, a court having personal jurisdiction over the parties may decree the payment of alimony, and the decree will be a conclusive adjudication of the existence of a personal obligation to pay, upon which suit may be brought anywhere,¹⁶ but a court having only jurisdiction *in rem* cannot decree the payment of alimony,¹⁷ although it may appropriate property within the state to that purpose.¹⁸ These cases, it is submitted, are strictly analogous to the principal case; and, since the court had personal jurisdiction, the result is entirely correct.

¹⁰ ZIVILPROZESSORDNUNG, § 894. And see 22 HARV. L. REV. 161, 179. Cf. Goldstein v. Curtis, 63 N. J. Eq. 454, 59 Atl. 639, where it was held, that when a decree operates as a conveyance, a married woman ordered to make a conveyance need not include therein the statutory acknowledgment that the conveyance was her voluntary act.

¹¹ Putnam Investment Co. v. King, 96 Kan. 109, 150 Pac. 559. *Accord*, Whitworth v. Pool, 96 S. W. 880 (Ky.); McDonald v. Minnick, 147 Ill. 651, 35 N. E. 367. *Contra*, Kyle v. Kavanaugh, 103 Mass. 356; Emerick v. Hackett, 192 N. Y. 162, 84 N. E. 805.

¹² See Price v. Sisson, 13 N. J. Eq. 168, 172.

¹³ See note 10, *supra*.

¹⁴ Worthing v. Lee, 61 Md. 530.

¹⁵ Price v. Hickok, 39 Vt. 292; McVicker v. Beedy, 31 Me. 314.

¹⁶ Johnson v. Johnson, 31 Neb. 385, 47 N. W. 1115; Gray v. Gray, 143 N. Y. 354, 38 N. E. 301; Sanford v. Sanford, 5 Day (Conn.) 353.

A court cannot, however, charge alimony on foreign lands and an order to convey such land as alimony will not be enforced at the *situs*. Fall v. Fall, 75 Neb. 104, 113 N. W. 175; Fall v. Eastin, 215 U. S. 1. See 21 HARV. L. REV. 210; 25 HARV. L. REV. 653.

¹⁷ Hekking v. Pfaff, 91 Fed. 60; Rea v. Rea, 123 Ia. 241, 98 N. W. 787; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145. See Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

¹⁸ Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502. See Rea v. Rea, 123 Ia. 241, 98 N. W. 787.

SUCCESSIVE REGISTRATIONS OF THE SAME LAND UNDER THE "TORRENS SYSTEM."—In the recent case of *Legarda v. Saleeby*, 13 Phil. Off. Gaz. 2117, the Supreme Court of the Philippine Islands rendered a decision under the "Torrens Act" in force there, which, if accepted as law, may go far to undermine public confidence in the system. The registrar had included the same piece of land in the certificates of adjoining owners. It was held that the one first obtaining a certificate should prevail against a purchaser from the other, who bought for value and without actual notice of the existence of the prior certificate.¹

To a thorough understanding of the difficulties of the case, and in order to reach a correct result, it is necessary to keep in mind the chief aim and purpose of the so-called "Torrens system." Registration of title to land was first introduced into Australia in 1858;² and has since been adopted by England and many of her colonies,³ several states of the United States, Hawaii, the Philippines and Porto Rico.⁴ The system was designed to simplify dealings with real estate, and to give titles greater security, thereby affording greater protection to the purchaser than was vouchsafed to him under the old system.⁵ Therefore, although of course no two statutes are quite alike, there are certain essentials common to all. The decree of registration operates on the title to make it conclusive against all the world, subject however, by most statutes, to the right of the true owner to set aside a registration obtained by fraud,⁶

¹ Two judges out of six dissented. For a full statement of the case, see RECENT CASES, p. 790.

² See, for historical matter, NIBLACK, THE TORRENS SYSTEM, 6; 3 DEVLIN, REAL ESTATE, § 1438; and a book by the founder of the system, Sir Robert Torrens, ESSAY ON THE TRANSFER OF LAND BY REGISTRATION, 9, 28.

³ For a history of the English statutes, see DUMAS, REGISTERING TITLE TO LAND, 52; TORRENS, ESSAY ON THE TRANSFER OF LAND BY REGISTRATION, 39-44. The system is also in operation in Australasia and in many of the provinces of Canada. See YEAKLE, HURD'S ESSAY ON THE TORRENS SYSTEM, 56; 3 DEVLIN, REAL ESTATE, § 1438.

⁴ The early Illinois and Ohio statutes were held unconstitutional. But the difficulties in the former case were surmounted by a new statute, and in the latter case, probably, by a constitutional amendment. For discussion of these points, see 3 DEVLIN, REAL ESTATE, §§ 1441-44; Niblack, Pivotal Points in the Torrens System, 24 YALE L. J. 274, 282. But constitutional difficulties have not greatly hindered the extension of the system, as acts are now in force also in California, Colorado, Massachusetts, Minnesota, New York, North Carolina, Oregon, and Washington, and when questioned, their constitutionality has been upheld. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129; *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 Pac. 949; *Tyler v. Judges of Court of Registration*, 175 Mass. 71, 55 N. E. 812; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N. W. 175. See 3 DEVLIN, REAL ESTATE, §§ 1449-1455; 65 CENT. L. J. 449. The United States Supreme Court has not yet passed on the constitutionality of the system. In *Tyler v. Judges of Court of Registration*, 179 U. S. 405, it refused to take jurisdiction by a five to four decision. 8 COL. L. REV. 438, 446; 43 AM. L. REV. 97; 3 DEVLIN, REAL ESTATE, § 1451.

⁵ For statements of the purpose of the system, and the benefits it is intended to bring about, see TORRENS, ESSAY ON THE TRANSFER OF LAND BY REGISTRATION, 9-17; YEAKLE, HURD'S ESSAY ON THE TORRENS SYSTEM, 52; DUMAS, REGISTERING TITLE TO LAND, 29-33, 94-102; 3 DEVLIN, REAL ESTATE, § 1439.

⁶ See, for instance, ACTS PHILIPPINE COM., No. 496, § 38. See also *Wadham v. Buttle*, 13 S. A. R. 1, 3. Colorado and Minnesota make no exception in the case of fraud. 1 MILLS ANN. STAT. COLO., § 885; MINN. GEN. STAT., § 6889. See *Baart v. Martin*, 99 Minn. 197, 207, 108 N. W. 945, 949. However, the Minnesota courts will set aside a registration obtained by fraud. *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945.

and by some, to set aside a registration obtained through mistake or misdescription.⁷ Every subsequent transfer must be registered, and no interest can pass till registration takes place.⁸ A purchaser for value from a registered owner gets indefeasible title subject only to such incumbrances as are registered.⁹ Also most statutes provide for an indemnity fund, raised by imposing a small charge for each registration, to which an owner deprived of any interest by the operation of the system may have recourse.¹⁰

Although the "Torrens Acts" are generally conceded to be an improvement over the old method of transferring land by deed,¹¹ they have given rise to many new problems of their own, not the least of which is the problem of overlapping registration. There are several situations which may possibly arise. Where the certificates are still in the hands of the original holders, the first holder should prevail. Such is the weight of authority.¹² The state has purported to pass on the validity of both titles, and, by its adjudication, to make them conclusive against all the world. Each owner had notice of the registration by his neighbor,¹³ and each was at fault in not contesting such proceedings. Since both titles cannot be good against the world, the best that can be done is to allow the owner who first sought the benefits of the system to prevail. *A fortiori* an innocent purchaser for value from the holder of the first certificate would prevail over the other original holder. But where both original holders have sold to innocent purchasers for value, it is submitted that the first purchaser should prevail regardless of from which of the two he purchased. For, as both purchasers are equally meritorious, neither having notice of the other registered certificate, and as both

⁷ The Australian acts generally provide for the delivery up and cancellation of a certificate issued in error. See DUFFEY & EAGLESON, TRANSFER OF LAND ACT, §§ 82, 83; ACTS OF SOUTH AUSTRALIA, 1886, No. 380, § 69.

⁸ See, for instance, N. Y. CONSOL. LAWS, REAL PROPERTY LAW, c. 52, § 406.

⁹ See, for instance, ACTS PHILIPPINE COM., §§ 38, 39. N. Y. CONSOL. LAWS, REAL PROPERTY LAW, c. 52, § 400. It is perhaps a trifle inaccurate to call titles under the system indefeasible, as in the principal case both titles cannot be indefeasible. Guaranteed title is perhaps a better term. See NIBLACK, THE TORRENS SYSTEM, 64; BRICKDALE, REGISTRATION OF TITLE TO LAND, 44.

¹⁰ See, for instance, ACTS PHILIPPINE COM., No. 496, §§ 99-107. The assurance fund provision was held unconstitutional in Ohio as taking property for private use. *State ex rel. Attorney General v. Guilbert*, 56 Oh. St. 575, 623, 47 N. E. 551, 557. See also NIBLACK, THE TORRENS SYSTEM, 8.

¹¹ The success of the system in Australia is undisputed. See TORRENS, ESSAY ON TRANSFER OF LAND BY REGISTRATION, 54-58; DUMAS, REGISTERING TITLE TO LAND, 94-102; NIBLACK, THE TORRENS SYSTEM, 14. But doubt has been expressed as to its success in other countries. See NIBLACK, THE TORRENS SYSTEM, 14-22. The outlook in the United States, however, seems hopeful. See 8 COL. L. REV. 438, 445.

¹² *Stevens v. Williams*, 12 Vict. L. R. 152; Registrar of Titles and Esperance Land Co., 1 West. Aust. R. 118; *Lloyd v. Mayfield*, 7 Aust. L. T. 48; *Oelkers v. Merry*, 2 Q. S. C. R. 193. See HOGG, AUSTRALIAN TORRENS SYSTEM, 823. But if the inclusion of the land in the prior certificate can be clearly shown to have been unintentional, it may be reformed to suit the intentions of the parties. See *Pleasant v. Allen*, 15 Vict. L. R. 601. See also HOGG, AUSTRALIAN TORRENS SYSTEM, quoted in the principal case at page 2119. Unfortunately this valuable treatise was not available at the time of writing.

¹³ This is the effect of the notice "To all whom it may concern." See, for instance, ACTS PHILIPPINE COM., No. 496, §§ 35 and 38. By most acts it is provided that adjoining landowners shall have actual notice. See, for instance, ACTS PHILIPPINE COM., No. 496, § 32.

have what purport to be equally good titles, there is no affirmative reason for divesting the prior registered title in favor of a later one.

Applying this reasoning to the situation in the principal case, it would seem doubly clear that a *bonâ fide* purchaser from the original holder of the second certificate should prevail over the original holder of the first. As against such innocent purchaser the original holder of the first certificate stands in much the same position as the original holder of the second certificate stood toward him. As by the Philippine statute notice is required to be given adjoining landowners,¹⁴ the original holder of the first certificate had actual notice of the second registration proceedings, on the faith of which the purchaser bought; whereas the purchaser has had no notice of any previous registration, nor by any possibility could have notice. In other words, it is not a case of equal equities as the majority opinion seems to assume, since the equity of the purchaser for value is clearly superior.¹⁵ And if the purchaser in the principal case is not *bonâ fide* it is difficult to see how there can be such a thing as a *bonâ fide* purchaser under the system. For, although the description in the notice of the registration proceedings, "To all whom it may concern," makes all the world parties defendant, yet to charge a purchaser buying land under a second certificate with notice of the first certificate would have the effect of nullifying all the advantages which the "Torrens system" was intended to bring about.¹⁶

The decision in the principal case is therefore a serious misfortune in that its result will be to give titles to realty even less security, and purchasers even less protection, than existed under the old methods of conveyancing, with all the concomitant evils of cost, complexity, and delay intensified. For in view of the fact that no ministerial officer or court is always infallible, the purchaser of land instead of being confined only to the "chain of title," as he was under the old system, will be forced to extend his search to every certificate of land originally registered prior to the initial registration of the land he intends to buy, before he may assume with safety that he is getting a good title. That the court intended to bring about any such result seems hardly possible, yet it is difficult to see how any other conclusion can be reached from its decision. Its disregard of one of the cardinal principles of the act, that of protection to the purchaser, may serve to make the remedy worse than the disease.

¹⁴ See ACTS PHILIPPINE COM., No. 496, § 32. It appears that the plaintiff had actual notice in the principal case.

¹⁵ As one of the chief essentials to the proper operation of the system is the protection of innocent purchasers for value from a registered owner, such protection has been consistently given regardless of how the original registration was brought about. See *Main v. Robertson*, 7 Aust. L. T. 127; *Hassett v. Colonial Bank of Australasia*, 7 Vict. L. R. 380; *Gibbs v. Messer*, [1891] A. C. 248, 254. But cf. *Gibbs v. Messer*, [1891] A. C. 248.

¹⁶ The notice "To all whom it may concern" has the effect, with certain exceptions, of concluding all the world from disputing the validity of that registration. See ACTS PHILIPPINE COM., No. 496, §§ 35, 38. But there is nothing to indicate that such notice of the first proceedings will affect a purchaser under a second certificate. See *Oelkers v. Merry*, 2 Q. S. C. R. 193, 201. Cf. *Miller v. Davy*, 7 N. Z. R. 515. Otherwise there could be no such thing as a *bonâ fide* purchaser. The majority opinion in the principal case confuses registration of *deeds* with registration of *titles*. The former method has of course no effect on the title, while the latter purports to clean the slate. See 8 COL. L. REV. 438, 443 ff. 3 DEVLIN, REAL ESTATE, § 1440.

RECENT CASES

ADMISSIONS — PARTIES AND PRIVIES — STATEMENT OF TRANSFEROR OF STOCK: ADMISSIBILITY AGAINST CORPORATION IN ACTION FOR WRONGFUL REGISTRY OF TRANSFER. — Upon A.'s presenting B.'s certificate of stock indorsed in blank, the defendant corporation, in spite of notice from B. that he claimed the stock adversely, registered a transfer of the stock to C. B. now sues the corporation for conversion of the stock. To prove his ownership, he offers in evidence declarations of A. made while A. possessed the certificate. *Held*, that the declarations are admissible against the defendant as admissions of a predecessor in interest. *Cooper v. Spring Valley Water Co.*, 153 Pac. 936 (Cal.).

Statements of one from whom a party claims to derive title, made while he held his alleged title, are admissible against the party as admissions. *Woolway v. Rowe*, 1 A. & E. 114; *Guy v. Hall*, 3 Murph. (N. C.) 150. See 2 WIGMORE, EVIDENCE, §§ 1080, 1081; 23 HARV. L. REV. 397. Thus the admissions of an assignor of a chose in action are receivable against his assignee. *Glanton v. Griggs*, 5 Ga. 424; *Hatch v. Dennis*, 10 Me. 244. But in the principal case the corporation did not succeed to any interest of the transferor in the stock. For registry by the corporation is only a step in the transfer. See 2 COOK, CORPORATIONS, 7 ed., §§ 373, 381. And it seems clear that the title to stock does not pass through a corporation in going from the transferor to the transferee. Since the corporation here had notice of the plaintiff's claim, it is true that its right to make the registry depends on the ownership of the transferor. *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 27, 116 Pac. 298, 302. See *Mount Holly, etc. Turnpike Co. v. Ferree*, 17 N. J. Eq. 117, 122. See 2 COOK, CORPORATIONS, 7 ed., §§ 361, 387. But that fact does not justify the admission of the latter's statements. The theory on which a party's admissions are receivable is to show a discrediting inconsistency with his present claim. See 2 WIGMORE, EVIDENCE, § 1048. Because of the identity of the title held by a party and his predecessor, the common law treated them both as one personality. Hence, the statements of the latter were admitted to show the inconsistency of the former as though they were the statements of the party himself. See *Guy v. Hall*, 3 Murph. (N. C.) 150, 152. When this rule crystallized it remained limited to those who were identical in regard to their ownership of the right in issue, and should not now be extended except by the legislature. In the analogous case of a life insurance policy this limitation has been observed. It is avoided as against an innocent beneficiary by the fraud of the insured. *Burruss v. National Life Ass'n of Hartford*, 96 Va. 543, 32 S. E. 49. Yet it seems that the insured's admissions are not receivable against the beneficiary to prove his fraud, since there is no legal identity of title between them. *Mutual Life Insurance Co. of New York v. Selby*, 72 Fed. 980; *Rawson v. Milwaukee Mutual Life Insurance Co.*, 115 Wis. 641, 92 N. W. 378. Cf. *Fidelity Mutual Life Ass'n v. Winn*, 96 Tenn. 224, 33 S. W. 1045. See 2 WIGMORE, EVIDENCE, § 1081.

ATTACHMENT — ROLLING STOCK OF NON-RESIDENT CARRIER — BAILEE'S SPECIAL INTEREST AS A BAR TO ATTACHMENT. — A foreign railroad delivered a loaded car to a domestic road under an agreement whereby, after delivery at destination, the domestic road might use the car on the return trip at a small daily rental. The car while unloaded was attached by the plaintiff in an action against the foreign road. The domestic road intervened. *Held*, that the attachment be discharged. *Dye v. Denver & Rio Grande R. Co.*, 153 Pac. 502 (Kan.).

It is laid down as a fundamental principle that the attaching creditor can acquire no greater interest in the property than the debtor possesses. See *Shahan v. Hertzberg*, 73 Ala. 59, 64; DRAKE, ATTACHMENT, § 245. Where the debtor is not entitled to immediate possession, attachment, which is essentially an assumption of possession, would therefore seem to be precluded. So it has been held that an attachment must be postponed in favor of a prior lien. *Truslow v. Putnam*, 1 Keyes (N. Y.) 568. See *Nathan v. Giles*, 5 Taunt. 558, 576. The same decision was reached in favor of a bailee for hire. *Hartford v. Jackson*, 11 N. H. 145. See *Stanley v. Robbins*, 36 Vt. 422, 433; *Brigham v. Avery*, 48 Vt. 602, 607. Clearly, therefore, the bailee's special interest must defeat the attachment in the principal case. Such an attachment was also discharged, in an early case, on the ground that it was detrimental to the freedom of commerce. *Michigan Central R. Co. v. Chicago, etc. R. Co.*, 1 Bradw. (Ill.) 399. But cf. *Boston, etc. Ry. v. Gilmore*, 37 N. H. 410. Again such an attachment has been considered an unauthorized interference with interstate commerce. *Wall v. Norfolk & Western R. Co.*, 52 W. Va. 485, 44 S. E. 294; *Connery v. Quincy, etc. R. Co.*, 92 Minn. 20, 99 N. W. 365. But the Supreme Court of the United States, at least in the case of cars not in use, has held that the attachment cannot be defeated on this ground. *Davis v. Cleveland, etc. R. Co.*, 217 U. S. 157. See 23 HARV. L. REV. 642. It has been suggested, however, that where the bailee has a special interest in the property, his creditor may proceed by garnishment. See 1 SHINN, ATTACHMENT AND GARNISHMENT, § 34. But this would not be feasible in the principal case, for the obligation of the bailee to redeliver does not mature until the car has passed beyond the court's jurisdiction. See *Southern Flour & Grain Co. v. Northern Pacific Ry. Co.*, 127 Ga. 626, 630, 56 S. E. 742, 744.

BANKRUPTCY — PREFERENCES — PREVIOUS TRANSFER RECORDED WITHIN FOUR MONTHS OF BANKRUPTCY.— More than four months before bankruptcy an insolvent transferred property to the appellant, which the latter had reasonable cause to believe would result in a preference. The transfer was by deed, which was recorded less than four months before the filing of the petition. By the law of Ohio the unrecorded deed was valid except as to subsequent purchasers in good faith. The trustee in bankruptcy now seeks to avoid the transfer as a preference. *Held*, that the deed is not voidable. *Carey v. Donohue*, Sup. Ct. Off. No. 179.

A contract of conditional sale executed more than four months before bankruptcy was recorded within the four months period, at a time when the vendee was insolvent, as the vendor knew. Under the law of Kansas, a conditional sale is not regarded as an absolute sale with a mortgage back. The recording law made such contracts void as against creditors who fastened a lien upon the property by legal process before the contract was recorded. The trustee seeks to avoid the contract as a preference. *Held*, that it is not voidable. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50.

For a discussion of the questions involved in these cases, see NOTES, p. 766.

BANKRUPTCY — STATE BANKRUPTCY AND INSOLVENCY LAWS — STATE LAW SUPERSEDED AS TO FARMERS.— An insolvent farmer made a voluntary assignment for the benefit of creditors under the Pennsylvania Insolvency Law which provides for voluntary and involuntary proceedings, and for distribution of the assets and the discharge of the insolvent. (1901, LAWS OF PENNSYLVANIA, 404.) The National Bankruptcy Act expressly excepts farmers from involuntary bankruptcy, but provides for voluntary bankruptcy. (30 U. S. STAT. 544.) The assignee brings suit to set aside a fraudulent conveyance in pursuit of his right under the state statute. *Held*, that the assignee has no right to sue because the National Bankruptcy Act has superseded the Pennsyl-

vania statute as to the voluntary bankruptcy of a farmer. *Dictum*: that the same is true of involuntary bankruptcy. *Closser v. Strong*, 35 Am. Bank. Rep. 864 (U. S. Dist. Ct., Western Dist. of Pa.).

State legislation, dealing with the subject of bankruptcy, though admittedly within the power of the state, is superseded by a national exercise of the power granted to Congress by Art. I, Sec. 8, of the Constitution. *Tua v. Carriere*, 117 U. S. 201. See *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 196. The extent to which it is superseded, however, is disputed, the cases appearing to set forth four views. First, that the state act is not suspended unless the federal courts can at the very time actually take jurisdiction over the case. See *Lace v. Smith*, 34 R. I. 1, 12, 86 Atl. 268, 272; *Geery's Appeal*, 43 Conn. 289, 303; *Singer v. National Bedstead Co.*, 65 N. J. E. 290, 294, 295; *Sturges v. Crowninshield*, *supra*, 195. Second, that where the National Act either expressly or by necessary implication excepts a class of cases from its operation, Congress did not intend to interfere with state legislation on this subject. See *Herron v. Superior Ct.*, 136 Cal. 279, 282, 68 Pac. 814, 815; *Simpson v. Savings Bank*, 56 N. H. 466, 475. Third, that unless the National Act provides for both voluntary and involuntary bankruptcy on a set of facts, the state insolvency law is not in any respect superseded. See *In re Rittenhouse's Estate*, 30 Pa. Super. Ct. 468, 470; *McCullough v. Goodhart*, 3 A. B. Rep. 85, 86; *Miller v. Jackson*, 34 Pa. Super. Ct. 31, 39. Fourth, that the state courts are precluded from entertaining any petition under a state bankruptcy act. See *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 180, 51 N. E. 529, 530; *Harbaugh v. Costello*, 184 Ill. 110, 118, 56 N. E. 363, 365. Cf. *Ketcham v. McNamara*, 72 Conn. 709, 46 Atl. 146. The fourth view, adopted in the principal case appears preferable. For surely Congress intended to create a complete system of bankruptcy, and when it made certain exceptions it did so because it seemed wise that in such cases bankruptcy proceedings should not be permitted at all. See S. Williston, "Effect of a National Bankruptcy Law upon State Laws," 22 HARV. L. REV. 547, 553; REMINGTON, BANKRUPTCY, § 1630. See *contra*, *Singer v. National Bedstead Co.*, *supra*, 296. And the general tendency of decisions as to other matters, denies to the states the right to supplement federal legislation on a subject. See *Houston v. Moore*, 5 Wheat. (U. S.) 1, 22, 23; *Southern Ry. Co. v. Ry. Comm.*, 236 U. S. 439, 446; *Erie Ry. Co. v. New York*, 233 U. S. 671, 683. Yet the decision of the principal case is contrary to the holding of the Pennsylvania state courts. *Citizens National Bank v. Gass*, 29 Pa. Super. Ct. 31; *Miller v. Jackson*, *supra*. And the *dictum* is opposed to previous holdings of state courts. *Old Town Bank v. McCormick*, 96 Md. 341. See *In re Rittenhouse's Estate*, *supra*.

BILLS AND NOTES — DELIVERY — DELIVERY TO PAYEE IN TRUST FOR SPECIAL ENDORSEE — BONÂ FIDE PURCHASER. — The maker of a check, without relinquishing control over it, procured the payee's special indorsement to the plaintiff. He then gave it to the payee to give to the plaintiff. The former indorsed the latter's name, and negotiated the check to a *bonâ fide* purchaser. The purchaser deposited it in the defendant bank, which, having collected it, is now sued by the plaintiff who claims the proceeds as owner of the check. *Held*, that the plaintiff may recover. *Wolfen v. Security Bank of New York*, 156 N. Y. Supp. 474.

At common law, and by the Negotiable Instruments Law, actual or constructive delivery of a negotiable instrument is necessary to vest title in an indorsee. *Clark v. Boyd*, 2 Ohio, 56. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, §§ 30, 191; 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 63 a. Nor is the mere delivery to the transferor's agent effective as a constructive delivery to the transferee. *Brind v. Hampshire*, 1 M. & W. 365; *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295. See *contra*, *Gordon v. Adams*, 127 Ill. 223, 226.

19 N. E. 557, 558. And delivery to a third person to deliver to another constitutes such person the agent of the remitter, and not of the remittee. See *Jones v. Jones*, 101 Me. 447, 452, 64 Atl. 815, 817. As there was therefore no effective delivery to the plaintiff, though the beneficial interest vested in him, he did not acquire legal title. It passed to the payee. Hence, though the payee's indorsement of the plaintiff's name was ineffective, the delivery of the instrument to the purchaser operated as an assignment. *Hughes v. Nelson*, 29 N. J. Eq. 547; *Freund v. Importers and Traders, etc. Bank*, 76 N. Y. 352, 357. The defendant, by collecting the check, converted this equitable right into legal title to the money. Thus, though his equity was subsequent to the plaintiff's, since he gave value for the very right which he has now in good faith made legal, he should prevail.

BILLS AND NOTES — INDORSEMENT BY JOINT PAYEES TO ONE OF THEM. — The defendant made a negotiable note payable to himself and the plaintiff. Both of them indorsed it in blank and the plaintiff now sues as holder of the note. *Held*, that he cannot recover. *Dotson v. Skraggs*, 87 S. E. 460 (W. Va.).

Since a man cannot contract with himself, a note of which the maker and the payee are the same person is a nullity until indorsed. *Pickering v. Cording*, 92 Ind. 306. See 1 DANIEL, NEGOTIABLE INSTRUMENTS, 7 ed., 130. The same result would logically follow when the maker is one of joint payees. Since there is no contract, even if the procedural difficulty involved in the identity of plaintiff and defendant is removed, there can be no recovery. See *Edison Electric Illuminating Co. v. De Mott*, 51 N. J. Eq. 16, 19, 25 Atl. 952, 953. Hence, in the principal case, the plaintiff could not recover as payee. However, as such a note is rightly treated as payable to the person to be designated as indorsee, a valid indorsement will create an original obligation between the maker and such indorsee. *Ewan v. Brooks-Waterfield Co.*, 55 Oh. St. 596, 45 N. E. 1094. But when there are other payees, all must indorse to render the indorsement valid. *Ryhiner v. Feickert*, 92 Ill. 305; *Kaufman v. State Savings Bank* 151 Mich. 65, 114 N. W. 863. However, in the principal case this was done, both payees indorsing in blank. Now a note payable to the order of the maker, indorsed in blank, is payable to bearer. *Wilder v. De Wolf*, 24 Ill. 190; *Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415. Thus, as the plaintiff in the principal case comes within that description, he should have been allowed to recover. *Smith v. Gregory*, 75 Mo. 121. Though he is named as payee and his indorsement was necessary, as the instrument became effective subsequently and as even on its face he was then without title, he is really an anomalous indorser and as such not remitted to his former position. Hence, the fact that he is described as joint payee with the maker is no impediment to his recovery.

CONFLICT OF LAWS — FOREIGN CORPORATION — EFFECT OF DISSOLUTION — STATUTORY SUCCESSOR. — A Pennsylvania insurance corporation was dissolved by an order of a court in that state under a statute which provided for dissolution in case of insolvency and vested title to the assets in the State Insurance Commissioner. (1911 LAWS OF PENNSYLVANIA, 600.) The plaintiff brought an action in New York against the corporation and the Insurance Commissioner on a claim due him from the corporation and attached debts due the corporation in New York. *Held*, that the attachment is invalid. *Martyn v. American Fire Insurance Co.*, 110 N. E. 502 (Court of Appeals of New York).

A corporation duly dissolved by the state of incorporation ceases to exist everywhere, and a judgment against it after dissolution is of no more effect than a judgment obtained against a dead man. *Sturges v. Vanderbilt*, 73 N. Y. 384; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 286. The assets become a trust fund for creditors and stockholders. See BEALE, FOREIGN CORPORATIONS, § 825. Many jurisdictions, however, provide by statute for a successor to the dissolved corporation, and vest title to its assets in him. His title and his right

to sue on claims of the corporation, unlike those of an ordinary receiver, assignee in bankruptcy, or executor, are fully recognized outside of the state. *Relfe v. Rundle*, 103 U. S. 222; *Bockover v. Life Ass'n*, 77 Va. 85. Cf. *Willets v. Waite*, 25 N. Y. 577. See BEALE, FOREIGN CORPORATIONS, § 799; see 29 HARV. L. REV. 442, 443. The distinction rests on the theory that the statutory successor does not assume the position of a mere representative, but takes all the rights of the deceased as a universal successor. But since the law of the domicile cannot pass title to realty situated abroad, he does not take title to such property. *City Insurance Co. v. Commercial Bank*, 68 Ill. 348. As to personalty, however, he takes precedence over creditors of the corporation even in a foreign jurisdiction. *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305. In the principal case the plaintiff proceeded on the basis of an action *quasi in rem*, since a judgment against the corporation could not be obtained. But the commissioner having obtained title under the laws of Pennsylvania, no attachment could be made on the property to subject it to claims directly against the corporation.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — EQUAL PROTECTION OF THE LAWS — STATUTE PROHIBITING USE OF TRADING STAMPS. — State statutes imposed a prohibitive license tax on the use of trading stamps redeemable in merchandise. *Held*, that the statutes are constitutional, as a proper exercise of the police power. *Rast v. Van Deman & Lewis Co.*, Sup. Ct. Off., No. 41; *Tanner v. Little*, Sup. Ct. Off., No. 224; *Pitney v. State of Washington*, Sup. Ct. Off., No. 242.

The great weight of authority has hitherto held such statutes unconstitutional. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429. See 2 L. R. A., N. S. 588, note. The cases went on the ground that since there was no element of chance in the trading stamp business, it did not partake of the nature of gambling, but was a legitimate form of advertising, and as such could not be prohibited. See FREUND, POLICE POWER, § 293. But it is at least arguable that such schemes, by tempting the ignorant with the hope of getting something for nothing, lure them to improvidence and extravagant expenditure. Furthermore, unlike ordinary advertising, the trading-stamp system serves no useful purpose. See FREUND, POLICE POWER, p. 279. It thrusts an additional and unnecessary cost on distribution which must ultimately be borne by the entire public, and under our competitive system it cannot be successfully resisted by individuals. And it would be a perversion of the Fourteenth Amendment to say that it prohibits the remedy of community action in these otherwise incurable diseases of competition, detrimental to the whole public. For the police power embraces all regulations designed to promote the general welfare or prosperity. See *Chicago, etc. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 592; *Noble State Bank v. Haskell*, 219 U. S. 104, 111; *Eubank v. City of Richmond*, 226 U. S. 137, 142. Such legislation will not be overthrown by the courts unless utterly unreasonable or purely arbitrary. *Otis v. Parker*, 187 U. S. 606; *McLean v. Arkansas*, 211 U. S. 539. See *Schmidinger v. Chicago*, 226 U. S. 578, 587, 588. Likewise, if there is any reasonable ground for the classification adopted, the equal protection clause of the Fourteenth Amendment is not violated. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *International Harvester Co. v. Missouri*, 234 U. S. 199. Nor need a statute cover the whole field of possible abuses in order to hit what the legislature deems an evil. *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Keokee Coke Co. v. Taylor*, 234 U. S. 224. There clearly is sufficient difference in fact between the use of trading stamps and ordinary advertising to afford a reasonable basis for a legislative discrimination. It is to be hoped that the principal cases mark the turning of the tide on this question.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION — *STARE DECISIS*. — A Texas statute punished as a crime the operation of pool rooms in any district that voted to prohibit them. This statute had been held unconstitutional by the Texas Supreme Court, contrary to a prior decision of the co-ordinate Court of Criminal Appeals. *Cf. Ex parte Mitchell*, 177 S. W. 953, with *Ex parte Francis*, 72 Tex. Cr. R. 304, 165 S. W. 147. The question of the constitutionality of the statute is now brought once more to the Court of Criminal Appeals. *Held*, that the statute is constitutional. *Ex parte Mode*, 180 S. W. 708.

The constitutionality of liquor local option laws is now well settled. See *JOYCE*, INTOXICATING LIQUORS, §§ 368, 371. Most courts have rested their decision on the ground that the statutes are not a delegation of legislative power but are laws to take effect on a contingency. *Locke's Appeal*, 72 Pa. St. 491; *People v. McBride*, 234 Ill. 146, 84 N. E. 865. However, as the voters pass on exactly the same question as the legislature and relieve it of responsibility, it is submitted that such a statute is in fact a delegation, and the same courts have so decided in case the referendum is to the voters of an entire state. *State v. Hayes*, 61 N. H. 264; *Opinion of the Justices*, 160 Mass. 586, 36 N. E. 488. *Contra*, *State v. Frear*, 142 Wis. 320, 125 N. W. 961. The law is better justified as a delegation within the field of those local regulations which it is proper for the legislature to delegate. *Commonwealth v. Bennett*, 108 Mass. 27. *Cf. Feek v. Township Board of Bloomingdale*, 82 Mich. 393, 47 N. W. 37. See *COOLEY*, CONSTITUTIONAL LIMITATIONS, 7 ed., 173, 174; 19 HARV. L. REV. 203. This argument applies even more emphatically to pool rooms than to liquor establishments, as the former are everywhere recognized as a proper subject of local control. *City of Burlingame v. Thompson*, 74 Kan. 393, 86 Pac. 449; *Cole v. Village of Culbertson*, 86 Neb. 160, 125 N. W. 287. Hence, the Court of Criminal Appeals was justified in treating the statute as constitutional unless it was precluded from so doing by the decision of the Supreme Court. Prior to this decision, the Supreme Court had held itself bound by the decisions of the Court of Criminal Appeal on criminal matters. *Green v. Southard*, 94 Tex. 470, 61 S. W. 705; *Commissioners' Court v. Beall*, 98 Tex. 104, 81 S. W. 526. To have continued such a course would have avoided the absurd anomaly of two conflicting laws in a single state which has now resulted from treating the question of what decision is binding as one, not of subject matter, but solely of the court where the action is brought. However, as the question in the principal case was one of criminal law, the Court of Criminal Appeals properly disregarded the decision of the Supreme Court and followed their former holding.

CORPORATIONS — DISSOLUTION — DEVOLUTION OF PROPERTY ON DISSOLUTION: CHOSSES IN ACTION. — After the expiration of the charter of a corporation, the business was continued by the single stockholder in the corporate name. By statute an expired corporation continued in existence for an indefinite period for the sole purpose of winding up its business. (1915, KY. STAT., § 561.) After the dissolution certain deposits which were held by foreign banks in the name of the corporation were assessed for taxation both at the corporate home and at the domicile of the stockholder. *Held*, that the tax should be collected at the stockholder's domicile. *Ewald's Executor v. City of Louisville*, 181 S. W. 1095 (Ky.).

By the old common law rule debts due a corporation were extinguished by its dissolution. 1 BL. COMM. 484; *Bank of Mississippi v. Duncan*, 56 Miss. 166. Later the rule in regard to personalty, that it reverts to the Crown as *bona vacantia*, was extended to apply to the debts of an extinct corporation. *In re Higginson and Dean*, [1899] 1 Q. B. 325. See 19 HARV. L. REV. 610. The hardship of such a rule is now largely obviated by statutes authorizing the courts to dispose of the assets of the corporation, usually by the appointment of receivers. But in our courts, even in the absence of a statute, equity, apparently

ignoring the claim of the state, has regarded the corporate assets as a trust fund for the benefit of the stockholders and creditors. *Connecticut Life Insurance Co. v. Dunscomb*, 108 Tenn. 724, 69 S. W. 345; *Craycraft v. National Building & Loan Ass'n*, 117 Ky. 229, 77 S. W. 923. Cf. *Bacon v. Robertson*, 18 [How. 480. Where there is no insolvency the title to the corporation property on dissolution is regarded as in the stockholders as tenants in common, subject, of course, to the rights of the creditors to have it applied in satisfaction of the corporation debts. *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171. See 15 HARV. L. REV. 743. In the principal case it would seem that title passed to the stockholder immediately upon dissolution. The statute it is submitted makes no difference. Where there is no intention to wind up the business, and no winding up was desirable or necessary, it is hard to see why the indefinite extension in the statute should postpone the vesting of title in the stockholder.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — ABATEMENT AND REVIVAL: DEATH OF BENEFICIARY. — A Massachusetts statute provides that the administrator of one killed by a negligent act can maintain a suit for the benefit of the deceased's next of kin, the amount of recovery to be proportionate to the defendant's negligence. (1910, MASS. REV. LAWS, SUPPLEMENT, 1378.) While an action under this statute was pending, the next of kin died. *Held*, that the action is not abated, since the statute is punitive. *Johnston v. Bay State Street Ry. Co.*, 111 N. E. 391 (Mass.).

At common law it finally became settled that a person pecuniarily injured by the death of a relative had no right of action against one wrongfully causing the death. *Baker v. Bolton*, 1 Camp. 493; *Carey v. The Berkshire R. Co.*, 1 Cush. (Mass.) 475. See TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 11. Cf. *Hermann v. The New Orleans, etc. R. Co.*, 11 La. Ann. 5, 22. Statutes now generally authorize the deceased's administrator to sue for the benefit of financially dependent relatives, recovering only the pecuniary loss they have actually sustained. TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 153. Again, though at common law actions of tort usually did not survive the plaintiff's death, statutes now invariably provide that actions for injuries to property rights shall survive. See 1 WILLIAMS, EXECUTORS, 8 ed., 797, 798. And an injury to property, within the meaning of the statutes, is whatever is an injury to the estate of the deceased plaintiff. *Nettles v. D'Oyley*, 2 Brev. (S. C.) 27. Since the beneficial plaintiff in an action for wrongful death can only recover for the actual financial loss he has incurred, his cause of action arises from an injury to his estate. *Matter of Meekin v. Brooklyn, etc. R. Co.*, 164 N. Y. 145, 58 N. E. 50; *Union Steamboat Co. v. Chaffin's Admrs.*, 204 Fed. 412. Accordingly, the action should not be abated by his death, although, by showing the actual brevity of the period of loss, the beneficiary's death may be evidence tending to diminish the amount of damages. *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 633; *Shawnee v. Cheek*, 41 Okla. 227, 248, 137 Pac. 724, 731. See TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 87. Cf. *Morris v. Spartanburg Ry., etc. Co.*, 70 S. C. 279, 49 S. E. 854; *Billingsley v. St. Louis, etc. Ry. Co.*, 84 Ark. 617, 107 S. W. 173. *Contra*, *Gilkeson v. Missouri, etc. R. Co.*, 222 Mo. 173, 121 S. W. 138; *Harvey v. Baltimore, etc. R. Co.*, 70 Md. 319, 17 Atl. 88. In the principal case the action is brought under a unique punitive statute, which is merely a substitute for indictment and fine. See *Brown v. Thayer*, 212 Mass. 392, 398, 99 N. E. 237, 240. See TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 44. And as punitive actions aim to punish the tortfeasor, not to redress the injury, they should survive the death of the incidental beneficiary. *Western Union Telegraph Co. v. Scirde*, 103 Ind. 227, 2 N. E. 604. Cf. *Prescott v. Knowles*, 62 Me. 277, 280.

DEEDS — CONSTRUCTION — DEEDS TO GROWING TIMBER: RIGHTS OF THE GRANTEE. — The defendant granted, by deed, the timber then standing on his

land, with a right to enter to cut and remove the trees, to the plaintiff, and his heirs, with covenants of warranty. After a lapse of more than a reasonable time for cutting and removing the trees, the plaintiff brings a bill to gain possession of them, and for an injunction restraining the defendant from cutting them. *Held*, that the relief sought by the plaintiff be granted in full. *Chapman v. Dearman*, 181 S. W. 808 (Tex.).

Growing trees may be granted in fee without granting a corresponding interest in the soil. *Stanley v. White*, 14 East 332; *White v. Foster*, 102 Mass. 375, 378. But the grant carries, by implication, a right in the soil for support and nutriment, and a right to enter to remove the timber. *Clap v. Draper*, 4 Mass. 265; *Liford's Case*, 11 Coke 85, 99. As such a conveyance deprives the grantor of practically all enjoyment of the soil while the trees remain standing, courts are reluctant to construe a grant of timber as in fee. Hence, though the words of the deed are unqualified as to title and time, their literal meaning is avoided whenever possible. Thus, if the words of the grant are applicable to a sale of personalty, the trees are treated as such; title to them does not pass until severance, and the contract endures only a reasonable time. *Houston Oil Co. v. Boykin*, 153 S. W. 1176 (Tex.). Again, if the grant of the right of entry is not specifically unlimited, in some courts, the title to the timber is held to pass in fee, but the right of entry is treated as contractual, and is limited to a reasonable time. *Decker v. Hunt*, 111 App. Div. 821, 825, 98 N. Y. Supp. 174, 177; *Western Lime, etc. Co. v. Copper River Land Co.*, 138 Wis. 404, 412, 120 N. W. 277, 280. Other courts look at such a conveyance as giving a mere term in the trees, and hold that all trees uncut after a reasonable time revert to the grantor. *Patterson v. Graham*, 164 Pa. St. 234, 30 Atl. 247. This same diversity of view is displayed in adjusting the rights of the parties after the expiration of the time for removal. See 17 HARV. L. REV. 411. But where the grant is unambiguously in fee, and in addition the right of entry is expressly declared to be perpetual, the courts have construed the conveyance as passing a perpetual right to lumber the tract. *North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873; *France v. Deep River, etc. Co.*, 79 Wash. 336, 140 Pac. 361. But the principal case goes further, for the right of entry, though granted to the plaintiff and his heirs, is not expressly declared perpetual. It is supported, however, by a similar case in the same jurisdiction. *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238.

EQUITY — JURISDICTION — PROCEDURE — DECREE OPERATING AS A WARRANTY DEED. — In a suit for specific performance of a contract for the sale of Kansas land, the court in that state decreed that the vendor, who was personally served with process, should execute a conveyance, and that, if he failed to do so, the decree should have the same effect as if a conveyance had been made, according to KAN. GEN. STAT. 1909, § 5993. By the Kansas law, the vendor would have been required to execute a warranty deed. No deed was executed, and the vendee took possession under the decree. He now sues the vendor to recover compensation for his loss through the foreclosure of a prior mortgage on the land, claiming that the decree operated as a warranty deed. *Held*, that he may recover. *Paris v. Golden*, 153 Pac. 528 (Kan.).

For a discussion of the questions involved, see NOTES, p. 770.

EVIDENCE — CONFESSIONS — ADMISSIBILITY OF PLEA OF GUILTY WITHDRAWN BY LEAVE OF COURT. — The defendant entered a plea of guilty to an indictment. By leave of court he withdrew this plea and entered a plea of not guilty. The court admitted evidence of the plea of guilty. *Held*, that there was no error in admitting the evidence. *State v. Carta*, 96 Atl. 411 (Conn.).

Among the few unsatisfactory decisions to be found, there is a split whether a

withdrawn plea of guilty is admissible in evidence. *People v. Jacobs*, 165 N. Y. App. 721, 151 N. Y. Supp. 522. See *Commonwealth v. Ervine*, 8 Dana (Ky.) 30. *Contra*, *State v. Meyers*, 99 Mo. 107, 119, 12 S. W. 516, 519. Cf. *People v. Ryan*, 82 Cal. 617, 23 Pac. 121. A voluntary acknowledgment of guilt by the defendant is ordinarily probative, and is admissible as a confession. A voluntary plea of guilty should thus be admissible, unless the statement of a person in a criminal plea, like that of an actor on the stage, loses its ordinary significance. It is well settled that a plea of guilty is competent as an admission. *Parker v. Couture*, 63 Vt. 449, 21 Atl. 1102; *Green v. Bedell*, 48 N. H. 546. This involves the decision that the plea is probative; and it should hence be admissible as a confession, if it is voluntary. A plea of guilty may, it is submitted, be voluntary. The demand of the court that the defendant make some plea would not seem to offer any inducement for a false plea of guilty. There might be circumstances which showed the plea to be involuntary. But these present only a preliminary question for the trial judge; and the judge's permission for the defendant to withdraw his plea as a conclusive determination of guilt and to thus get a jury trial does not, it seems, necessarily show that he considered the plea to be involuntary. It might be objected that evidence of the plea would be given undue weight by the jury; but the chance of this would seem slight in view of the defendant's opportunity to show the circumstances under which the plea was offered. The evidence would thus seem admissible. The feeling of a lawyer that it should not be admitted arises probably from the point of view that a trial is a game and that it is unsportsmanlike for one party to take advantage of the withdrawn pleadings of the other.

EVIDENCE — DECLARATIONS CONCERNING MATTERS OF GENERAL OR PUBLIC INTEREST — TRADITIONAL PROOF THAT THE LOCUS IS INCLUDED IN SPECIFIED LARGER TRACT. — The plaintiff in ejectment claimed under a deed which described the land conveyed merely as the "Grant Mill Place." He offered to testify to a general reputation in the community that the land in issue was embraced within the tract so known. While reversing the case on other grounds, the court held that this evidence was properly excluded. *McAfee v. Newberry*, 87 S. E. 392 (Ga.).

Georgia has codified the rule permitting traditional proof of ancient boundaries; the statute embracing private boundaries, in accordance with the general rule in this country. (1910, GEORGIA CIVIL CODE, § 5772.) This exception to the hearsay rule is based on necessity and the fact that community reputation upon such subjects is likely to embody the truth. See *Toole v. Peterson*, 9 Ired. L. (N. C.) 180, 185; *Harriman v. Brown*, 8 Leigh (Va.) 697, 707, 710; 2 WIGMORE, EVIDENCE, §§ 1580-83. Strangely enough, there has been little adjudication as to precisely what may be proved by this method. We are free therefore to decide the case in the manner indicated by the reasons that justify the rule. It is laid down broadly that "particular facts" cannot be proved. 2 WIGMORE, EVIDENCE, § 1585. However, evidence was admitted to prove that a castle was located in a certain hundred. *Duke of Newcastle v. Broxtowe*, 4 B. & Ad. 273. But evidence that premises lay within a larger unsurveyed tract was not admitted when the boundaries of the larger tract could have been determined by survey. *Mendenhall v. Cassels*, 3 Dev. & B. (N. C.) 49. See also *Toole v. Peterson*, 9 Ired. L. (N. C.) 180. The difference between the cases, both in the matter of necessity and in the probability of accurate report, is evident. Necessity is absolute whenever the boundaries lie only in tradition; when they do, the location of a certain piece within a larger tract is as capable of accurate report as the position of the boundaries of the larger tract themselves, for the two things are identical. The principal case demonstrates the wisdom of discretionary leeway which will permit the admission of evidence

slightly below the ordinary standard of trustworthiness, in a case of extreme need.

INJUNCTIONS — ACT RESTRAINED — INJUNCTION AGAINST EXHIBITING MOTION PICTURE OBTAINED THROUGH INDUCING BREACH OF NEGATIVE COVENANT. — The plaintiff contracted with an actress of unique ability for her services in producing the first motion picture play in which she was to appear, and the actress expressly covenanted not to appear for anyone else. Through fraudulent misrepresentations, the defendant induced her to break her contract with the plaintiff and act for a picture for the defendant. Later she returned to fulfill her contract with the plaintiff, who now seeks to enjoin the defendant from exhibiting films "featuring" her. *Held*, that the demurrer to the bill be overruled. *Jesse L. Lasky, etc. Co. v. Fox*, 157 N. Y. Supp. 106 (Sup. Ct.).

The defendant, by inducing the actress to render him services to which the plaintiff under his contract was exclusively entitled, committed a legal tort upon the plaintiff. *Lumley v. Gye*, 2 El. & Bl. 246; *Ashley v. Dixon*, 48 N. Y. 30; *Walker v. Cronin*, 107 Mass. 555. Legal damages for inducing the breach of such a contract are a wholly inadequate remedy. Hence with a view to prevent further breaches of the contract by the actress equity would restrain the wrongdoer from accepting the services. *Lumley v. Wagner*, 1 DeG. M. & G. 604; *Manchester, etc. Co. v. Manchester, etc. Co.* (1901), 2 Ch. 37, 51; *Donnell v. Bennett*, 22 Ch. 835. However efficacious this may be in dealing with the "legitimate" stage, it is apparent that with moving picture plays, once the pictures have been taken, such a remedy is quite useless. For the difficulty is not in preventing the defendant from inducing further breaches of contract, but to protect the picture monopoly for which, in substance, the plaintiff has contracted and to which he is entitled. It is well settled, however, that equity will enforce against a wrongdoer specific reparation for his tort in cases of unique injury. *Duke of Somerset v. Cookson*, 3 P. Williams 390; *Beresford v. Driver*, 14 Beav. 287, 16 Beav. 134; *Williams v. Carpenter*, 14 Colo. 477. Again equity will enjoin the negotiation of negotiable instruments illegally obtained. *Smith v. Aykwell*, 3 Atkyns 566. On these analogies, since by his wrongful acquisition of the films, the defendant in the principal case has destroyed the plaintiff's monopoly, the plaintiff should be secured specific reparation of the injury by enjoining the defendant from showing the pictures.

INSURANCE — INCONTESTABILITY CLAUSE — DEFENSE OF FRAUD IN PROCURING POLICY. — A life insurance policy contained a clause making it incontestable from its date except for non-payment of premiums. In an action brought by the beneficiary to recover the amount of the policy the defendant company set up the defense of fraud in procuring the policy. The plaintiff demurred. *Held*, that the alleged fraud is no defense. *Duvall v. National Ins. Co.*, 154 Pac. 632 (Idaho).

Many life insurance policies provide that the policy shall be incontestable after a period of two or three years, some states requiring this by statute. It is universally held that the expiration of this period bars the defense of fraud in procuring the policy. *Mass. Benefit Life Ass. v. Robinson*, 104 Ga. 256, 30 S. E. 918; *Wright v. Mutual Benefit Life Ass.*, 118 N. Y. 237, 23 N. E. 186; *Murray v. State Mutual Life Assurance Co.*, 22 R. I. 524, 48 Atl. 800. These cases are put on the ground that the parties have contracted for a short period of limitations. Such contracts are very generally held valid. *Riddles-Barger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Gooden v. Amoskeag Fire Ins. Co.*, 20 N. H. 73. *Contra, Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615. But when the stipulated incontestability is from the inception of the policy this reasoning fails. It is clear that on grounds of public policy the courts will prevent a person who has procured an ordinary contract by fraud

from shielding himself by inserting a clause that the contract is incontestable. *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458; *Hofflin v. Moss*, 67 Fed. 440; *Redmond v. Wynne*, 13 N. S. Wales (Law) 39. But it is suggested that in life insurance contracts, this public policy is overborne by the facts that the company, and not the alleged wrongdoer, inserted the incontestability clause, and that it thereby offered an attractive inducement to the insured who would be defrauded were the provision held worthless. *Union Central Life Ins. Co. v. Fox*, 106 Tenn. 347, 61 S. W. 62. See *Patterson v. Natural Premium Life Ins. Co.*, 100 Wis. 118, 124, 75 N. W. 980, 984. See also 24 HARV. L. REV. 53. However, since the clause, though abrogated as to fraud, would still render the policy incontestable on all other grounds, it would only be an empty inducement in so far as the insured had relied upon immunity from charges of intentional wrong. And as such charges are difficult to falsify even after the death of the insured, it would seem that the chance of loss to innocent policyholders would hardly justify the protection of wrongdoers. *Welch v. Union Central Life Ins. Co.*, 108 Iowa 224, 78 N. W. 853; *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217. See *Mass. Benefit Ass. v. Robinson*, 104 Ga. 256, 271, 30 S. E. 918, 924.

INTERSTATE COMMERCE ACT — CONSTRUCTION OF FREE-PASS PROVISION. — The plaintiff sued in the Mississippi court for an injury due to the railroad's negligence, sustained on an interstate journey, while riding on the tender, with the engineer's permission, and without payment of fare. In Mississippi a person cannot recover for an injury sustained while violating the law. *Held*, that plaintiff cannot recover, as his presence on the tender was in violation of the free-pass provisions of the Interstate Commerce Act. *Illinois Central R. Co. v. Messina*, 240 U. S. 395.

By the Hepburn Amendment to the Interstate Commerce Act, no common carrier may "issue or give any interstate . . . free transportation for passengers," and a penalty is provided for "any person . . . who uses any such interstate . . . free transportation." 34 U. S. COMP. STAT. 584. To allow a friend to ride on the tender is clearly not within the scope of the engineer's authority. *Chicago & Alton R. Co. v. Michie*, 83 Ill. 427, 430; *Rucker v. Missouri Pacific Ry. Co.*, 61 Tex. 499, 501. See *Waterbury v. New York, etc. R. Co.*, 17 Fed. 671, 673. Nor would the friend be a passenger. *Files v. Boston & Albany R. Co.*, 149 Mass. 204, 21 N. E. 311. See J. H. Beale, Jr., "The Creation of the Relation of Carrier and Passenger," 19 HARV. L. REV. 250, 259, 265. It follows that the railroad was not giving "free transportation for passengers" under the act. The principal case therefore establishes that a person may violate the law by accepting a ride, although the railroad is not acting unlawfully in carrying him. The word "such," which seems to establish the same test for the person as for the carrier, is interpreted as merely an indication "that free transportation had been mentioned before." There is much force to the dissenting argument of Mr. Justice Hughes and Mr. Justice McKenna, that there is nothing in the general purpose of the free-pass provisions to call for such a departure from their literal language.

JUDGMENTS — LIENS — EXECUTION BY ONE JUDGMENT CREDITOR AS AFFECTING RIGHTS OF EQUAL JUDGMENT LIENORS. — A debtor, against whom there were docketed three judgments, inherited an interest in realty. By statute these judgments constituted liens on the debtor's realty and by decision they attached as liens of equal force to after-acquired realty. Execution was issued under one of the judgments and a sale of the debtor's interest was made to A. At a subsequent partitioning proceeding, A. sought to be preferred out of the proceeds of the original debtor's share to the extent of the judgment under which he bought. *Held*, that the proceeds of the share of the original judgment

debtor must be divided *pro rata* among the claimants under the three judgments. *Hulbert v. Hulbert*, 216 N. Y. 430, 111 N. E. 70.

For a discussion of the question involved in this case, see NOTES, p. 755.

JUDICIAL NOTICE — TERRITORIAL JURISDICTIONS OF INFERIOR COURTS — NO JUDICIAL NOTICE OF JURISDICTIONS OF JUSTICES OF THE PEACE WHEN FIXED BY BOARD OF SUPERVISORS. — The defendant was convicted of wife abandonment in a justice's court. On retrial in the Circuit Court the only proof of the requisite jurisdiction of the justice of the peace was a statement in the record of the testimony in the justice's court of the place where the defendant left his wife. The territorial jurisdictions of justices of the peace in each county are fixed by a board of supervisors of the county. (1906, MISSISSIPPI CODE, § 2721.) *Held*, that the record fails to show jurisdiction. *Elzey v. State*, 70 So. 579 (Miss.).

The principal case indicates that there are limitations on the rule that the law of the forum will be judicially noticed. The underlying principle, it is submitted, is that the taking of judicial notice of enactments of governmental bodies depends, not upon the mere fact that the enactments are law, but upon the relative importance of their source. Thus, when the judicial and administrative divisions of a state are fixed by public statute, the courts will take judicial notice of their boundaries. *Chicago, etc. R. Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8. See *Board of Commissioners v. State*, 147 Ind. 476, 497, 46 N. E. 908, 914. Judicial notice will also be taken of the location of towns incorporated under a public statute. See *Gilbert v. National Cash Register Co.*, 176 Ill. 288, 292, 52 N. E. 22, 24. Likewise, when the voice of the people speaks in a public election, the courts will take judicial notice of the results of the voting. *Thomas v. Commonwealth*, 90 Va. 92, 17 S. E. 788. And a state court has not required proof of the executive orders of the Federal Treasury Department. See *Low v. Hanson*, 72 Me. 104, 105. And by the same guiding principle municipal courts must take judicial notice of municipal ordinances. *Scranton v. Danenbaum*, 109 Iowa 95, 80 N. W. 221. But in state courts municipal ordinances must be proved, although they are part of the law. *Metteer v. Smith*, 156 Cal. 572, 105 Pac. 735. Authority supports the principal case in holding that territorial jurisdictions determined by local boards will not be judicially noticed. *Blackenstoe v. Wabash, etc. Ry. Co.*, 86 Mo. 492. See 4 WIGMORE ON EVIDENCE, §§ 2572, 2575, 2577.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — DISTINCTION BETWEEN MUTUAL COMMERCIAL ASSOCIATIONS AND MERCANTILE AGENCIES CONDUCTED FOR A PROFIT. — The defendant was the secretary of a mutual trade protective society which was not conducted for profit. In answer to the inquiry of one of the subscribers regarding the financial standing of the plaintiff, the defendant, in good faith, made a false and libelous statement, for which the plaintiff now sues. *Held*, that the statement was privileged. *London Association for the Protection of Trade v. Greenlands*, 32 T. L. R. 281 (House of Lords).

Credit reports of a mercantile agency are not privileged, when not confined to subscribers having a special interest in the matter. *Sunderlin v. Bradstreet*, 46 N. Y. 188; *King v. Patterson*, 49 N. J. L. 417, 9 Atl. 705. However, the distinct weight of American authority treats reports of such agencies, if confined to persons having a special interest, as privileged. *Ormsby v. Douglass*, 37 N. Y. 477; *Erber v. Dun*, 12 Fed. 526. Cf. *State v. Lonsdale*, 48 Wis. 348, 369, 4 N. W. 390, 397. But in England and a few United States jurisdictions, a contrary view is taken, when the agency is conducted for profit. *Macintosh v. Dun*, [1908] A. C. 390; *Johnson v. Bradstreet*, 77 Ga. 172. See *Pacific Packing Co. v. Bradstreet*, 25 Ida. 696, 704, 139 Pac. 1007, 1010. It is well settled

that private reports of the financial standing of a third person, made to one having an interest in the matter, are privileged. *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261; *Richardson v. Gunby*, 88 Kan. 47, 48, 127 Pac. 533, 534. See *King v. Watts*, 8 C. & P. 614, 615. And it follows that such communications by an agent to his principal are privileged. *Bohlinger v. Germania Ins. Co.*, 100 Ark. 477, 140 S. W. 257; *Mead v. Hughes*, 7 T. L. R. 291. Since the defendant may be considered as the agent of the subscriber, the principal case is easily explained. But since a profit-making agency is just as truly the agent of the subscriber, the English rule imposing liability on such a company is an anomaly in the law of libel which may be justified only by the modern tendency to impose on businesses dangerous to life, property or reputation, the risks incidental to their operation. The distinction taken by the English courts is analogous to that between a private, gratuitous surety and a surety company. See 29 HARV. L. REV. 314.

MASTER AND SERVANT — ASSUMPTION OF RISK — STATUTORY ABROGATION: EFFECT ON DEFENSE OF CONTRIBUTORY NEGLIGENCE. — A New York statute abrogates the defense of assumption of risk, but leaves unaltered the defense of contributory negligence. (BIRDSEYE, CON. LAWS OF N. Y. 202, p. 1624.) The plaintiff, a longshoreman, sues under this statute, for injuries sustained by a fall from an obviously insecure and unsafe ladder, which had been furnished him as the only means of descending into the hold where he was working. Held, that the plaintiff may be barred on account of contributory negligence if found to have used the ladder carelessly, but not on account of the fact that he used it at all. *Maloney v. Cunard Steamship Co.*, 54 N. Y. Law Jour. 2067 (Court of Appeals).

The defenses of contributory negligence and assumption of risk, though frequently confused, are fundamentally distinct. See 49 L. R. A., 49, note. For assumption of risk bars the employee on the ground that by his acquiescence he has either waived or negatived the employer's negligence—while contributory negligence bars him because his action or inaction contrary to the standard of the ordinary prudent man, was a contributing cause of the injury. See Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 14, 17, 18. Still the two defenses are frequently concurrent. Thus the mere use of an appliance which is so dangerously defective that the ordinary reasonable man would refuse to use it at all, will bar the employee on both grounds. See *Narramore v. Cleveland, etc. Ry. Co.*, 96 Fed. 298, 304; *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 579, 96 N. W. 929, 931. Hence, in the principal case, even though the defense of assumption of risk has been removed, a narrow construction of the statute would allow the jury to refuse recovery to the plaintiff merely because he used the ladder. But as it is inconceivable that a legislature would intend to abrogate the defense that an employee, by encountering his employer's negligence, has waived it, and yet bar the employee on the ground that he was contributorily negligent in encountering it; a broader reading of the statute, by which the defense of contributory negligence in so far as it is based on the mere use of a dangerous appliance is impliedly removed, is clearly more desirable.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — MEASURE OF COMPENSATION — GENERAL FALL IN WAGES DISTINGUISHED FROM LOSS IN EARNING CAPACITY THROUGH ACCIDENT. — A workman was partially incapacitated. The Massachusetts act provides that in case of partial incapacity the workman is to be paid "one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter." (1911, MASS. STAT. c. 751, pt. 2, § 10.) Before the accident he was earning \$22 a week; now he is able to earn only \$13.20. The Industrial Board found that if he had not been injured he would earn \$19.40 in

the present state of the labor market, but that if the labor market had held constant he would now earn \$15 with the handicap of his injury. He was awarded \$8.80, the difference between his past and his present wages. *Held*, that the award be modified to \$7, the difference between his past wages and what he would be earning now if it were not for the fall in the labor market. *In re Durney*, 111 N. E. 166 (Mass.).

The British Workmen's Compensation Act (6 Edw. 7, c. 58, sched. 1, § 3), wherein the difference between past and present wages is set as a maximum, to be awarded in full only when proper in the circumstances, has been held to contemplate a compensation only for a diminution in earning power through an injury, not through a decline in the labor market. *Merry & Cuninghame v. Black*, 46 Scot. L. R. 812, 2 B. W. C. C. 372. See *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009, 1018, 1026, 4 B. W. C. C. 159, 168; *Dobby v. Wilson Pease Co.*, 2 B. W. C. C. 370, 371. Cf. *Thompson v. Johnson*, [1914], 3 K. B. 694, 7 B. W. C. C. 479; *Jamieson v. Fife Coal Co.*, 40 Scot. L. R. 704. In spite of the unqualified language of the statute in the principal case, to apply the theory developed by the English courts is more in accord with the fundamental purpose of workmen's compensation. And because of their essentially remedial nature, their fundamental purpose should be made operative by a liberal construction. See *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 193, 22 N. E. 766, 767; *Colorado Milling, etc. Co. v. Mitchell*, 26 Colo. 284, 287, 58 Pac. 28, 30. See 28 HARV. L. REV. 307, 308. Thus, in the principal case, since the difference between the plaintiff's actual past wages and his actual present wages includes a slump in the labor market, that difference should not be made the basis of compensation, but either the scale of wages at the time of injury, or at the time of recovery, should be used throughout the computations. As the use of either basis is equally violative of the literal language of the act, and as the difficulty of estimating the average labor market for the entire period of compensation demands the selection of a market at a single arbitrary time, the rule of the principal case would seem the more natural. But cf. *Bevan v. Energlyn Colliery Co.*, [1912] 1 K. B. 63, 5 B. W. C. C. 169. And, though the purpose of the act is not to indemnify for injury, since it aims to measure the relief given to a workman of any particular standard on the basis of the full loss occasioned by the injury regardless of extrinsic occurrences, when the scale of wages has risen, the labor market should be equalized just as when it has fallen. But cf. *Pomphrey v. Southwark Press*, [1901] 1 Q. B. 86, 3 W. C. C. 194; *Irons v. Davis & Timmins*, [1899] 2 Q. B. 330, 1 W. C. C. 26. However, the fact that the present English act, after providing for the modification of awards to accord with what is proper in the circumstances, expressly sets the actual loss in wages as a maximum, may afford a distinction in this respect.

PARTITION — RIGHT OF TENANT UNDER "OIL LEASE" TO COMPEL PARTITION. — A tenant in common of certain land, purporting to be the sole owner, granted the exclusive rights to search for and take away oil and gas, together with all other rights reasonably necessary to do this. In order that he may exercise his rights upon his grantor's share of the land the grantee now sues the co-owners to compel a partition in kind. This the pleadings admit will be just. *Held*, that the suit is not maintainable. *Gulf Refining Co. of La. v. Hayne*, 70 So. 509 (La.).

The common law rule is that no one but the holder of a legal estate in possession can compel partition in his own right. See FREEMAN, CO-TENANCY AND PARTITION, 2 ed., § 446; 1 TIFFANY, REAL PROPERTY, § 175. The provisions of the Louisiana code as to partition are conflicting. See LA. REV. CIV. CODE, Art. 740, 1310. Under the civil law partition may be compelled by any obligee of a co-owner. See CODE NAPOLÉON, Art. 1166. See 34 CARPENTIER ET DU SAINT, RÉPERTOIRE DU DROIT FRANÇAIS, 149 (No. 766). Now it is generally

held that an "oil lease" merely gives title to the minerals when severed, together with rights in the nature of an easement. *Gulf Refining Co. of La. v. Rives*, 133 La. 178, 62 So. 623; *Heller v. Dailey*, 28 Ind. App. 555, 560, 63 N. E. 490, 493; *Beardsley v. Kan. Nat. Gas Co.*, 78 Kan. 571, 574, 96 Pac. 859, 860. See THORNTON, OIL AND GAS, 2 ed., §§ 51, 57 *a*. Hence, at common law, the grantee under such a lease could not compel partition in his own right. *Watford Oil and Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53. But *cf. Charleston, etc. R. Co. v. Leech*, 33 S. C. 175, 11 S. E. 631. It is submitted, however, that the interest created is really a *profit à prendre*. *Cf. Caldwell v. Fulton*, 31 Pa. St. 475; *Muskett v. Hill*, 5 Bing. N. Cas. N. C. 694. See WASHBURN, EASEMENTS AND SERVITUDES, 4 ed. *9, *80. Though a *profit* is a legal estate in the land, it is doubtful whether the holder of it can demand partition in his own right. The grantee under an "oil lease" should, however, be allowed to compel partition through his grantor since partition is reasonably necessary to make the grant effective. The decree for partition would be, in effect, specific performance of the grantor's covenant, followed by the latter's suit for partition. *Cf. Charleston, etc. R. Co. v. Leech*, *supra*; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175; *Heaton v. Dearden*, 16 Beav. 147. However, in both common law and civil law jurisdictions the courts will generally refuse to partition in kind, land on which oil is actually known to exist, since it is presumed that such partition would be unjust. *Dangerfield v. Caldwell*, 151 Fed. 554, 558. See THORNTON, OIL AND GAS, 2 ed., § 277; LA. REV. CIV. CODE, § 1303. But that such a partition would be just is admitted by the pleadings in the principal case. However, to grant any partition in the principal case would involve the objection of partitioning the payment to the grantor, who contracted to convey the *profit à prendre* from the entire tract of land.

PROXIMATE CAUSE — INTERVENING CAUSES — NATURAL FORCES. — A tug under contract to tow stone-barges to and from a breakwater was disabled by a defective rudder. The barges were left in an exposed position, so that when the wind changed several hours later, one of them was sunk. But for the accident the barges would not have remained thus exposed. The owner brings a libel against the tug. *Held*, that the breaking of the rudder was the proximate cause of the loss. *The Enterprise*, 132 Fed. 131, 133 (Dist. Ct., Dist. of Conn.).

A carload of household goods was negligently delayed by the carrier, and several days later was injured in transit by an unprecedented flood which could not reasonably have been foreseen. But for the delay, the goods would not have been overtaken by the flood. The shipper sues the carrier. *Held*, that the delay was not the proximate cause of the injury. *Seaboard Air Line Ry. v. Mullin*, 70 So. 467 (Fla.).

The intervention of a new force does not make a cause remote if that force was foreseeable. *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 473; *Carter v. Towne*, 98 Mass. 567; *Pastene v. Adams*, 49 Cal. 87. This would be decisive of the Federal case if at the time of the defendant's negligence, a shift in the wind and its consequences were foreseeable. It is submitted that a defendant may even be liable for unforeseeable results of his negligence. *Smith v. London, etc. R. Co.*, 6 C. P. 14. See 1 BEVAN, NEGLIGENCE, 3 ed., 88; Jeremiah Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, 123, 223, 237, 303. But a defendant cannot be held merely because the injury would not have happened but for his negligence. *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 36 So. 593. A defendant is liable, however, if his negligence precipitate an unstable equilibrium though it was unknown and the result unforeseeable. *State v. O'Brien*, 81 Ia. 88; *Hill v. Winsor*, 118 Mass. 251. So also, if his act substantially coöperate with an active force, even though that force be unforeseeable. *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; *New Brunswick Steamboat, etc. Co. v. Tiers*, 24 N. J. Law 697. But if an independent unfore-

seable force intervene, and the defendant's act serve merely to put the plaintiff or his property in its path, the defendant's act should not be considered a proximate cause of the result. *Gilman v. Noyes*, 57 N. H. 627; *Bush v. Commonwealth*, 78 Ky. 268. Thus the decision of the Florida case would seem to be right, and is supported by the weight of authority. *Rodgers v. Missouri Pacific Ry. Co.*, 75 Kans. 222. *Contra, Green-Wheeler Shoe Co. v. Chicago, etc. Ry. Co.*, 130 Ia. 123.

REAL PROPERTY — ADVERSE POSSESSION — TACKING — PRIVACY. — The defendant owns a tract of land adjoining the plaintiff's. For over thirty years the defendant and his predecessors in title have held adversely a small strip of the plaintiff's land, though no one of them has held for the statutory fifteen years. In none of the conveyances through which the defendant holds was there any mention of the disputed strip, nor is there any evidence of an agreement concerning it between these successive holders. The plaintiff brings trespass to try title. *Held*, that title was not acquired by adverse possession. *Lake Shore & Michigan Southern Ry. Co. v. Sterling*, 155 N. W. 383 (Mich.).

It is generally accepted that for the purpose of acquiring title a disseisor may tack to his own adverse possession that of his predecessor. *Overfield v. Christie*, 7 S. & R. (Pa.) 173. See 2 TIFFANY, REAL PROPERTY, § 438. But the great weight of authority, regarding the statute as a protection of ownership that has been openly asserted for the period set, from suits on remote and possibly fictitious claims, demands that the adverse claim be a continuation of that of the predecessor — that there be "privity" between the disseisors. See *Sherin v. Brackett*, 36 Minn. 152, 153, 30 N. W. 551. A few courts, in defining privity, require a continuous paper title to the disputed land sufficient to have transferred it had the grantor held title. *Evans v. Welch*, 29 Colo. 355, 363, 68 Pac. 776, 779; *Vicksburg, etc. Ry. Co. v. Le Rosen*, 52 La. Ann. 192, 203, 36 So. 854, 860; *Messer v. Hibernia, etc. Soc.*, 149 Cal. 122, 124, 84 Pac. 835, 837. But generally any agreement, oral or written, between the successive holders touching the land is held sufficient, but essential. *McNeely v. Langan*, 22 Oh. St. 32; *Weber v. Anderson*, 73 Ill. 439, 443. If the disputed strip was held as a part of another tract to which the successive possessors had title, some courts, as in the principal case, refuse to spell out the necessary agreement touching the disputed strip from the mere transfer of the tract owned by the predecessor. *Erck v. Church*, 87 Tenn. 575, 11 S. W. 794; *Sheldon v. Mich. Cent. Ry. Co.*, 161 Mich. 503, 126 N. W. 1056. Other courts do find an agreement between the parties from this mere transfer. *Crispen v. Hannavan*, 50 Mo. 536, 549; *Davock v. Nealon*, 58 N. J. L. 21, 32 Atl. 675; *Illinois Central R. Co. v. Hatter*, 207 Ill. 88, 96, 69 N. E. 751, 753. A few courts, looking rather at the owner's continuous laches than at the possessor's continuous claim, have discarded the doctrine of privity, barring the true owner whenever there has been a continuous adverse possession for the statutory period. *Fanning v. Wilcox*, 3 Day (Conn.) 258; *Wishart v. McKnight*, 178 Mass. 356, 360, 59 N. E. 1028; *Carter v. Bernard*, 13 Q. B. 945, 952. See 9 HARV. L. REV. 279.

RECORDING AND REGISTRY LAWS — TORRENS' LAND REGISTRATION SYSTEM — RIGHTS OF PURCHASER OF AN OVERLAPPING CERTIFICATE. — The plaintiff registered his land under the Torrens' system. Later an adjoining owner registered his land, the plaintiff having actual notice of the proceedings. The adjoining owner obtained a certificate which included a wall also included in the plaintiff's certificate. The adjoining owner sold to the defendant, a purchaser for value. The plaintiff now seeks to reopen the later decree, and have the defendant's certificate reformed, claiming that the wall belongs to him. *Held*, that the decree will be reopened. *Legarda v. Saleeby*, 13 Phil. Off. Gaz. 2117 (Phil. Sup. Ct.).

For a full discussion of the principles involved, see NOTES, p. 772.

SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — PLAINTIFF'S DELAY WHERE TIME IS EXPRESSLY OF THE ESSENCE. — The plaintiff contracted to buy land from the defendant for \$16,000. Of this \$1,000 was to be paid down and the remainder paid in \$1,000 annual installments. The agreement expressly provided that time was of the essence and that on any default, the whole sum should be due, or the contract determined at the option of the vendor, any payments made to be retained as liquidated damages. The first deferred installment was not paid on the day. The defendant at once gave notice that the contract was determined. Thereupon the plaintiff tendered the amount due, which was refused. He now sues in chancery for relief. *Held*, that he will be relieved from forfeiture of the money paid, but be denied specific performance. *Steedman v. Drinkle*, [1916] A. C. 275.

How far equity shall ignore the plaintiff's delay in the face of a provision that time is essential depends upon balancing desiderata. On the one hand, the exigencies of business require the uniform enforcement of precise rules concerning contracts. In the name of this principle startling forfeitures have been allowed in this country and Canada. *Steele v. McCarthy*, 1 Sask. 317, 7 W. L. R. 902; *Iowa, etc. Land Co. v. Mickel*, 41 Ia. 402; *Heckard v. Sayre*, 34 Ill. 142; *Brown v. Ulrich*, 48 Neb. 409, 67 N. W. 168. Cf. Pound, "Decadence of Equity," 5 COL. L. REV. 20. On the other hand, a purchaser under a contract to buy land generally acquires an equitable estate analogous to that of a mortgagor, and to divest him of it because of a slight delay is inequitable forfeiture, even though his money is returned. Accordingly other American cases have refused to enforce harsh provisions as to time literally. *Ewing v. Gordon*, 49 N. H. 444, 460; *Hall v. Delaplaine*, 5 Wis. 206, 216; *Steele v. Branch*, 40 Cal. 3, 11; *Edgerton v. Peckham*, 11 Paige 352. A condition precedent to a right to a legal title is not generally a condition precedent to the vendor-purchaser relationship out of which the equitable estate arises. But this point appears to have been overlooked at times. *Wells v. Smith*, 2 Edw. Ch. 78; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713. See POMEROY, EQUITY, § 455. In no case should a court of equity be concluded by a bare recital that time is essential, but should look to the underlying intention of the parties in regard to creating a vendor-purchaser relationship. See FRY, SPECIFIC PERFORMANCE, 3 ed., 492. However, if one party actually needs quick performance and the other knows it, there is no difficulty. *Judd v. Skidmore*, 33 Minn. 140, 22 N. W. 183; *Ewing v. Crouse*, 6 Ind. 312; *Tilly v. Thomas*, 3 Ch. App. 61. The English law was originally lenient in enforcing time provisions, but Lord Eldon began to apply more rigid rules which were followed. See *Boehm v. Wood*, 1 J. & W. 419, 420; *Levy v. Lindo*, 3 Meriv. 81, 84. *Accord*, *Eaton v. Lyon*, 3 Ves. 689; *Hudson v. Bartram*, 3 Madd. 440, 447. See 27 HALS. LAWS OF ENGLAND, 67. However, in 1873 a reaction toward liberality set in, specific performance being granted after default in spite of express provision that time was of the essence and that on default the vendors might repossess themselves of the land without obligation to repay the purchase money. *In re Dagenham Dock Co.*, 8 Ch. App. 1022; *Kilmer v. British, etc. Lands, Ltd.*, [1913] A. C. 319; *Snell v. Brickles*, 49 Can. S. C. 360; *Whilla v. Riverview Realty Co.*, 19 Man. 746. But the first two of these cases failed to recognize the severability of relief against forfeitures of installments and the granting of specific performance. See *Snell v. Brickles*, *supra*, 382; *Labelle v. O'Connor*, 15 Ont. L. R. 519, 546. The principal case, recognizing this distinction, reaches a result not perhaps unjust in view of the early breach and the absence of excuse offered, but indicates a tendency to revert to Eldonian strictness in regard to specific performance.

STATUTE OF FRAUDS — SALES OF GOODS — GOODS IN POSSESSION OF VENDOR AT TIME OF SALE. — A number of shares of stock in the possession of a pledgee, were orally sold to him by the pledgor. Thereafter the pledgee stated

to witnesses that he owned the stock. In a suit for the purchase price the defense was that there was no delivery to take the case out of the Statute of Frauds. *Held*, that the sale was valid. *Wilson v. Hotchkiss*, 154 Pac. 1 (Cal.).

Section 17 of the Statute of Frauds requires that the buyer under an oral contract "shall accept part of the goods so sold and actually receive the same." England has so construed this section as to uphold a sale whenever the buyer has done an act with reference to the goods which recognizes a preëxisting contract of sale. *Kibble v. Gough*, 38 L. T. R. (N. S.) 204; *Page v. Morgan*, 15 Q. B. 228. *Cf. Taylor v. Great Eastern R. Co.*, [1901] 1 K. B. 774. Under this construction it would seem that a declaration of ownership by a purchasing bailee would be a verbal act of recognition. *Edan v. Dudfield*, 1 Q. B. 302; *Taylor v. Wakefield*, 6 El. & Bl. 765, 770. See *Lillywhite v. Devereux*, 15 M. & W. 285, 291. New York, however, has laid down a rule, accepted in several other American jurisdictions, that transfer of possession cannot be evidenced by mere words. *Shindler v. Houston*, 1 N. Y. 261. See WILLISTON, SALES, § 87. And this rule has been applied to invalidate a sale to a bailee in possession unless the form of returning the article and receiving it anew was gone through. *In re Hoover*, 33 Hun. (N. Y.) 553; *Dorsey v. Pike*, 50 Hun. (N. Y.) 534. But *cf. Bristol v. Mente*, 79 N. Y. App. Div. 67, 80 N. Y. Supp. 52. Other courts have recognized that it would not be expedient to require a re-delivery to a purchasing bailee. *Smith v. Bryan*, 5 Md. 141; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. But *cf. Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 112 N. W. 1081. These decisions are supported by the analogy of the case of gifts, for a parol gift to a donee in possession at the time of the gift, is valid. *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 383; *Winter v. Winter*, 4 L. T. R. (N. S.) 639. Some courts have gone even further and recognized as valid, parol sales of goods not in the possession of either the owner or the buyer. *Brown v. Wade*, 42 Ia. 647, 650; *Calkins v. Lockwood*, 17 Conn. 154, 173. *Contra, Alderton v. Buchoz*, 3 Mich. 322. The principal case seems correct in distinguishing purchases by a bailee from sales when the seller is in possession. *Cf. Malone v. Plato*, 22 Cal. 103, with principal case.

TRADE-MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — RECOVERY OF PROFITS ON SALES UNDER INFRINGING DESIGN.— The plaintiffs adopted as a trade-mark for women's shoes the words "The American Girl," under which they advertised and sold their shoes throughout the United States. With full knowledge of this use, the defendants used on a similar grade of shoes the name "The American Lady," sometimes accompanied with their name as "maker," and sometimes with their name only, and sometimes alone. The Circuit Court of Appeals held that the plaintiffs' mark, when applied to women's shoes sold in America, was descriptive and geographical and not subject of a valid trade-mark, but enjoined the unfair competition, and ordered an accounting on the sales of defendants' shoes marked with "The American Lady" without their name as maker annexed. The case came to the Supreme Court on *certiorari*. *Held*, that the words "The American Girl" are subject of a valid trade-mark and that the decree ordering an accounting be affirmed upon that ground. *Hamilton-Brown Shoe Co. v. The Wolf Bros. & Co.*, 240 U. S. 251, 36 Sup. Ct. 269.

The plaintiffs sold hosiery under a label on which was written the word "Notaseme." Without knowledge of this use, defendants used a similar label with the word "Irontex" in place of "Notaseme." The plaintiffs notified the defendants that they were infringing their mark and brought a bill in equity to enjoin this use and to recover profits. There was no evidence of confusion in the public's mind. The markets of the two companies rarely conflicted. *Held*, that the defendants be enjoined from using the label, but an accounting

of profits be denied. *Straus v. Notaseme Hosiery Co.*, 240 U. S. 179, 36 Sup. Ct. 288.

For a discussion of these cases in connection with another recent case, see NOTES, p. 763.

TRADE-MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — TERRITORIAL LIMITATION OF TECHNICAL TRADE-MARK. — In 1872 the Allen and Wheeler Co. used the words "Tea Rose" as a trade-mark on its flour, making sales throughout Ohio and Pennsylvania, but never advertising nor selling its "Tea Rose" brand in Alabama or the adjoining states. In 1885, without notice of this prior adoption, the Hanover Star Milling Co. used the same brand on its flour for sales throughout Alabama, where it acquired the reputation of being the "Tea Rose Company." In 1895 the Steepleville Milling Co. adopted the same design, and in 1912 sold a quantity of flour of that brand to Metcalf for sale in Alabama. The Hanover Co. obtained a temporary injunction in the District Court, but the United States Circuit Court of Appeals for the Fifth Circuit reversed the decree because of the prior use by the Allen and Wheeler Co. In another district this latter company obtained an injunction against the Hanover Co., but this in turn was reversed by the United States Circuit Court of Appeals for the Seventh Circuit on the ground that the Hanover Co. had acquired a valid trade-mark in Alabama. Because of this diversity on fundamental questions, the cases were brought to the Supreme Court by writs of *certiorari* before final disposition in the lower courts. *Held*, that the Hanover Co. had acquired a valid trade-mark in Alabama. *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403.

For a discussion of this case with two other recent cases, see NOTES, p. 763.

TRIAL — VERDICT — JOINT TORTFEASORS: SEVERANCE OF DAMAGES. — In an action against joint maintainers of a nuisance the jury found a verdict for \$700 against one defendant and for \$150 against the other. On interrogation by the court they stated their purpose to find the plaintiff's damages equal to \$850 and to divide them between the two defendants. The trial court entered judgment for \$850 against both defendants. *Held*, that the judgment stand. *Wands v. City of Schenectady*, 156 N. Y. Supp. 860 (App. Div.).

The Supreme Court of Michigan has recently upset a verdict of this sort. *Rathbone v. Detroit United Ry.*, 154 N. W. 143. For a criticism of the Michigan decision, see 29 HARV. L. REV. 344.

TRUSTS — CREATION AND VALIDITY — CHARITABLE TRUSTS: PREFERENCES — RULE AGAINST PERPETUITIES. — A will provided for perpetually maintaining a home for "educated Protestant gentlewomen whose means are small," preference to be given to the lineal descendants of seven named relatives and six friends. *Held*, that the trust is charitable, and so is not void as infringing the Rule against Perpetuities. *Matter of MacDowell*, 55 N. Y. L. J. 61 (Court of Appeals).

Under the present New York statutes, the old English law of charitable trusts for undetermined beneficiaries has been restored. *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568. Under that law, whether the invalidity of perpetual trusts without defined beneficiaries is due, as is commonly stated, to the Rule against Perpetuities, or more properly to a rule against inalienability, charitable trusts form a clear exception. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 589-607. Such trusts must be limited to purposes necessarily charitable as defined by the Statute of Elizabeth. *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522. But the purpose in question is clearly within the established conception, for the courts have upheld trusts for "reduced gentlewomen," "lady teachers in need of rest," and "wornout clerks." *Attorney General v.*

Power, 1 Ball & B. 145; *In re Estlin*, 72 L. J. Ch. 687; *In re Gosling*, 16 T. L. R. 152. See TUDOR ON CHARITIES, 4 ed., 46-60. Even trusts "for elderly widows and spinsters," although not further limited to charity in the will, have been construed to apply only to those who are poor and are so held charitable. *Thompson v. Corby*, 27 Beav. 649; *Re Dudgeon*, 74 L. T. (N. S.) 613. Again, trusts for the relatives of the founder if permanent and limited to those who are poor are held charitable and valid. *Attorney General v. Northumberland*, 7 Ch. D. 745. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 683 and n. *A fortiori*, gifts for general charitable purposes with a preference for a particular lineage are valid trusts. *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371; *Franklin v. Armfield*, 2 Sneed (Tenn.) 305, 351. See *Attorney General v. Sidney Sussex College*, 34 Beav. 654, 667. And scholarships with such preferences were early recognized. *Flood's Case*, Hobart 136. Cf. *Spencer v. All Souls College*, Wilmot 163. Furthermore, were the preferences invalid, the general charitable gift would be good. See *Dexter v. Harvard College*, *supra*, 196. The over-riding charitable purpose should prevail even if some of the directions for applications cannot be carried out because not charitable. *In re Douglas*, 35 Ch. D. 472. See *Hunter v. Attorney General*, [1899] A. C. 309, 324. Accordingly it seems entirely proper to carry out the donor's intention in the principal case. Cf. *Matter of Robinson*, 203 N. Y. 380, 96 N. E. 925.

TRUSTS — INCOME AND CORPUS — PROFITS BY SALE OF STOCK: APPORTIONMENT BETWEEN LIFE TENANT AND REMAINDERMAN. — The trustee of a *corpus* largely composed of stocks, was given a power of purchase and sale. The right to the profits gained in some of the transactions made under this power, are now contested by the life tenant and the remainderman under the trust. *Held*, that the life tenant is entitled to all the gains realized from dealings in the stock, except so much as are necessary to make the present *corpus* equal in value to the original *corpus* plus the amount that the original stocks increased in value while still in the hands of the trustee. *In re Barron's Will*, 155 N. W. 1087 (Wis.).

In the case of a trust of a share in a business the net profits earned go to the life tenant. *Heighe v. Littig*, 63 Md. 301. See LORING, A TRUSTEE'S HANDBOOK, 3 ed., 124. The decision in the principal case seems to be rested on this principle. But clearly a power of purchase and sale of stock is given the trustee only as a means of protecting the *corpus*, and does not constitute the trust estate a business in which the life tenant has an interest. Hence, not the earnings of the trustee, but only the earnings of the corporation whose shares have been bought, constitute the life tenant's income. Now an increased market value of the stock of a corporation may be due to undeclared earnings as well as unearned increment. As Wisconsin gives the declared dividends of stock to income or *corpus*, accordingly as the fund from which they are declared has accrued from earnings or unearned increment, it would seem as if on principle a similar rule should apply to the apportionment of gains due to increased value of stock. See *Miller v. Payne*, 150 Wis. 354, 377, 383, 136 N. W. 811, 819, 821; see 29 HARV. L. REV. 551. But see 2 PERRY, TRUSTS, 5 ed., § 545, note, p. 94. Such a course, however, is impractical, if not impossible. Therefore, the courts have almost invariably added the entire increase in value of the stock to the *corpus*. *Graham's Estate*, 198 Pa. 216, 47 Atl. 1108; *In re Robert's Will*, 40 Misc. 512, 82 N. Y. Supp. 805. Cf. *Billings v. Warren*, 216 Ill. 281, 74 N. E. 1050. All the profits from a sale thus belong to the remainderman, and the life tenant is restricted to his share of the declared dividends. And undoubtedly it is more in accord with the intention of the settlor that the fluctuation should occur in the *corpus* rather than the income. Moreover, as the remainderman must bear the loss of any shrinkage in the funds, it is but equitable that he take the gain. See *Graham's Estate*, *supra*, 219. Again the life

tenant is fully protected under this apportionment, for an investment by the trustee in a non-dividend paying stock is certainly a breach of trust. See *Jordan v. Jordan*, 192 Mass. 337, 345, 78 N. E. 459, 461; *Kinmonth v. Brigham*, 5 Allen (Mass.) 270, 278. In such case, besides his action against the trustee, the life tenant should be permitted a lien for interest at the market rate on any profit gained by resale of this stock.

WAR — PARTNERSHIP — ALIEN ENEMY PARTNERS — CONDEMNATION OF CAPTURED PARTNERSHIP PROPERTY. — A partnership composed of four partners, two Germans both of German domicile, and two Englishmen resident in Shanghai, was registered at the German consulate in Shanghai as a German firm. A cargo belonging to the partnership was captured. *Held*, that the shares of the German partners be condemned, and those of the English partners be restored. *The Eumaeus*, 51 L. J. 7 (Adm. Ct.).

The important consideration in determining liability to condemnation as enemy cargo, is the trade domicile of the owner of the goods. See *The Gerasimo*, 11 Moore P. C. 88, 96; *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 505. Consequently the property of a neutral or friend, having a trade domicile in a hostile country, is confiscable. *The Venus*, 8 Cranch. (U. S.) 253; *The Baltica*, Spinks P. C. 264. *Cf. O'Mealey v. Wilson*, 1 Camp. 482. Conversely, the property of an alien enemy having a trade domicile outside the hostile country is not subject to condemnation. *The Portland*, 3 C. Rob. 41. In the case of a firm it is submitted that under any theory of partnership the individual trade domiciles of the partners must govern condemnation. For at common law, even in the absence of the usual statutes, it is forbidden to make contracts with alien enemies, and antebellum contracts of this sort, if executory, are dissolved by the declaration of war. *The Hoop*, 1 C. Rob. 196; *Potts v. Bell*, 8 T. R. 548. See *Clemontson v. Blessig*, 11 Ex. 135, 141 n. Since a partnership is based on an executory contract, it is at once dissolved. *Griswold v. Waddington*, 15 John. (N. Y.) 57, 16 *id.*, 438. Hence its members must be treated separately. But to determine the proportion properly confiscable presents a difficult problem. Until the partnership has been wound up and its accounts settled, each partner really has nothing but a right against the firm for the portion of the surplus which may be found to be due him. Of course, this may not bear any relation to their respective shares in the capital. But it is beyond the power of the prize court to determine this, and any attempt to do so would seriously hinder an effective administration of prize law. Hence the principal case is amply justified by expediency in following the old common law conception of the partners as tenants in common of partnership personalty, to the extent of their shares in the enterprise.

WILLS — EXECUTION — ATTESTING WITNESSES — STOCKHOLDERS OF A CORPORATE EXECUTOR. — An Illinois statute provides that, if one of the necessary subscribing witnesses to a will is given a beneficial interest in the will, the interest shall be void, but the witness shall testify as to the rest of the will. (1913, HURD'S REV. ST. c. 148, § 8.) A corporation was made the executor of a will. A stockholder and director of the corporation was a necessary subscribing witness. *Held*, that the stockholder is a valid witness and that the corporation is disqualified as executor. *Scott v. Couch*, 111 N. E. 272 (Ill.).

In most jurisdictions an executor is considered a valid subscribing witness to a will. *Rucker v. Lambdin*, 20 Miss. 230. See *Cochran v. Brown*, 76 N. H. 9, 10, 78 Atl. 1072, 1073. See 22 HARV. L. REV. 616. *A fortiori* the witness in the principal case would be competent and the whole will valid. But in Illinois, aside from the statute, an executor is considered sufficiently interested to be incompetent. *Jones v. Grieser*, 238 Ill. 183, 87 N. E. 295. So is a witness who has a contract with the executor for a part of his commissions. *Smith v. Goodell*,

258 Ill. 183, 101 N. E. 255. Since a stockholder of a corporate executor has a contract right in the profits of the executor, it is natural that he should be considered incompetent. But the purpose of statutes like that in the principal case is to prevent the interest of a witness from invalidating a will; and it would seem better to hold it applicable to all witnesses formerly disqualified by interest. See *Jones v. Grieser*, 238 Ill. 183, 188, 87 N. E. 295, 296; *Winslow v. Kimball*, 25 Me. 493, 495. But some states seem to consider the statutes applicable only where the interest of the witness comes directly from the will. So a witness who is spouse of a legatee has not been allowed to testify. *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314; *Sullivan v. Sullivan*, 106 Mass. 474. And in Illinois the statute has been held not to make competent a witness who has a subsisting contractual right to the profits of the executor of a will. *Smith v. Goodell*, *supra*. According to these cases it would seem that the stockholder in the principal case, being only a debtor of the executor, would have only an indirect interest in the will, and would not be made a valid witness by the statute.

BOOK REVIEWS

THE NEUTRALITY OF BELGIUM. By Alexander Fuehr. New York: Funk and Wagnalls Co. 1915. pp. x, 1-248.

BELGIUM NEUTRAL AND LOYAL. By Emile Waxweiler. New York: G. P. Putnam's Sons. 1915. pp. xi, 1-324.

These two are among the better of those books presented to show the national point of view in regard to the neutrality of Belgium. The first shows the German attitude and the second presents the Belgian point of view. Dr. Fuehr purports to "take as his task only to investigate Germany's case with regard to" the invasion of Belgium. In the first part of the book he presents what is now a well-known history of Belgium's neutrality down to August, 1914. In the second part the legal aspects of Belgium's neutrality are considered. There are in this book many statements for which at present absolute verification seems not to be available; and in the two books identical documents receive opposite interpretation. There is also a tendency to cite only those documents which support the German theory. He even maintains that "taking into consideration fundamental political changes wrought by events since 1870" the guarantee of Belgium's neutrality could not be held to be valid at the outbreak of the present war because of the implied condition in negotiation of treaties, *rebus sic stantibus*. Referring to the agreement of 1870 between Great Britain and France and between Great Britain and Prussia that Great Britain would act on the side of one or the other of these powers against one or the other which might violate the neutrality of Belgium, Dr. Fuehr states that this agreement of Great Britain constitutes "an affirmation that England did not then consider the treaties of 1839 as binding." He cites statements of a military attaché as offsetting those officially made by a minister of foreign affairs. In mentioning the German demand for the privilege of passing over Belgian territory, he says, after referring to the passage of French troops through Prussia in 1805, "in a similar manner, King Albert of the Belgians might have acted in 1914, following the example set by his grandfather, who, in a situation far more painful to Belgian pride, declared to the powers in 1831 that he 'yielded to the imperious law of necessity.'" Dr. Fuehr also says that the fact that perpetual neutrality failed to afford Belgium adequate protection was not necessarily due to any fault of International Law but to the abuse of it. He

also states that it is open to doubt "whether Germany's invasion of Belgium, with no other object but a passage through her confines in order to reach the northern parts of France, and after formal assurances as to Belgium's independence and integrity had been given, constituted *ipso jure* a breach of Belgium's neutrality."

Such citations as above from what is entitled "The Legal Aspects of Belgium's Neutrality" clearly show the thesis the writer is endeavoring to maintain.

There are several valuable documents in the Appendix.

The book by Dr. Waxweiler, who was the director of the Solway Institute of Sociology at Brussels, claims "to clear up every doubt and furnish material for a considered judgment." This book has also appeared in French and German. It shows the peaceful penetration of Germans into the industrial, economic, and social life of Belgium, up to 7 P. M., August 2, 1914, also showing why, after considering the statements of Jagow and Bernhardt, King Albert of Belgium became an advocate of preparedness. He also shows that the German statement that if Belgium would maintain "friendly neutrality" Germany would at the conclusion of the war "guarantee the possessions and independence of the Belgium Kingdom in full," presumes a result of the war which Belgium could not in August, 1914, foretell. Then follow the well-known discussions of the statement of the German Chancellor that the entrance into Belgian territory by force was in violation of the law and that indemnities would be paid at the close of the war. The negotiations of the early days of the hostilities, including the "scrap of paper" incident, etc., are reviewed. Accusations and counter accusations are considered. The German rules of war and their application to Belgium form the concluding chapter. Manifestly it is too early, and the data is insufficient, to enable one who would form a just estimate of these contentions to come to a final judgment upon many of the matters considered in this book. In general, however, it may be said that the temper of the book is more moderate and the basis for the conclusions is more sound than in the work of Dr. Fuehr.

Like all books issued with the object of presenting the case for one or another party in the present struggle, there is an undue stress upon the positions which may be more advantageous to the side whose case is favored. This book has a brief appendix and also a convenient index. GEORGE GRAFTON WILSON.

THE COMMODITIES CLAUSE. By Thomas Latimer Kibler. Washington, D. C.: John Byrne & Company. 1916. pp. 178.

Into this legal-economic treatise Professor Kibler has condensed a great amount of interesting and valuable information as to the inevitable tendency to monopoly where railroad companies engage in any non-transportation business in competition with other shippers over their lines. Confining his discussion chiefly to the coal business and basing it upon the findings of the Interstate Commerce Commission and the facts disclosed in various suits brought by the federal government, he shows convincingly that the failure of this country to follow the example of Europe and to divorce transportation altogether from other enterprises has led to the monopolization by railroad companies of much the greater part of the anthracite and bituminous coal fields along their respective lines and that this process of monopolization is still going on.

His discussion of the Commodities Clause of the Interstate Commerce Act, passed in 1906 to remedy this situation, may be summarized as follows. In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, the Supreme Court held that, despite the sweeping language of the act, nevertheless in view of its legislative history, it must be construed as not prohibiting a railroad company

(1) from owning stock, even all of the stock, of a *bona fide* corporation engaged in mining, producing and shipping commodities over its lines, or (2) from transporting commodities mined or otherwise produced by the railroad company itself, provided it has in good faith dissociated itself from such commodities prior to the act of transportation — sale to a *bona fide* separate corporation whose stock is owned by the railroad company, apparently constituting such dissociation. Although in subsequent decisions the Supreme Court has shown a disposition to give to the act the most effective possible construction consistent with these limitations, nevertheless so long as they exist no real dissociation will ever be accomplished.

He urges, therefore, in some detail, legislation designed to sweep away these limitations and to secure a genuine separation of railroad companies from any business other than that of common carriage. Both on the merits and for the purpose of disarming opposition, these suggestions should be modified to the extent of permitting mining and producing companies, on application to the Interstate Commerce Commission, to build and operate such lateral branch lines or spur tracks as may be reasonably necessary to reach a trunk line railroad. Broadly speaking, however, these suggestions accord with repeated utterances of the Interstate Commerce Commission and of the Attorney General and will doubtless meet the approval of most disinterested persons.

The concluding section in which Professor Kibler seems to advocate extending "the principle of dissociation" to "any two industries that are complementary in their nature" will not be so generally accepted. Common carriers, whose facilities other shippers are under compulsion to use, stand upon a very different footing from any ordinary business. Most readers will be doubtful indeed as to the wisdom of prohibiting the union of complementary industries generally — the mere integration of industry.

The usefulness of the book for legal reference purposes would be increased by a proper table of cases cited and by a reference to the cases of *United States v. D. L. & W. R. Co.*, 231 U. S. 363; *The Tap Line Cases*, 234 U. S. 1, 27; and *United States v. Lake Shore & M. S. R. Co.*, 203 Fed. 295, 315, 319.

THURLOW M. GORDON.

CLINICAL STUDIES IN THE RELATIONSHIP OF INSANITY TO CRIME. By Paul E. Bowers, M.S., M.D. Michigan City, Indiana: The Dispatch Print. pp. 104.

Lawyers are beginning to admit that there is no such sharp division between the legally responsible and the legally irresponsible as they used to believe. Science is pressing upon them the realization that a penalty affixed to an act by law is less often an efficacious preventive of the act than the law supposes. Instead of sending the malefactor to prison only to let him out later, the psychiatrists are demanding an opportunity to try their new-found learning on him in a hospital. And to this plea they add the assurance that in case of failure they will isolate him for good and not for a time only. It is clear that the opportunity must be given them. Crime must follow disease into the hands of the scientists.

Dr. Bowers' monograph is an attempt to draw the line between the responsible and the irresponsible. He believes that too many of the latter are sent to the prison, and his thesis is a more accurate division of the field between the prison and the hospital. To do this it is first necessary to get an exact idea of the relation between the abnormal mind and the abnormal act, for, so far at least, the only method of classifying men the law knows is by their acts. "By their fruits shall ye know them" is peculiarly true of the criminal. This relation the author tries to show by a series of clinical cases. For "theoretical discussions," he

says, "are tiresome and confusing." However we may differ as to that, the cases he gives us, almost all from his own experience, are both interesting and illuminating. These are divided under general headings: epilepsy, paranoia, hysteria, etc., with an explanatory introduction and about half a dozen cases under each. The cases are described and explained in a brief and simple way, quite sufficient for the lawyer or layman, but perhaps too untechnical for the expert. The introductions, on the contrary, are inadequate. For the layman needs more than he can find here for even an intelligent understanding of the cases, and the expert must not be told what he already knows. Perhaps this is the result of the distaste for theory intimated in the preface. But it leads us all the more to regret that an author who has combined a personal knowledge of the cases described and a study of the bibliography at the end of the book should not hazard his own theories in a subject where they are so welcome.

C. P. CURTIS, JR.

COMMENTARIES ON THE LAWS OF ENGLAND. By Sir William Blackstone. Edited by William Cary Jones. San Francisco: Bancroft Whitney Company. 1915. pp. cxx, 2770.

We have nothing but good to say of Professor Jones' new edition of Blackstone. He, with the assistance of his colleagues in the school of jurisprudence in the University of California, has taken the Hammond edition, retained the original notes and the more important notes of the distinguished editor, and has profusely annotated the commentaries with his own work and with extracts from the writings of modern jurists. These two latter contributions give this edition its peculiarly valuable character.

Blackstone's short section on the Roman law in England, Book I, *18, is made the base of an elaborate note and a bibliography of Maitland's, Stubb's, and Vinogradoff's contributions. The consideration of rights, Book I, *121, has been an excuse for pointing out the classifications of Holland, Salmond, Holmes, Pound, Stephen, and Langdell. The law of master and servant, Book I, *429, is annotated with a short description of workmen's compensation acts. Modern theories of corporate personality appear in Professor Lynch's contributions to Book I, c. 18. The Rule against Perpetuities now contains a note by Professor McMurray which leads the reader to Leake, Gray, and recent legislation. Reference to all the modern learning on possession appear in the note to Book II, *196, and the whole subject of private wrongs, Book III, c. 8, takes on a new aspect when annotated with modern decisions on negligence, physical injury resulting from fright, the right to privacy, libel, slander, and malicious prosecution. A wholly new chapter has been supplied by Professor McMurray on the Conflict of Laws. All these and other new matter make it apparent that we shall now resort to Blackstone not only for clear and elegant statements of the old law but for references to modern thinking and decisions of present-day importance.

The form of the work is much improved by the use of sections numbered and appropriately entitled in bold-faced type.

JOSEPH WARREN.

LES TRAITÉS FÉDÉRAUX ET LA LÉGISLATION DES ÉTATS AUX ÉTATS-UNIS. Par Lindell T. Bates. Paris: Librairie Générale de Droit et de Jurisprudence. 1915. pp. 228.

This pamphlet has for its chief purpose the enlightening of foreigners as to the treaty-making power of the United States, and as to specific instances of apparent conflict between treaties and the laws of the several states. It begins

with conditions under the Articles of Confederation, passes to a rapid survey of the changes wrought by the Constitution, discusses the general problem of the federal treaty-making power and other preliminary matters, and then devotes the greater part of its pages to such topics as rights of property, taxation, workmen on public works, corporations, liquor licenses, workmen's compensation acts, public schools, and trademarks. Little that has been written regarding the borderland between international law and constitutional law can compare with this pamphlet in clearness or in interest. The whole of it is well worth reading; and even the very busy man ought to run through the two historical sections at the beginning and the section on the public schools. This last, consisting of four pages, leading to the conclusion, peculiarly acceptable in San Francisco, that "L'attitude du Departement d'État fut donc plus favorable au Japon qu'il ne fallait, en insistant sur le rapport de la resolution de séparation des races."

EUGENE WAMBAUGH.

VICARIOUS LIABILITY. By T. Baty. Oxford, England: At the Clarendon Press. 1916. pp. 244.

THE LAW OF ARCHITECTURE AND BUILDING. By Clinton H. Blake, Jr. With a Special Introduction by Aymar Embury II. New York: The William T. Comstock Co. pp. xxxviii, 314.

LAW AND ORDER IN INDUSTRY: FIVE YEARS' EXPERIENCE. By Julius Henry Cohen. New York: The Macmillan Company. 1916. pp. xx, 292.

TREATIES: THEIR MAKING AND ENFORCEMENT. By Samuel B. Crandall. Second Edition. Washington: John Byrne & Company. 1916. pp. xxxii, 663.

COMMERCIAL MORTMAIN: A STUDY OF THE TRUST PROBLEM. By John R. Dos Passos. New York: The Bench and Bar Company. 1916. pp. viii, 101.

AMERICAN GOVERNMENT AND MAJORITY RULE: A STUDY IN AMERICAN POLITICAL DEVELOPMENT. By Edward Elliott. Princeton: University Press. 1916. pp. viii, 175.

GROTIUS: ANNUAIRE INTERNATIONAL POUR 1915. La Haye: Martinus Nijhoff. 1916. pp. 200.

THE GROTIUS SOCIETY: PROBLEMS OF THE WAR. PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1915. Volume I. London: Sweet and Maxwell. 1916.

THE FEDERAL TRADE COMMISSION: ITS NATURE AND POWERS. By John Maynard Harlan and Lewis W. McCandless. Chicago: Callaghan and Company. 1916. pp. vi, 183.

A MANUAL OF THE FEDERAL TRADE COMMISSION. By Richard S. Harvey and Ernest W. Bradford. Washington: John Byrne & Company. 1916. pp. xxii, 457.

A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks (Editor), W. M. Geldart, W. S. Holdsworth, R. W. Lee, J. C. Miles. Books iv and v. London: Butterworth & Company. 1916. pp. liii, 1155-1294, (16).

THE LAW OF BLOCKADE. By A. Maurice Low. Washington: Columbian Printing Company, Inc. pp. 20.

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LIABILITY WITHOUT FAULT *

"I AM satisfied that *Rylands v. Fletcher* is not limited to the case of adjacent freeholders. I shall not attempt to show how far it extends. It extends as far as this case, and that is enough for the present purpose." So Lord Sumner,¹ using the method of inclusion and exclusion by which the common law "broadens down from precedent to precedent." That method has its conveniences for the judiciary. Other students of the law, however, cannot so easily avoid the question how far *Rylands v. Fletcher* extends; and the question is a profitable one, for there has been too little consideration of the scope or utility of the doctrine for which that famous case stands as compared with the discussion of its theoretical merits. On this latter point there has been abundant controversy for a generation or more, with the apparent assumption on both sides that it involved a difference of serious importance in its practical aspects as well as in legal theory. The soundness of this assump-

* NOTE. — Dean Thayer left three drafts of this article among his papers, together with a great mass of manuscript materials for notes. From his manuscript alterations upon what appears to have been the last draft it has been possible in almost every case to determine what he intended as the final form. In one or two instances of no great importance the text has been fixed on the balance of probability as between different drafts. Unfortunately it has proved impossible to work out the elaborate notes which were to have illustrated and reinforced the text. A few that appear to be complete are given as he left them. For the rest, reference to the cases cited and quoted from is as much as the state of the manuscript warrants.

¹ Charing Cross & City Electricity Supply Co. v. London Hydraulic Power Co., [1914] 3 K. B. 772, 779.

tion ought to be examined. Even if we have not yet reached the time to which Mr. Justice Holmes looks forward, "when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them,"² it is none the less important in estimating the legal value of a doctrine to consider whether its results have been misunderstood and its practical significance exaggerated.

What, then, is the doctrine of *Rylands v. Fletcher*? The first thought suggested by the familiar name is that of absolute liability imposed upon a landowner who collects certain things on his land — a duty of insurance against harm caused by their escape regardless of the owner's fault. A duty of this sort to insure against consequences, remote as well as proximate,³ attaching to the original act of bringing into existence the conditions which eventually do the harm, would no doubt be a matter of serious concern practically as well as theoretically. It would not lack legal analogies; witness the case of him who unlawfully creates a dangerous condition (in ordinary legal parlance a "nuisance"), or the lawful keeper of a savage animal; and although some of these analogies have an archaic flavor, and the ideas in *Rylands v. Fletcher* have been criticized as a survival from a time when the English law had as yet "no well-defined test of an actionable tort,"⁴ it is a point of view toward which modern legal thought is turning.⁵ This reversion of recent legislation to ancient conceptions has been clearly pointed out by Judge Smith in his able discussion of the Workmen's Compensation Act.⁶ A community which accepts the principle of such an act cannot be expected to find anything intrinsically unreasonable in the doctrine which seeks to throw upon the undertaker the full responsibility for harm arising from his enterprise, on the theory

² "The Path of the Law," 10 HARV. L. REV. 457, 474.

³ The conception is perhaps that the person who sets in motion an uncontrollable or dangerous agency — an agent, a wild animal, ponded water, a business (under the Workmen's Compensation Acts), a dangerous condition of premises — is held responsible for what is proximately caused by the agency rather than proximately by himself; that is, if the agency is a proximate cause of the injury, the person responsible for the agency is liable though a remote cause of the injury.

⁴ Doe, J., in *Brown v. Collins*, 53 N. H. 442, 445.

⁵ See Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195, 233.

⁶ "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235.

that the business should bear its losses in the first instance regardless of fault or proximate cause, and that ultimately, like any other overhead charge, they would fall on the consumer. But despite frequent misunderstandings, this is just what *Rylands v. Fletcher* does *not* do. There is a good deal in the original judgments which looks in that direction. The much-quoted judgment of Blackburn, J., in the Exchequer Chamber shows doubt whether even the act of God would excuse the owner; and Lord Cranworth goes to great lengths.⁷ Moreover, the English judges have shown a disposition at every stage to treat the liability of the owners of savage animals as a parallel case;⁸ and since *Baker v. Snell*⁹ it is doubtful indeed what escape from liability (excepting the fault of the victim) is left to him who indulges in the dangerous luxury of such ownership. But whatever the thought of the judges who decided the case, and wherever analogy might have been expected to lead, it was soon settled that *Rylands v. Fletcher* was to stand for no such doctrine of insurance against remote consequences. Not only was it limited to owners whose acts were for their individual purposes, excluding arrangements for the joint benefit of the plaintiff and the defendant, and excluding also undertakings of a public nature, but the defendant could set up in excuse that the escape was caused by the act of God, or by the act of a third party, or even, it would seem, by rats if their operations had been so skillfully conducted as to acquit the defendant of accessory negligence. This last point indeed was not decided, for *Carstairs v. Taylor*¹⁰ went off on another ground;

⁷ "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape." Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279 (1866).

"My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." Lord Cranworth in same case, L. R. 3 H. L. 330, 340 (1868).

⁸ "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." Bramwell, B., in *Nichols v. Marsland*, L. R. 10 Ex. 255, 260 (1875).

⁹ [1908] 2 K. B. 352, 825.

¹⁰ L. R. 6 Ex. 217 (1871).

but it seems to be fairly involved in *Nichols v. Marsland*¹¹ and *Box v. Jubb*.¹² For upon what can those cases rest except the abandonment of any idea of insurance against remote consequences? Elementary principles of the law of negligence would fix liability upon the defendant for an escape, whether caused by an act of nature, or of a third person, if by due care he would have foreseen and avoided it; and these decisions can mean in reason nothing less than this — that where an escape is caused by the direct interposition either of an act of man or a natural force, the defendant is excused in any case where he would not be liable on ordinary principles of negligence. In other words, in such a case *Rylands v. Fletcher* can be invoked only when it is unnecessary to invoke it.

If this is true alike of the forces of nature and human intervention, it is not apparent in reason why there should be a special doctrine for harm caused by other members of the animal kingdom. And, however this may be, Sir Frederick Pollock's comment is apt:

"In every case of the kind which has been reported since *Rylands v. Fletcher*, that is, during the last 25 years, there has been a manifest inclination to discover something in the facts which took the case out of the rule. According to the English judicial system which has gone round the world with the English language and English or Anglicized institutions, the decisions of superior courts are not merely instructive and worthy of regard, but of binding authority in subsequent cases of the like sort. But there are some authorities which are followed and developed in the spirit, which become the starting-point of new chapters of the law; there are others that are followed only in the letter, and become slowly but surely choked and crippled by exceptions."¹³

The territory within which the doctrine of *Rylands v. Fletcher* may operate is thus bounded on one side by that in which the defendant is excused by the intervention of some new agency which could not be foreseen, and, on the other, by that in which, even if *Rylands v. Fletcher* were altogether repudiated, the defendant would be held by the ordinary principles of negligence. Between these limits is left only the field where the thing which the defendant has collected escapes by its own force acting on existing conditions

¹¹ L. R. 10. Ex. 255 (1875).

¹² 4 Ex. Div. 76 (1879).

¹³ THE LAW OF FRAUD IN BRITISH INDIA, 53.

without negligence of the defendant. Such an intermediate ground no doubt exists; but it is a little space. How narrow it is can hardly be realized until the full scope of the modern law of negligence is recognized. That law is very modern — so modern that even the great judges who sat in *Rylands v. Fletcher* can have had but an imperfect sense of its reach and power. In its modern development the emphasis which the conception of due care *according to the circumstances* throws on the special facts of the case, with the right and duty of the jury to take into account every consideration which should have come into the defendant's calculations, so justifies and encourages the natural human proclivity to argue *post hoc propter hoc* that as practical a matter a defendant must have been a very prudent man indeed to escape the suggestion — *i. e.*, a suggestion proper to go to the jury — that in the light of the facts before him he should have thought of this or that danger and provided against it. And if the theory of negligence is sufficient to carry the case to the jury, the plaintiff's remaining difficulties — again looking at the matter in its practical aspect — are not likely to be very serious in a case of this class.

How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. The futility of degrees of care in general has long been recognized; but in the case of public service companies the habit of talking as if the carrier owed some special degree of care other than that of the ordinary prudent man has persisted and is common to-day. Clear-headed judges, however, have pointed out that the distinction is illusory. The ordinary prudent man would never take human beings into his keeping under conditions where they trusted utterly in him, and where life and limb was the stake, without qualifying himself in advance in all practicable ways for so dangerous a business and without using all available precautions in carrying it on. In such a business the highest care is thus nothing more than ordinary care under the circumstances; and it may be conjectured that in the case of carrier and passenger there is little difference, as a practical matter, between the results reached by the law of negligence and the doctrine of *Rylands v. Fletcher*. Few cases are likely to arise in which a railroad company would escape to-day, except where the accident was caused by the unforeseeable

intervention of some natural force or human being. Yet those are the very things which excuse him also under *Rylands v. Fletcher*.

This stringent liability of the carrier is not due to his public calling, but to the nature of the agencies he uses, the helplessness of the passengers, and the peril to life and limb. If these conditions are the same, the carrier's liability is no less stringent even where he is not technically a common carrier (the proprietor of a sight-seeing automobile, for example).¹⁴ And in these respects the parallel between the carrier and the defendant in a case like *Rylands v. Fletcher* is close. In each case the defendant has chosen to create a condition dangerous to others unless kept in control. In each the plaintiff has no means of protecting himself and is left helpless and forced to look to the defendant for protection. In the one case as in the other the argument is overwhelming that ordinary prudence requires the defendant not only to take every precaution to inform himself of the dangers of his enterprise before undertaking it, and to guard against such dangers in construction, but also to use unremitting diligence in maintenance and inspection. And so great are the resources of modern science that an accident occurring without the intervention of a new unforeseeable agency will make a hard case for the defendant. There may, of course, be facts which will entitle him to prevail, but they are most unlikely. It will be a strange case where the accident was due to conditions existing when the defendant did the responsible act, or where new forces operated which should have been foreseen, and yet the defendant was free from blame in failing to guard against them. A proper study of the plaintiff's case with expert assistance will be likely to disclose the elements of liability under the modern law of negligence in the vast majority of cases where, assuming the rule in *Rylands v. Fletcher*, the defendant would not be excused in view of *Nichols v. Marsland* and *Box v. Jubb*.

It may be objected that without *Rylands v. Fletcher* the plaintiff will suffer from lack of evidence; the means of proving the defendant's negligence lying within the latter's control and beyond plaintiff's reach. But here, as so often, the arsenal of the common law, if explored with an understanding eye, discloses powerful and sufficient weapons to deal with an apparent injustice. The difficulty is

¹⁴ *Hinds v. Steere*, 209 Mass. 442, 95 N. E. 844 (1911).

met by the doctrine of *res ipsa loquitur*. It is, indeed, the very situation for which that doctrine exists. *Res ipsa loquitur* is often dealt with as if it designated something peculiar with a tinge of mystery about it—a notion to which the Latin phrase perhaps lends color. The thought is suggested of the possible significance of a single isolated fact—as if any fact were ever presented *in vacuo*. In reality nothing could be simpler or have less flavor of mystery or technicality than the principles to which the phrase points, principles which, rightly understood, raise no difficulty whatever in their application except the inevitable and eternal difficulties incidental to any close question of fact. The phrase is nothing but a picturesque way of describing a balance of probability on a question of fact on which little evidence either way has been presented. We speak as if it were the mere fact that an accident has occurred. But it is never limited to that. Some evidence (more or less, as the case may be) of surrounding circumstances is always added; and a great body of additional evidence, which never needed to be introduced, the tribunal always has with it in the shape of its common knowledge. As soon as the plaintiff rests and his case is closed the question must arise whether he is entitled to go to the jury—in other words, whether a reasonable tribunal would be justified in saying that he has proved his case, that is, has made the facts which entitle him to recover definitely more probable than all other states of fact. If his evidence, taken at its best, justifies this view, then, and then only, it speaks of liability. It is manifestly all a matter of reasonable probabilities according to the common experience of mankind. The idleness of any talk of “certainty” has been long since exposed, and “legal certainty” is a mere phrase. In passing on such a question the opportunities of the parties to get at the facts must obviously be considered, for the conduct of a plaintiff in stopping short with a meager case will have a very different aspect according as he has or has not the means of proving more. In a case of the *Rylands v. Fletcher* type the plaintiff should have no difficulty in proving his harm, the fact that it was caused by the escape of the dangerous agency, and (if it were deemed necessary) the absence of any convulsion of nature which might serve to excuse the defendant as *vis major*. Such evidence should be sufficient to satisfy the demands of *res ipsa loquitur*, and the defendant is thus forced to expose to the plaintiff the evidence explaining the escape, or, as a practical matter, to submit to a verdict.

If then the two rules of law, namely, the doctrine of *Rylands v. Fletcher* and the rules prevailing where that case is rejected and the defendant's liability depends on negligence, be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great. But the matter does not stop here. Even in the narrow domain left to *Rylands v. Fletcher*, namely, the territory in which the plaintiff could recover under that case but not according to the law of negligence, we find another doctrine competing with *Rylands v. Fletcher*, and going far to accomplish the same result by a different method. The search for an actual case requiring any such doctrine as *Rylands v. Fletcher*, none too easy for the reasons above indicated, is thus made all the harder. At least it must extend farther than the facts of that historic case itself, for the circumstance that the escape of the water was due to the negligence of the contractor employed by the defendant would have entitled the plaintiff to recover in many, if not all of the jurisdictions which reject *Rylands v. Fletcher*, regardless of his care in selecting the contractor. This doctrine by which a defendant who has employed an independent contractor may be liable for the consequences of the contractor's negligence, though himself free from fault either in selecting the contractor or in any other particular, is sometimes misleadingly stated as if *respondeat superior* were somehow involved.¹⁵ To say that the contractor is treated as the owner's servant is merely to misstate the situation; it is negatived by the very proposition that he is an independent contractor. The true statement of the case is that the law charges the defendant with a non-delegable duty. Though it be only a duty of care, it is his duty to see that care be used, whatever the agency which he employs to do the work. Sometimes this result follows naturally from the circumstances creating the duty, as where it is attached to some right or privilege the giver of which looked to the defendant's personal responsibility. In

¹⁵ "Where the thing committed to an independent contractor to do for the occupier, on or about his premises, is of itself inherently dangerous, such contractor is the mere instrument or agent of the occupier, so far as concerns the responsibility to those lawfully coming within such danger. In the present case, the responsibility of the defendant, as occupier, is the same as if the window cleaner, who fell from the window sill, had been the ordinary servant of the defendant. He was bound in either case to use the care requisite to see that the work of cleaning his windows was not made unreasonably dangerous to one passing on the sidewalk." Gray, J., in *Doll v. Ribetti*, 203 Fed. Rep. 593, 596 (1913).

other cases the non-delegable quality of the duty is a familiar feature of certain special relations, as, for example, the master's duty to supply proper facilities to his servant. But the matter does not stop with these instances of a *delectus personae* or a consensual relation. There is another class of cases in which it is laid down that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else — whether it be the contractor employed to do the work from which the danger arises or some independent person — to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." ¹⁶ Here we have what is a mere duty of care and yet a non-delegable duty, and what makes it non-delegable is nothing but the character of the enterprise lawfully undertaken by the defendant. The logic of those courts which rejected *Rylands v. Fletcher* on the ground that fault was essential to liability might seem equally to condemn a doctrine which results in holding responsible a defendant whose conduct has been lawful and free from negligence at every stage of the transaction. But when even the most uncompromising of these courts are found to accept this doctrine, sometimes after delay and reluctance, a presumption of usefulness and adaptation to social ends arises from the very vitality of the doctrine. It has, after all, respectable common law analogies behind it; for he who makes permanent works of dangerous possibilities forces upon his neighbors a relation to which, though it is not consensual, the law must nevertheless attach appropriate duties. To follow the analogy of relations of a different nature and fix him with a non-delegable duty of care to guard against danger has the practical advantage of being conveniently workable, of supplying a spur to effective care in the choice of contractors, and in pointing the victim to a defendant who is easily discoverable and probably financially responsible — features which suggest some of the considerations which have at least helped to keep *respondeat superior* alive.

The existence of such a doctrine imposing a non-delegable duty of care where work, lawful but dangerous, is undertaken, may be

¹⁶ Cockburn, C. J., in *Bower v. Peate*, 1 Q. B. D. 321, 326 (1876).

clearly recognized, though its outline is curiously indistinct. It is perhaps most commonly applied to damage caused by structures on the defendant's land. But there is nothing in reason or in the ordinary statement of the rule so to limit it, and since even *Rylands v. Fletcher* is not limited to adjoining landowners, no basis for any such arbitrary limitation appears in this instance. But it is no easy matter to draw the line. Many things there must be which can be intrusted to contractors without liability when the employer is free from personal blame. How are they to be discriminated from those where he cannot relieve himself of responsibility? The difficulties of this question are not relieved by some statements from high authority. There is, for example, an often-quoted passage in Chief Justice Cockburn's judgment in *Bower v. Peate* asserting "an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."¹⁷ But is there anything obvious about this difference except the antithesis between a negative and a positive form of stating an identical proposition, helped out by some color in the phrasing? All work to which a duty of care attaches is dangerous work, *i. e.*, work which threatens some injury to others unless care is taken. If the ordinary prudent man would foresee no danger there is no reason to use care. In every case where the question of negligence arises, therefore, it may truly be put either way — that if the doer acts properly, injury will not occur, or that injury will be done unless care is taken to prevent. It is hard to see what is behind this asserted distinction except a difference in the degree of danger; and the same thought may be detected in the frequent statement that the employer is not liable if the negligence of the contractor is merely "collateral." So far as that most conveniently question-begging adjective points to a definite conception, it seems to indicate a distinction according to the definiteness of the danger inherent and visible in the nature of the undertaking. In any such matter as this any statement as to the future is all a matter of probabilities; even if Chief Justice Cockburn's statement has been strengthened, as is sometimes done, by limiting it to a case where harm would "necessarily" arise in the absence of precaution, this,

¹⁷ 1 Q. B. D. 321, 326-27.

on a true analysis, would not mean certainty in any other sense than a high degree of probability. The line, then, can only depend on the degree of danger; the feature which makes the duty non-delegable when there is no *delectus personae*, and the parties have come into no consensual relation, and the plaintiff has nothing to stand on except his rights as a fellow being threatened by the defendant's undertaking, must be the extra-hazardous character of that undertaking. The very nature of such a discrimination involves difficulties and fluctuations of individual opinion in its application; the comparison of instances is likely to produce somewhat bewildering results, suggesting that the maintenance of a lamp overhanging the street or washing the windows of an office building involves greater hazards than the ownership of a motor car or the transportation of dynamite. It may well be doubted whether the doctrine is worth the price represented by such uncertainties; whether the law of negligence with its requirement of personal fault should not be left to take care of all cases in which the duty is not made non-delegable as a necessary consequence of the special relation of the parties, and whether, for reasons already indicated, it is not quite sufficient to take care of them.

But assuming that such a doctrine is to be accepted — and it seems to have taken a pretty firm root — its incompatibility with *Rylands v. Fletcher* is striking. Both doctrines depend on the extra-hazardous character of the undertaking; the field for any such doctrine is narrow at the best; the line between the danger which calls for care and the “extra” hazard is hard enough to draw; and to magnify this difficulty by bringing in two degrees of “extra” hazard is to introduce needless vexation which makes the old discredited degrees of negligence almost look legally respectable by contrast.

This, however, is the point to which courts which have accepted *Rylands v. Fletcher* have found themselves driven without escape. They must subdivide undertakings into at least four classes. (1) A first class would be those which are unlawful, so that creating the condition results in what ordinary legal parlance would designate a “nuisance.” Here the defendant's act may be in unlawfully furnishing the material for the catastrophe, even though it is produced by causes which make his act in creating or maintaining the condition remote — for example, gunpowder unlawfully stored

and exploded by lightning or a stranger. (2) A second class would be lawful undertakings so hazardous as to make the defendant liable without fault of anybody, provided no new intervening force produced the result (*i. e.*, *Rylands v. Fletcher*). (3) In a third class would be lawful undertakings less hazardous than this last, where liability is excluded unless there has been fault in someone, but still so hazardous as to make the duty of care non-delegable, so that a defendant who is without personal blame may still be held responsible. (4) Lastly, there would be undertakings which involve a duty of care, but for which the defendant cannot be held without fault of his own or his servant's. This situation has been recognized by the Supreme Judicial Court of Massachusetts, which, speaking through one of its ablest members, has defined the second and third classes as follows:

"This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed, as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees. . . . The principle applicable to the erection of common buildings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. . . . The duty which the law imposes upon an owner of real estate in such a case, is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to every one who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. . . . The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual and in a sense natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes with-

out absolutely protecting his neighbors from injury or loss by reason of the use." ¹⁸

In thus differentiating from one another the two intermediate situations of the four above referred to, the court seems at times to use an emphasis which brings the second near to the first, and the third to the fourth — as if *Rylands v. Fletcher* scarcely applied, unless the use of the defendant's property were so unreasonable that it might almost be classed as a nuisance, and as if the rule of non-delegable duties applied to all building operations. But this cannot have been the meaning of the court, as there are undoubtedly cases — the ordinary external repair of a chimney, for example — to which no such rule applies. ¹⁹

On this general subject of the relation of liability to fault — the attempt at method in solving the problem of adequate protection to the plaintiff without injustice to the defendant — the confusion of our law by no means stops at the instances above referred to. Rules coming down in tattered fragments from a time when, to quote Chief Justice Doe once more, "there seems to have been no well-defined test of an actionable tort" — "precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject" ²⁰ — leave the law in an inexcusably cluttered and unsystematic condition. The carrier of passengers, for example, is liable on one basis; the carrier of goods on another. The latter is an insurer, and he is not; he is liable without fault or proximate causation if the harm is done by a third party and not if by a vice of the goods by an unforeseeable act of nature, so that if robbers derail the train he is liable for goods which they steal, but not for those which perish through the delay, though all be without the carrier's fault. It is perfectly lawful to keep a savage animal, to say nothing of a cow; yet in the one case, as in the other, the owner finds himself burdened with liabilities imposed without reference either to fault or causation, binding him to pay for the consequences of the acts of others for all the world as if the original keeping were an unlawful act.

Some of these instances may work well, however they arose, to

¹⁸ Knowlton, J., in *Ainsworth v. Lakin*, 180 Mass. 397, 399-401, 62 N. E. 746, 747 (1902).

¹⁹ See also *Davis v. Whiting*, 201 Mass. 91, 87 N. E. 199 (1909).

²⁰ *Brown v. Collins*, 53 N. H. 442, 445.

serve the ends of justice; and no doubt the notion of perfect symmetry is a pedant's dream. And yet, after making all allowance for precedent and practical confusion alike, such a result as *Rylands v. Fletcher* produces in our system is not tolerable, and those courts have done well who have flatly refused to have anything to do with it. The subject is one where too much weight should not be given to history, for the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it. And at the present time a social interest of high importance requires that this subject be dealt with by the application of broad and simple general conceptions.²¹ This is a period of legislation, when it is alike inevitable and desirable that industry be subjected to detailed regulations of many kinds. Some of these, like the Workmen's Compensation Act, will be general in their application; others will deal in detail with special situations. The imposition of liability without fault will be a constant characteristic of such legislation. The apparent tendency in this respect to recur to earlier conceptions has been ably pointed out by Judge Smith.²² It is desirable that this should be so; for in civil, no less than in criminal relations, the need of proving fault may for practical reasons defeat the just purpose of the legislation. What cases call for such treatment will be a question of the nicest sort for the legislator, often admitting of no general answer, but depending on all sorts of considerations affecting the particular industry. He has a difficult structure to build; and it is idle to hope that it can be well built on a shifting foundation. That, however, is just what the courts supply to him unless the courts recognize some intelligible and practically workable theory as the basis of liability. A state of the law which leaves it indefinitely difficult to say in advance whether its

²¹ "Lord Mansfield, speaking many years ago against subtleties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain broad principles, such as, not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules." Best, C. J., in *Strother v. Barr*, 5 Bingham 136, 153 (1828). Compare also the remarks of Professor Ballantine, "Qualified Martial Law," 14 MICH. L. REV. 102, 103.

²² "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344, 368.

rules will or will not hold the defendant responsible for harm which has resulted from his undertaking without his personal tort leaves the legislator in unreasonable doubt as to the material on which he is to work; and such a condition is the less excusable when the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet. One who is little disposed to adopt the view that the power of the legislature in this matter is taken away by the constitution may yet so far agree with the Court of Appeals of New York in *Ives v. South Buffalo Ry. Co.*²³ as to the fundamental proposition of the common law which links liability to fault.

Ezra Ripley Thayer.

²³ 201 N. Y. 271, 293.

THE ALIENABILITY OF CHOSSES IN ACTION

THE complete history of the law relating to the assignment of *choses* in action remains to be written. The late James Barr Ames gave us a portion of it in his essay upon "The Inalienability of Choses in Action."¹ In that essay he traced for us the development of the law relating to the subject in the common law courts of England, but not to any considerable extent its development in the English court of equity or in American courts of law and equity. In his essay the learned author also reached certain conclusions concerning the present state of the law relating to the alienability, or inalienability, of *choses* in action, these conclusions being based in part upon his historical survey and in part upon an analysis of the fundamental nature of *choses* in action. It is the purpose of the present paper to follow the development of this branch of our law from its earliest beginnings in English equity, so far as they can be ascertained, down to the present day. An attempt will also be made to present what is believed to be a more accurate analysis of the nature of ownership of a *chose* in action. It is believed that a wider historical survey and a more careful and thoroughgoing analysis will throw much additional light upon the matter and aid us in reaching a clearer understanding of the actual law now in force in our own country.

We start, of course, with the proposition that according to the original common law rule, which had a few exceptions enumerated by Mr. Ames, a *chose* in action was not assignable. At the outset let us first of all ask ourselves just what it is that the common law refuses to recognize as assignable. Perhaps we cannot do better than to take as the starting point of our discussion passages from the essay already referred to. The learned writer says:

"The rule (that a *chose* in action is not assignable) is . . . believed to be a principle of universal law. A right of action in one person implies a corresponding duty in another to perform an agreement or to make

¹ 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, p. 580; reprinted in LECTURES ON LEGAL HISTORY, p. 210.

reparation for a tort. That is to say, a *choses* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferor and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may of course be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action, and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment."

To the mind of the present writer, the analysis of the nature of a *choses* in action here presented by the learned author is inadequate and possibly even misleading. To begin with, the word "transfer" is used in two senses in the passage quoted. When the transfer of the physical thing is spoken of, what is meant is merely the physical delivery of custody; when the transfer of legal rights is referred to, what is meant is of course something quite different. Upon analysis, as the learned author himself states, it seems very clear that no rights are, strictly speaking, transferable. What happens, for example, upon a so-called transfer of title to real property from A. to B. is, that the rights and other jural relations of A. in relation to his fellowmen with respect to the object transferred are extinguished or divested and that B. becomes invested with similar though not necessarily identical rights and other jural relations. Whether in a given case A. and B., either singly or acting in co-operation, can do acts to which the law attaches such legal consequences seems to be purely a question of positive law. In this respect it does not seem possible to recognize that the transfer or assignment of a *choses* in action involves anything fundamentally different from what is involved in a transfer of a *choses* in possession. A. has a certain *choses* in action, say a claim for \$100, based upon a

common law debt, against X. Can A. and B., without X.'s consent, do acts to which the law will attach the legal consequences that A.'s claim against X. will be divested and B. be invested with a similar claim against X.? It seems clear that to this question no answer based upon a *a priori* reasoning can be given; it also is purely a question of positive law.

Just what the learned author from whom we have quoted meant by the statement that the rule that a *chose* in action is not assignable "is a principle of universal law" the present writer has never been able to decide. If all that is meant is that it seems to be the original view of both the Roman law and the common law, it is true; but if it means that the rule is a necessary one, one that must exist in all systems of law, it seems to be erroneous except in the sense that all legal rights are from their nature not, in the strictest sense, transferable. Thus interpreted, however, the statement, while true, is of little value, for we can say with equal truth that it is a principle of universal law that property rights of all kinds are not transferable. It has seemed worth while to discuss this passage in the essay referred to for the reason that some at least of Dean Ames's students seem to have assumed that he meant by it the erroneous proposition that there is some universally necessary and absolute principle of universal law — one that from the nature of things must exist in all systems of law — which renders the transfer of a *chose* in action impossible but does not prevent the transfer of other legal rights. For example, one of them says:

"Dean Ames has shown, that while the title to a corporeal thing is transferable, the title to a *chose* in action, which is an incorporeal thing, is incapable of transfer. Consequently, the purchaser of a corporeal trust *res* — a legal or equitable *chose* in action — whatever else he acquires, acquires no title."²

² Thaddeus D. Kenneson, 23 YALE L. J. 194. Mr. Kenneson uses the supposed principle that a *chose* in action is "incapable of transfer," by which he seems to mean incapable because of its nature, as a premise to a series of arguments which seek to demonstrate the incorrectness of Mr. Ames's conclusions as to the law relating to *bonâ fide* purchasers for value. By assuming the further premises that equitable interests are *chooses* in action (in which he seems to follow Mr. Ames), he apparently reaches the conclusion that they are not transferable. As the contrary has been the law for a long time, it is obvious that there is a flaw somewhere, and clearly it is found in the premises, both of which seem to the present writer erroneous. Whether the conclusions in regard to the doctrine of *bonâ fide* purchaser for value as applied to the transfer of equitable interests which the learned writer draws from his argument are sound or not is another question and one which cannot be discussed here.

Let us return to our question, What is this *chore* that at common law cannot be assigned? What is it that one who "owns" or "has title to" a *chore* in action really has that he cannot transfer or assign? Upon analysis it turns out to be a much more complex thing than seems to have been supposed. Let us begin with a concrete example of a *chore* in action of some kind — say the common law debt for \$100 previously referred to, A. being the creditor and X. the debtor. What jural relations go to make up that complex of jural relations — the debt? In the first place — and this is about the only thing that usually is thought of — A. is said to have a right *in personam* against X.; X. is said to be under a duty to A. to pay him the \$100 when it is due. Another way of stating this is, that if X. does not pay the money when due, A. will acquire a cause of action of a certain kind — debt or *indebitatus assumpsit* in the case supposed — and can, by taking the appropriate proceedings, obtain a judgment against X. and enforce it by the usual means. A little reflection, however, shows us that this by no means constitutes the whole of "ownership" of or "title" to the debt. One who owns such a *chore* has also what some of us, especially those who are engaged in the teaching of law, are coming to call "legal powers." The owner of the debt can, for example, do acts which will bring about the extinguishment of the debt. One way is by executing and delivering a release under seal; another is by accepting payment, or something other than money by way of accord and satisfaction. By suing on the debt and reducing it to judgment, the creditor can bring it about that the original debt is extinguished and its place taken by a new obligation, a debt of record. The legal ability to accomplish any one of these or similar results is aptly called a legal "power."³ Let us note in passing that the rule of the old common law that we are discussing denies to the owner of a *chore* in action a legal power which owners of other kinds of property usually have, *viz.*, to do acts which will both divest the creditor's right *in personam* against the debtor and invest an assignee with a similar right.

³ See the valuable article by Professor Wesley N. Hohfeld of Yale University on "Some Fundamental Legal Conceptions" in 23 YALE L. J. 16. The fundamental concepts used in this article are the ones there set forth, and the learned reader is referred to Mr. Hohfeld's discussion for their further elucidation. And see Dean Roscoe Pound's article on "Legal Rights," in 26 INT. JOURN. OF ETHICS, 92. Compare also TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, §§ 113-29; also the present writer's discussion in 15 COL. L. REV. 40-44.

Continuing our analysis of the concept of ownership of a *chose* in action, we find farther that if one is completely the owner of a *chose* in action he may, without committing any legal wrong against anyone, exercise these various powers, *i.e.*, he is under no duty to others to refrain from exercising them, or, as we say, other people have no right that he shall not exercise them. This absence of duty to refrain from doing certain things some of us are getting into the habit of calling a legal "privilege," borrowing the term from the law of evidence, where we speak of the "privilege" of a witness not to testify, meaning thereby that he is under no duty to testify. Applying this to the ownership of a *chose* in action, we may say that in addition to the rights and powers described, the owner of the *chose* in action has certain legal privileges — to release the *chose*, accept payment, or enter in agreements of accord and satisfaction, etc.

A thoroughgoing analysis of the concept of ownership of a *chose* in action requires us to add one more element to those already mentioned. Complete ownership of any *chose*, whether in action or in possession, includes also the absence of legal powers on the part of other persons to do many of the things which the owner of the *chose* has the legal power to do. This we may express by saying that the owner of a *chose* in action possesses certain legal "immunities" from the power of other persons to do acts which will, for example, release or otherwise extinguish the rights above described. To sum up: We may say that the complete ownership of a *chose* in action is an aggregate of legal rights, privileges, powers and immunities of the kinds described.⁴ Our real problem, therefore, is this: Can the owner of a *chose* in action, either singly or in coöperation with a third person, the assignee, but without the consent of the one against whom the *chose* in action exists, do acts to which the law will attach the consequences that this aggregate of rights and other jural relations will be divested and the assignee become invested with a similar aggregate? In other words, does ownership of a *chose* in action include a *legal power* as well as a *legal privilege* to bring about such a result? As already stated, originally at common law it certainly did not. It is, however, the contention of the present writer

⁴ The analysis in the text does not include the jural relations growing out of the *chose* in action which exists between the owner of the *chose* and persons other than the one immediately bound. *Lumley v. Gye*, 2 E. & B. 216 (1853), and similar cases show that such jural relations exist.

that a careful survey of the historical development of the law, especially in this country, will show that the common law, by a gradual process of judicial legislation, stimulated no doubt by developments which went on in equity, and aided in some jurisdictions by statutes, reached the final result of making *choses* in action really alienable; and that statutes permitting the assignee to sue in his own name merely change the label of the action and not the substantive law. The contention, in other words, is, that the assignor really ceased to be regarded in any way as the owner of the *chose* in action, except for the purpose of lending his name to the title of the suit.

With the foregoing analysis as our guide, let us test this theory by examining the historical development of the law upon the subject. As might be supposed, we must begin with equity. Since Dean Ames wrote his essay, we have learned much concerning what went on in chancery during the early days. For this we are, with reference to our topic, especially indebted to the investigations of the chancery petitions during the fifteenth century, recently made by Mr. W. T. Barbour. With reference to the assignment of debts, Mr. Barbour says that "among the earliest petitions (in chancery) preserved we find assignees seeking to recover in their own names debts which had been assigned to them."⁵ It is not possible to say certainly whether at this time any consideration was required, though apparently it was not; but that assignments were enforced in equity seems clear. In any event, we know from later cases that it became the settled doctrine that the assignee, at least where there was a consideration, and perhaps where there was none, could recover from the debtor by bill in equity brought in the name of the assignee.⁶ It is important to notice that the chancellor regarded the debtor after notice of the assignment as owing

⁵ "The History of Contract in Early English Equity," by W. T. Barbour, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, edited by Paul Vinogradoff, p. 108.

⁶ Some of the early cases in equity are: *Perryer v. Hallifax*, Rep. *temp.* Finch, 299 (1677); *Fashion v. Atwood*, 2 Ch. Cas. 36 (1680); *Peters v. Soame*, 2 Vern. 428 (1701); *Anonymous*, 2 Freem. Ch. 144 (1675); *Atkins v. Dawbury*, Gilb. Eq. Rep. 88 (1714); *Lord Carteret v. Paschal*,¹ 3 P. W. 199 (1733); *Row v. Dawson*, 1 Ves. 331 (1749). There is confusion in the cases as to the necessity for consideration. It seems probable that originally it was not necessary, but that ideas as to maintenance, etc., led to a change of view. The resulting confusion in the authorities has left its traces in modern law. The subject is discussed by Mr. Edward Jenks, Sir W. R. Anson, and Professor George P. Costigan, Jr., in the LAW QUART. REV., vol. 16, p. 241; vol. 17, p. 90; and vol. 27, p. 326.

the debt directly to the assignee. The common law, however, continued for a considerable period to deny any validity whatever to an attempted assignment, having by this time developed the idea that the power of attorney, by which it was sought to evade the common law prohibition against assignment, unduly stimulated litigation and so was prohibited by the statutes against maintenance.⁷ It thus appears that there was a period in the history of English law during which the assignee acquired by the assignment no legal rights of any kind, but did acquire equitable rights against the one liable on the *chose* in action. The aggregate of common law rights and other jural relations composing ownership of the *chose* in action remained vested completely in the assignor, just as they do in the case of a typical trust; but the chancellor gave to the assignment the effect of creating in equity a new aggregate of rights and other jural relations. This aggregate of equitable jural relations included, in addition to the rights against the debtor, also a right that the assignor should refrain from exercising the privileges and powers which the common law still ascribed to him. A complete analysis would of course show that the assignee also possessed certain equitable privileges, powers, and immunities. This state of the law explains the origin of the familiar statement, true at the period of which we speak, but long since outgrown, that "a *chose* in action is assignable in equity but not at law."

The common law lawyers and judges, no doubt stimulated by this development in chancery, began to try to find some method of evading their rule against assignability. Down to a certain point, Mr. Ames has accurately described what happened on the common law side. By gradually changing their views concerning the illegality of assignments because of maintenance, the common law lawyers were able, through the device of the "power of attorney" already referred to, to enable the assignee to obtain relief in common law proceedings by suing in the name of the assignor. At first an express power of attorney was required, but later one was implied.⁸

⁷ AMES, LECTURES ON LEGAL HISTORY, p. 213.

⁸ AMES, *loc. cit.*, p. 214, note 1. Apparently Dean Ames thought of the power of attorney as "implied in fact," for he speaks of it as "implied from circumstantial evidence." But was any evidence beyond the "assignment" itself necessary in the fully developed doctrine? It would seem that the "power of attorney" was "implied in law," *i. e.*, was attached by the law to each assignment as a legal consequence of the same, irrespective of any implied intention in fact.

Originally, of course, the theory was that the assignee sued as the agent or attorney of the assignor, although entitled to appropriate the proceeds to his own use; and it seems to be the contention of Mr. Ames, or at least of some who follow his theory, that this has ever since remained the law.⁹ As has already been indicated, it is the belief of the present writer that a consideration of the cases, especially those in this country, will show that any such view is not warranted by the cases.

Perhaps before going farther it may be well to note what is really involved in the theory that the assignee is really in some sense the agent or attorney of the assignor in collecting the *choses* or in suing upon it. If the assignee is an agent and the assignor is still the owner of the *choses*, it would seem to follow that the assignor must retain the common law powers mentioned above. He must have, for example, the power to give a valid release, accept payment or accord and satisfaction, control the suit if brought in the common law court in his name, enter satisfaction of the judgment, control the issue of execution on it, etc., etc. Doubtless, as soon as the legality of the "power of attorney" is recognized, he is under a duty not to do these things, *i.e.*, he has lost some of his common law "privileges," so that he will incur a legal liability in damages for breaking his duty to the assignee not to do these acts except for the benefit of the assignee.¹⁰ Absence of privilege, however, does

⁹ AMES, *op. cit.*, p. 214, note 3; Kenneson, *loc. cit.* In the note referred to, Dean Ames contends that the bailor's interest in the chattel bailed is a *choses* in action and "upon principle and by the old precedents no more transferable than that of a creditor." He admits that the old precedents are no longer the law, so far as the decisions of the cases go, and it is difficult to see what the "principle" which forbids the transfer is, except the supposed "principle of universal law" previously referred to. It seems also that even if we admit the validity of such a principle, the assertion as to the bailor's interest is incorrect. The bailor has a true right *in rem* against "all the world" that they shall refrain from dealing with the chattel without authority, and may sue third persons unlawfully dealing with the chattel while in the bailee's possession, bringing trover or case, according to the circumstances. Cf. my discussion of similar questions in 15 COL. L. REV. 46; also the recent articles in the HARV. L. REV. for February and March, 1916, by Professor Percy Bordwell of Iowa.

The present writer is convinced that some of Dean Ames's students misinterpret Mr. Ames's real meaning when he says that the assignee held only a "power of attorney." He says (1 CASES ON TRUSTS, 2 ed., p. 61) that it was a power "for the attorney's own benefit," which, of course, is inconsistent with its being merely an agency, as, for example, Mr. Kenneson seems to assume.

¹⁰ It should be emphasized that the assignor is no longer complete owner of the *choses* in action if he has ceased to have all the privileges of an owner, *i. e.*, if, not as a

not mean absence of legal power, and so long as the theory of agency is followed, the extent of the assignee's rights in a court of law would be measured by an action for damages, and he would be powerless to prevent the breach of duty on the part of the assignor. If he wished preventive relief, it would be necessary for him to resort to equity, with its power to issue injunctions and its theory that the assignee ought to be regarded as the owner and protected accordingly.

For a time after the legality of the "power of attorney" came to be recognized it is undoubtedly true that the assignee had no greater rights in a court of law than have just been described; but the common law could not and did not remain in this condition. Traces of a farther evolution begin to appear at a relatively early date. In a case in the King's Bench in 1676 (*Carrington v. Harway*, 1 Keble 803), it appeared that the plaintiff, who was resident in Spain, had executed a letter of attorney to acknowledge satisfaction of a judgment which he held against the defendant. Counsel prayed that satisfaction might be acknowledged by the attorney's name in the letter, but the court refused, the plaintiff "having before assigned it [the judgment] over to one Cocke, which, being in satisfaction of just debt, is not revocable." The effect of a decision of this kind, of course, is to deprive the assignor of one of his common law powers, for clearly the real owner of a judgment could do what the plaintiff had attempted. Again in Lilly's Practical Register¹¹ we find the statement that the death of the assignor does not revoke the so-called power of attorney, but that the assignee may sue in the name of the assignor's administrator even without the latter's consent. Clearly the old theory is giving way, so far as results are concerned, although the courts still say that the assignment "does not vest an interest" in the assignee. In 1799, in the case of *Legh v. Legh*,¹² the Court of Common Pleas was confronted with this situation: the assignor of a bond, after the assignee had begun suit in the name of the assignor, accepted payment from the debtor who had notice of the assignment, and also executed a release, which release was

mere matter of contract, but because of an interest in the *chose* which is beginning to be ascribed to the assignee, he is regarded as under a duty to the assignee to refrain from exercising his common law powers. He no more has complete ownership than has the owner of the servient tenement in the case of an easement.

¹¹ LILLY'S PRACTICAL REGISTER, 2 ed. (1735), p. 124.

¹² 1 Bos. & Pul. 447.

pleaded as a defense by the debtor when sued by the assignee in the name of the assignor. On the theory that the assignor at law still owned the bond, this plea stated a complete defense to the action and the assignee's only remedy would be an action for damages against the assignor or by bill in equity for cancellation of the release. However, the counsel for the real plaintiff, the assignee, obtained a rule *nisi* for setting aside the plea and ordering the release to be canceled. The following extracts from the original report are worthy of quotation:

"Eyre, Ch. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application."

"Buller, J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

"*The Court* recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

"*Shepherd* on this day stated that the Defendant objected to going before the prothonotary, upon which the *Court* said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the statute to plead several pleas, the Court had no discretion.

"Eyre, Ch. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the *real Plaintiff*, this Defendant has colluded with the *nominal Plaintiff* to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court (*Vide Donnelly v. Dunn*, 2 B. & P. 45). And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

"Buller, J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

"Upon this the Defendant consented to go before the prothonotary."¹³

We have now reached the time when America separated from the mother country and we must therefore transfer our attention from English to American cases, for in this, as in so many other branches of our law, the so-called "common law" is received not as a completed system but as a growing organism whose further development under new and different surroundings is not necessarily the same as in the old home. The earliest American case worthy of notice which the present writer has found is one decided in 1772.¹⁴ In that case (*Bildad Fowler v. John Harmon*, reported in the opinion in another case) the Superior Court of New Haven County, Connecticut, had the issue placed squarely before it. The plaintiff, who had brought an action of trover, proved that he was assignee of a note payable in grain, the place of payment being the house of the promisor; that the promisor tendered the grain there; that it remained there for some time, as no one was there to receive it when tendered; that the defendant, a constable, under a judgment and execution against the assignor, attached the grain as the property of the assignor and took it away. Verdict and judgment were for the plaintiff, "for by the assignment of the note, the property of the grain upon the tender, vested in the assignee." Clearly here is no theory of agency, for, be it noted, the assignee had never dealt with the grain in any way. On the theory pursued by the writer in the Yale Law Journal previously quoted, the grain when tendered first becomes the property of the assignor, and passes to the assignee only when he appropriates it under an authority given him by the assignor to do so. On the agency theory the title to the grain vested in the assignor, and as the assignee never appropriated the grain or had anything to do with it, the plaintiff's trover action would fail. As we have seen, the court held just the contrary, *viz.*, that the property vested directly in the assignee.

In the same state, in a case in 1794, where the debtor had taken a release after notice of the assignment, we find the Supreme Court

¹³ Cf. similar action *in personam* by law courts in *Payne v. Rogers*, 1 Doug. 407 (1780); *Doe dem. Lock v. Franklin*, 7 Taunt. 9 (1816); *Hickey v. Burt*, 7 Taunt. 48 (1816); *Mountstephen v. Brooke*, 1 Chitty 390 (1819).

¹⁴ The case is reported in the case of *Redfield v. Hillhouse*, 1 Root (Conn.) 63 (1774).

saying to an assignee who had sued the promisor in equity, that probably now the assignee could get adequate relief at law without coming to equity, but that this time they will allow equitable relief as they have done in the past.¹⁵ Three years later, on similar facts a court of the same state denied equitable relief on the sole ground that the assignee had a complete and adequate remedy at law.¹⁶ This remedy at law seems in Connecticut to have been by tort action against the original debtor or against the assignor. Apparently the Connecticut court at this time had not reached the conception of *Legh v. Legh*, that the release could be treated as a nullity by a common law court, and of course the English case was not decided until 1799. In another early case, this time in Pennsylvania, a common law court in 1785 refused to recognize a power of attorney given by the nominal plaintiff authorizing a dismissal of the suit, where it appeared that there had been an assignment for a valuable consideration.¹⁷ This of course is in principle the same as the English case of *Carrington v. Harway* previously referred to.

In several of the states the development begun by the English cases was pushed to its logical conclusion. In New York especially, under the leadership of Chief Justice Kent, the development was very rapid. In 1800 the New York Supreme Court decided the case of *Andrews v. Beecker*.¹⁸ That was an action of debt on a bond. To a plea of release the plaintiff replied that prior to the release he assigned the bond to a third person, of which the defendant had notice. On demurrer the replication was held good, the court saying, "A release after the assignment of the bond and notice to the defendant, is a nullity and ought not to be regarded." The logical inconsistency of such a replication does not seem to trouble the court, but it is certainly perplexing to be told that the nominal plaintiff owns the *chose*, and the assignee does not; but that a release by the alleged owner, theoretically the plaintiff, is a legal nullity. Following our analysis, we recognize that, to use a some-

¹⁵ *Russel v. Cornwell*, 2 Root (Conn.) 122 (1794).

¹⁶ *Booth v. Warner* (1797), reported in *Coleman v. Wolcott*, 4 Day (Conn.) 6, 18 (1809).

¹⁷ *M'Cullum v. Cox*, 1 Dall. 139 (1785). The Chief Justice suggested that the assignee's name and the fact that the suit is for his benefit should be put on the margin of the record, so as to give notice of the real situation, stating that this was the practice when he was at the bar.

¹⁸ 1 Johns. Cas. (N. Y.) 411.

what homely figure of speech, one of the sticks in the bundle of jural relations which go to make up ownership in the assignor is now actually missing, *viz.*, the common law power to extinguish the *chose* by a release under seal. Not only is it a legal wrong for the assignor to do this — he no longer has the legal power to do it.

In the following year (1801) the same court decided another case in which they took a similar step. The assignor of a judgment had wrongfully entered satisfaction. This was on motion ordered vacated, the court saying:

"The assignee of the judgment is to be recognized by this court, as the owner, and all acts of the plaintiff (assignor) subsequent to the assignment, and affecting the validity of the judgment were fraudulent. He has no more power over the judgment than a stranger."¹⁹

In the case of *Littlefield v. Storey*, decided by the same court in 1808,²⁰ to a plea of payment the replication was, that prior to the payment the obligation had been assigned, that the defendant had notice of the assignment, and that the action was commenced for the sole use of the assignee. On demurrer, the replication was held good, and so another common law power of the assignor vanished. After notice of the assignment to the debtor the alleged owner of the *chose* in action no longer had the power to bring about its extinguishment by accepting payment.

The New York court seems to have carried to its logical conclusion its doctrine that after notice to the debtor the assignee in a court of law is to be treated as the owner for all purposes, with the one exception that in the title of the action the name of the assignor must be used. Perhaps the most extreme example, and one not followed by all courts, is found in the case of *Dawson v. Coles*, decided in 1819.²¹ The court went so far in that case as to hold that a plea of previous recovery by the plaintiff was satisfactorily answered, by way of confession and avoidance, by a replication which set out the assignment, notice to the debtor, and that the previous suit and recovery were brought by the plaintiff-assignor, for his own use, of which the defendant had notice. This so clearly denies ownership to the assignor and ascribes it to the assignee that it seems hardly worth while to do more than make

¹⁹ *Wardell v. Eden*, 2 Johns. Cas. 258 (1801).

²⁰ 3 Johns. (N. Y.) 425.

²¹ 16 Johns. (N. Y.) 51.

that assertion. If the real owner of a *chose* in action sue upon it and recover judgment, the *chose* in action is gone, being merged in the judgment. A theory that the assignee was the agent of the assignor would require us to hold in the case just cited that the original claim was gone, but that the assignee had some kind of a claim to the resulting judgment. In fact, as suggested, the older theory of our law prevented all courts from following the view of the New York court.²²

From this time on there is, however, little uncertainty in the vast majority of the cases, and the new doctrine is by most of the courts applied with reasonable consistency, if such a word can fairly be used in connection with a doctrine which begins by ascribing ownership to one man and ends by denying it to him and ascribing it to another. As has already been said, and as was to be expected with so complicated and anomalous a doctrine, there were at times in some states cases which did not go to the limit established by the New York decisions. We can of course in a survey of the kind we are making deal only with the generally prevailing views and not with all local variations in matters of detail. The following extracts are, it is believed, typical, in spite of occasionally dissenting voices:

"Although, as a general principle, a *chose in action* or a right in one to sue another to recover money or property in a court of law is not assignable, so as to enable the assignee to sue in his own name, yet it has long been settled by repeated decisions, not now to be doubted, that the law will protect the equitable interest of an assignee for a valuable consideration, and that the promisor shall not be permitted to avail himself of any payments made to the promisee subsequent to his having notice of the assignment, and that any release made to him by the promisee, after such notice, would be a fraud upon the assignee, and would not defeat an action brought for his benefit in the name of the assignor. . . . The assignee is to be recognized as the owner, and all acts of the assignor subsequent to the assignment, and affecting the validity of the contract, are fraudulent. *He has no more power over it, than a stranger*; but until the promisor has notice of the assignment all payments made by him, and all acts of the promisee in respect to him, are good."²³

²² See note 32, *infra*.

²³ Parris, J., in *Hackett v. Martin*, 8 Greenl. (Me.) 77, 78 (1831). The italics are the present writer's.

"I speak not of *chancery*, merely; it is the same at law. There is no hostility between the different jurisdictions on this subject. It is a *well settled principle of common law in Connecticut, that the property in a chose in action, may be assigned; and the courts of law have long since recognized the property in the assignee as fully as courts of chancery.* The last feature, which remained for some time, to distinguish the two jurisdictions, was that of resorting to a court of chancery for redress against an obligor, who had received a discharge from a bankrupt obligee, knowing the debt to be assigned. But this distinguishing feature is now removed; and the course is so well settled to bring suits at law, that I feel no hesitation in saying, that a court of chancery would not sustain a bill of the kind. *The old form of bringing the suit on the note, in the name of the obligee, is, indeed, continued; but it is now mere form.*"²⁴

Without attempting to state and discuss in detail individual cases, let us run briefly over some of the main results of the new doctrine. In each case it will be assumed, unless the contrary is stated, that notice of the assignment has been given to the debtor.

1. Payment to the assignor or a release by him does not discharge the obligation.²⁵

2. An accord and satisfaction entered into and carried out between the assignor and a debtor who has notice is invalid.²⁶ In the case of the assignment of a contract right before breach, instead of a debt or cause of action, any conditions precedent may be

²⁴ Smith, J., in *Colbourn v. Rossiter*, 2 Conn. 503, 508 (1818). The italics are the present writer's.

²⁵ Payment no defense at law. *Jones v. Witter*, 13 Mass. 304 (1816); *Anderson v. Miller*, 7 Sm. & M. (Miss.) 586 (1846); *Clark v. Rogers*, 2 Greenl. (Me.) 143 (1822); *Hackett v. Martin*, 8 Greenl. (Me.) 77 (1831); *Littlefield v. Storey*, 3 Johns. (N. Y.) 425 (1888).

Release no defense at law. *Legh v. Legh*, 1 Bos. & Pul. 447 (1779); *Dunn v. Snell*, 15 Mass. 481 (1819); *Duncklee v. Greenfield Steam Mill Co.*, 23 N. H. 245 (1851); *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411 (1800); *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121 (1801); *Martin v. Hawks*, 15 Johns. (N. Y.) 405 (1818); *Briggs v. Dorr*, 19 Johns. (N. Y.) 95 (1821); *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34 (1828); *Hackett v. Martin*, *supra*. Attention is called to the fact that no attempt at exhaustive citation has been made in any of the notes to the present paper. It is believed that the cases cited are typical and represent the general trend of the authorities. The earlier cases which settled the law have so far as possible been selected for citation. If there are dissenting voices upon any points, the attempt is made to call attention to the fact by citation of typical cases.

²⁶ *Jenkins v. Brewster*, 14 Mass. 291 (1817); *Eels v. Finch*, 5 Johns. (N. Y.) 193 (1809).

performed by the assignee; and conversely, tender should be made to the assignee.²⁷

3. Within the meaning of statutes relating to execution, the assignee is the execution creditor, in spite of the fact that the judgment nominally stands in the name of the assignor.²⁸ So also the assignee is the creditor within the meaning of an insolvency act requiring notice to creditors.²⁹

4. If after the assignment the assignor becomes insolvent and bankruptcy proceedings are had, the assignee may still use the assignor's name in suing the debtor and the bankruptcy of the assignor is no defense to the action as it would be if the assignor still owned the claim. The same principle is applied in similar cases of disability of the assignor to sue for his own benefit.³⁰

5. On the theory of ownership in the assignee, payments made to him or releases given by him should have the effect of extinguishing the claim, and it is so held.³¹

6. The judgment obtained nominally by the assignor but actually by the assignee, cannot be reached by the assignor's creditors. This is true apparently only where the attaching creditor has notice, either from some indication on the record or in some other way, a result, of course, which indicates the equitable origin of the assignee's common law rights.³² This equitable origin must never be lost sight of if we are to understand the present state of our law. Of course the creditor has notice to-day, where by statute the action is brought in the assignee's name.

7. Former recovery, where the defendant knows that the suit is

²⁷ *Van Vechten v. Graves*, 4 Johns. (N. Y.) 403 (1809); *Traders Insurance Co. v. Robert*, 9 Wend. (N. Y.) 404 (1832); *Allen v. Hudson River Mutual Ins. Co.*, 19 Barb. (N. Y.) 442 (1854); *Hamilton v. Brown*, 18 Pa. St. 87 (1851).

²⁸ *Colbourn v. Rossiter*, 2 Conn. 503 (1818).

²⁹ *Lyford v. Dunn*, 32 N. H. 81 (1856).

³⁰ *Matherson v. Wilkinson*, 79 Me. 159 (1887); *Stone v. Hubbard*, 7 Cush. (Mass.) 595 (1851); *Parsons v. Woodward*, 22 N. J. L. 196 (1849). Where the assignor had ceased to exist the assignee could not of course obtain relief in a law court. In such cases equity gave relief. *Person and Marye v. Barlow*, 35 Miss. 174 (1858).

³¹ *Cutts v. Perkins*, 12 Mass. 206 (1815); other cases cited in 5 *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW AND PRACTICE*, 948, note 14. On all the points this article in 5 *ENC. L. & P.* contains many excellent citations.

³² *Willes v. Pitkin*, 1 Root (Conn.) 47 (1764); *Fobs v. Brewster*, 1 Root (Conn.) 234 (1790); *St. John v. Smith*, 1 Root (Conn.) 156 (1790). If no notice, creditors of the assignor may of course attach. *Woodbridge & Co. v. Perkins*, 3 Day (Conn.) 364 (1809).

brought for the benefit of the assignor, is no defense to a suit in the assignor's name, brought for the benefit of the assignee. This view was apparently not accepted in all jurisdictions.³³

8. The assignee is not bound by "trustee process" used against the assignor, unless made a party to the proceedings.³⁴

9. An assignor who collects the debt is liable to the assignee in a common law action for money had and received.³⁵ This result, of course, does not, standing alone, prove much, as it is quite easy to permit a quasi-contractual action of this kind even if we consider the assignee's rights as primarily equitable and not legal.

10. The assignee is the only one who can control the court proceedings — dismiss the suit, etc.³⁶

11. Admissions made by the assignor after the assignment are by most of the courts held inadmissible, though upon this point there is some dissent.³⁷

12. Where the instrument is in the form of a common law specialty, the assignee can recover in trover against the assignor who has unlawfully detained the instrument, the measure of damages

³³ *Dawson v. Coles*, 16 Johns. (N. Y.) 51 (1819). *Contra*, *Armstrong v. Lancaster*, 5 Watts (Pa.) 68 (1836), 30 Am. Dec. 293 (*semble*). The difficulty was to see how the assignee could defeat the suit by the assignor. Some cases held a plea stating the facts bad. *Cage v. Foster*, 5 Yerg. (Tenn.) 261 (1833), 26 Am. Dec. 265; *Lynn v. Glidwell*, 8 Yerg. (Tenn.) 1 (1835). These cases say that the assignee should state the facts in the affidavit (the assignment, and that the plaintiff is not suing for the use of the assignee), and obtain a rule to show cause why the suit should not be dismissed. Of course to-day when the assignee sues in his own name this difficulty does not arise.

³⁴ *Page v. Thompson*, 43 N. H. 373 (1861).

³⁵ *Camp v. Tompkins*, 9 Conn. 545 (1833); cases cited in 5 ENC. L. & P. 951.

³⁶ *Southwick v. Hopkins*, 47 Me. 362 (1860); *Sloan v. Sommers*, 14 N. J. L. 509 (1834); *M'Cullum v. Cox*, 1 Dall. (Pa.) 150 (1785); cases cited in 5 ENC. L. & P. 975. Apparently Connecticut did not follow this rule, although on most points her law agreed with the other states. See remarks by Huntington, J., in *Fitch v. Boardman*, 12 Conn. 345 (1837).

³⁷ *Pringle v. South Western R. Bank*, 16 Ga. 582 (1855); *Hackett v. Martin*, 8 Greenl. (Me.) 77 (1832); *Frear v. Evertson*, 20 Johns. (N. Y.) 142 (1822); *Vrooman v. King*, 36 N. Y. 477 (1867); *Halloran v. Whitcomb*, 43 Vt. 306 (1871). *Contra*, *Bulkley v. Landon*, 3 Conn. 76 (1819). Changed by Statute of 1822. See *Scripture v. Newcomb*, 16 Conn. 588 (1844).

The assignor could be a witness: *Steele v. Phoenix Ins. Co.*, 3 Binn. (Pa.) 306 (1811); *Browne v. Weir*, 5 S. & R. (Pa.) 401 (1819); *North v. Turner*, 9 S. & R. (Pa.) 244 (1823). *Contra*, *Hackett v. Martin*, *supra*; *Frear v. Evertson*, *supra*. Connecticut here followed the progressive view and permitted him to be a witness. *Johnson v. Blackman*, 11 Conn. 342 (1836).

being the value of what would have been recovered in the suit on the instrument.³⁸

13. The right to control the issue and execution of process for the enforcement of the judgment is vested in the assignee. Here it is worth while to briefly examine at least one of the cases in detail.

In an action of debt on a judgment obtained by the assignee in the name of the assignor, the plea was that "the plaintiffs sued out their writ of execution and caused execution on said judgment to be done in full satisfaction thereof, and said execution to be returned fully satisfied." Issue was taken on the plea, and at the trial it appeared that the deputy sheriff had followed the instructions of the assignor, to proceed against the debtor's land, and had failed to proceed against the personal property of the debtor as the assignee had directed him to do. The Supreme Court of New Hampshire held that the sheriff should have done as directed by the "real owner" and that the common law court would protect the latter's rights.³⁹

14. If the officer whose duty it is to carry out the execution process fails properly to discharge this duty, the result is to make him liable to the assignee in a tort action for damages for any resulting loss. This action is brought by the assignee directly in his own name, as the officer owes him the duty to execute the process for his benefit.⁴⁰

15. Finally, one or two courts were bold enough to hold that the use of the assignor's name was a mere form; so that while the fact that suit was brought in the assignee's name could be objected to on demurrer, the objection could not be taken on motion after verdict. For example, in a New Jersey case the court said:

³⁸ *Clowes v. Hawley*, 12 Johns. (N. Y.) 484 (1815).

³⁹ *Baker v. Davis*, 2 Fost. (22 N. H.) 27 (1850).

⁴⁰ *Colbourn v. Rossiter*, 2 Conn. 503 (1818); *Page v. Thompson*, 43 N. H. 373 (1861); *State v. Herod*, 6 Blackford (Ind.) 444 (1843). Originally in such actions the assignee sued in the name of the assignor. *Woodman v. Jones*, 8 N. H. 344 (1836); *Martin v. Hawks*, 15 Johns. (N. Y.) 405 (1818). This produced a remarkable result in the case of *Riley v. Taber*, 9 Gray (Mass.) 373 (1857), where the assignee, suing in the name of the assignor, complained of the tort committed by the sheriff in paying the money realized from the execution over to the nominal plaintiff. Recovery was allowed for the benefit of the assignee, but in the name of the one who received the money.

The question of costs in the suit raised many difficulties. The whole tendency was to make the assignee liable and to exempt the assignor from liability. *Canby v. Ridgway*, 1 Binn. (Pa.) 496 (1808); *Reigart v. Ellmaker*, 6 S. & R. (Pa.) 44 (1820); cf. Mass. Statute as given in *Coulter v. Haynes*, 146 Mass. 458, 16 N. E. 19 (1888).

"The objection that the action cannot be maintained in the name of the present plaintiff, because the writing is a *chose* in action, and not assignable at law, so that the assignee may sue in his own name, is merely formal, and if valid, may be amended by inserting the name of Jennings [the assignor] as nominal plaintiff, upon proper terms. . . . The court may add formal parties . . . upon such terms as to the court may seem fit, for the purpose of determining in the suit the real question in controversy between the parties. *Washburn v. Burns*, 5 Vroom 18." ⁴¹

In closing this part of the discussion, we cannot do better than to quote the words of Mr. Justice Collins in a recent New Jersey case:

"It is said that *choses* in action have always been held in this state to be "not assignable" at law, except by statute. . . . But all that is meant by such an expression as that quoted is that a *chose* in action was not assignable so as to permit the assignee to sue in his own name in a court of law. Subject to that restriction, even in England, from a very early day, *choses* in action have been assignable *in fact*, and no consideration of the prevention of maintenance has been allowed to prevail. . . . That there was no inherent non-assignability appears from the fact that the restriction was never imposed on an assignee of the crown." ⁴²

Nearly everywhere to-day the assignee is permitted to sue in his own name.⁴³ It seems clear that a statute of this kind merely does away with an empty formality which no longer serves any useful purpose. The old bottles are filled with entirely new wine and it is time to change the label.

A word must be said concerning the situation after assignment but before notice of it to the debtor. Clearly here the assignor retains some of the powers of an owner — he can extinguish the claim by release, accepting payment, etc. Such acts on his part, of course, are wrongs against the assignee and render him liable to actions for damages. Translating this into the terms of our analysis, we may say that the assignor retains some of his legal powers but has

⁴¹ *Morrow v. Inhabitants of Vernon*, 35 N. J. L. 490 (1872); cf. *Buller, J.*, in *Master v. Miller*, 4 Durnf. & E. 320, 340-41; also the recent Georgia case of *Toole v. Cook*, 82 S. E. 772 (1914), taking the same view.

⁴² *Bouvier v. Baltimore & New York Ry. Co.*, 67 N. J. L. 281, 293, 51 Atl. 781, 785 (1901).

⁴³ In the code states the situation is covered by the clause requiring all actions to be brought in the name of the "real party in interest." In other states there are usually express statutes. The statute in Illinois is in the Practice Act, 1913 REVISED STATUTES, Ch. 110, § 18.

lost his privileges as owner of the *chose*, and the assignee is as yet only partly owner because he lacks the immunities which are essential to complete ownership. The situation may be compared to that of a grantee of land under an unrecorded deed. In such a case we think of the grantee as owning the land, but his title is not complete: it is subject to a power on the part of the grantor to extinguish it by a conveyance to another purchaser who buys in good faith and complies with the recording act. Notice to the debtor plays the same part in the assignment of the *chose* in action that recording the deed does in the case of the grant of land.⁴⁴

The device of suing in the name of the assignor has been of service in aiding our law to get rid of outworn rules in ways that are not always appreciated. At common law one disseised of land lacked the legal power to transfer title, apparently because his situation was assimilated to that of the owner of a *chose* in action.⁴⁵ It is not always noticed that here also in modern times a transferee of the disseisee could sue in the name of the disseisee and so recover possession of the land. The courts apparently applied all the rules as to control of the action, of execution, etc., to this case, the net practical result being that the transferee became owner actually though not nominally. When the New York Code of Civil Procedure was adopted, with its clause requiring all actions to be brought in the name of the real party in interest, doubt was expressed as to its effect on this situation; consequently an amendment was adopted expressly providing that in such cases the transferee should continue to sue in the name of the transferor.⁴⁶ In

⁴⁴ This comparison is made in *Bishop v. Holcomb*, 10 Conn. 444 (1835). Dean Ames put great emphasis upon this power of the assignor before notice as proof that the assignor still owned the *chose*, and he is right to the extent noted in the text. Before notice, there is complete ownership in neither assignor nor assignee.

⁴⁵ AMES, LECTURES ON LEGAL HISTORY, p. 174.

⁴⁶ See the whole subject discussed and cases cited in BLISS ON CODE PLEADINGS, 3 ed., § 23 a. So long as the common law action of ejectment prevailed, this application of the device of the "power of attorney" led to an action in which there were two "nominal plaintiffs" and one real "plaintiff." See *Jackson v. Leggett*, 7 Wend. (N. Y.) 377 (1831), in which in one count the tenant described the demise as made by the disseised grantor and in another as made by the grantee of the disseisee. Recovery was allowed on the first count. An interesting use of the "power of attorney" was made in the case of *Kilgour v. Gockley*, 83 Ill. 109 (1876). A note secured by a mortgage on real estate was transferred and the mortgage assigned without any conveyance of the property. Theoretically, therefore, the transferee had no title to the property. The court held, however, that the assignment carried a power of attorney

spite of this the New York Real Property Law of 1896⁴⁷ reenacts the old rule that "a grant of land held adversely is void." In other words, the old label must be preserved, no matter what the contents of the bottle!

The device of the "power of attorney" could not be applied to partial assignments, with the result that nearly everywhere they are still enforceable only in equity.⁴⁸ This rule seems to be a sensible one, however, as it requires all three persons concerned to be made parties to the suit. The theory of equity apparently is that the debtor owes in equity part to the assignee and part to the assignor; the debtor is an equitable debtor of the assignee as well as of the assignor.

No attempt has been made in this paper to discuss anything but the question of alienability. Formal requisites for transfer; the necessity of consideration; the effects of transfer (1) on defenses of the debtor, (2) on rights of set-off, etc., (3) on equitable claims of other persons — the so-called latent equities — are left for discussion at a later time. In closing our discussion, however, a word must be said concerning the effects of transfer in its relation to our problem of alienability. If it be decided, as many courts hold, that the transferee of a common law *chase* in action takes subject to "latent equities" of third persons, even if he purchase in good faith and for value, this is not, as some have thought,⁴⁹ an argument that legal title does not pass to the assignee. It means simply that because of the historical origin of the doctrine, with its beginnings in equity, as well as because of certain notions of policy, the equitable doctrine which protects *bonâ fide* purchasers for value has not been extended to cover this form of property which became alienable only in modern times. If by statute the legislature should

to bring actions at law in the name of the original mortgagee, and consequently that the transferee who had got into possession could not be disturbed. The practical result was that by gaining possession under the assignment the assignee became substantially the owner of the property.

⁴⁷ NEW YORK REAL PROPERTY LAW OF 1896, § 225.

⁴⁸ AMES'S CASES ON TRUSTS, 2 ed., pp. 63-64.

⁴⁹ George Luther Clarke, "The Real Party in Interest Statute in Missouri," 15 Univ. of Mo. Bulletin, No. 17, pp. 18-23. No one has ever doubted that title to overdue commercial paper may be transferred, though some courts hold that the transferee takes subject to equities of third persons. See the cases in 1 AMES, CASES ON BILLS AND NOTES, p. 191 and note 3, p. 892; also *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722 (1915).

repeal the doctrine of *bonâ fide* purchaser for value, it certainly would not follow that legal titles to land and chattels would cease to be transferable, but to such a conclusion we must come if we follow the logic of those who argue that even to-day the assignee of a *choss* in action does not acquire legal title.

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THE UNIFORM PARTNERSHIP ACT AND
LEGAL PERSONS

IN a recent number of the HARVARD LAW REVIEW there was published a criticism of the Uniform Partnership Act which has been approved by the Conference on Uniform State Laws and recommended to state legislatures for adoption.¹ Mr. William Draper Lewis, the draftsman of the proposed Act, replied to the criticism by an article published in the December, 1915, and January, 1916, numbers of the REVIEW.² Although unable to find in the article to which he replies a statement of reasons for the contention that the Act should be framed on the legal-person theory of partnership,³ Mr. Lewis states at some length his reasons for believing it should not be framed on that theory,⁴ and asserts that it was not framed on that theory but is inconsistent therewith.⁵ The editors of the REVIEW have kindly allowed the writer to supplement his former article by a more explicit statement of the considerations which favor the adoption of the legal-person theory as the basis of a codification of the law of partnership and a reply to the objections urged by Mr. Lewis.

The views expressed by Mr. Lewis regarding legal personality⁶ are difficult to understand for two reasons: First, he confuses entities in general with entities which are capable of legal personality. His definition of entity as "phenomena grouped in the mind as possessing a common attribute not had by other phenomena"⁷ may very well answer the purposes of philosophy, but is of little assistance in dealing with the problem of whether an alleged entity is such an entity as is capable of legal personality. It is submitted that an entity is capable of legal personality, *i. e.*, of being recognized and treated by the law as a legal person, if it has objective

¹ "The Uniform Partnership Act — a Criticism," 28 HARV. L. REV. 762.

² "The Uniform Partnership Act — a Reply to Mr. Crane's Criticism," 29 HARV. L. REV. 158, 291.

³ 29 HARV. L. REV. 158.

⁴ 29 HARV. L. REV. 162-92.

⁶ 29 HARV. L. REV. 159-62.

⁵ 29 HARV. L. REV. 291-96.

⁷ 29 HARV. L. REV. 161.

reality, interests such as the law protects, and power to will and to act. A group of human beings is such an entity. A business or group of activities is not. Second, he regards human personality as the only true legal personality and all other legal personality as fictitious.⁸ A legal person is an entity treated by the law as the subject of rights and obligations. Human beings constitute the numerically largest class of legal persons and have a wider range of interests and powers than other legal persons, such as the state, the city, the university, the business corporation. But not all human beings are legal persons, nor are all legal persons human beings.⁹

Mr. Lewis admits that the partnership is an entity,¹⁰ and apparently does not deny that it is capable of being treated as a legal person. The issue is whether it should be so treated in a codification of the law of partnership.

A. THE LEGAL PERSON THEORY SHOULD BE ADOPTED AS THE BASIS OF CODIFICATION

1. In any one jurisdiction the body of the law of partnership contains many rules and doctrines which are inconsistent with each other. As between the several common law jurisdictions there are an extraordinary number of conflicting decisions. The lack of unity, coherence and uniformity is largely due to the fact that the law of partnership has been built upon a patchwork foundation consisting of elements drawn from the law merchant, from equity and from the common law, whose special contributions have been joint estates and joint obligations. The Act attempts to remedy the situation by introducing a new element, "tenure in partnership."¹¹ The most effective way to make the law of partnership logical, scientific and uniform is to abandon the old premises and substitute one from which a body of law can be deduced with ease and certainty. The only adequate premise is the theory that the partnership is a legal person.

⁸ 29 HARV. L. REV. 161-62.

⁹ A slave is a human being, but has at times been denied all legal personality. That the personality of associations as separate from the personality of the associates individually is a fact not a fiction, is demonstrated in an article by Mr. Harold J. Laski, "The Personality of Associations," 29 HARV. L. REV. 404.

¹⁰ 29 HARV. L. REV. 162.

¹¹ Uniform Partnership Act, § 25.

2. The certainty and ease with which the details of the law could be developed under the legal-person theory would immensely shorten the labors of the judge, lawyer, student and business man.

3. Many important problems would receive solutions more nearly approximating current ideas of justice and business convenience than is now possible. For example, the questions regarding the rights of a partner and his separate creditors in partnership property,¹² the right of an insolvent partnership to dispose of its property,¹³ and the right of a partner to enter into a contract with the partnership valid and enforceable at law before dissolution.

4. The practical superiority of the legal-person theory is demonstrated by the fact that civil law countries have adopted it.¹⁴

5. Although the common law is said not to recognize the partnership as a legal person, many courts have expressly declared it to be such and based their decisions upon the theory that it is to be regarded as a legal person.¹⁵

¹² This matter is dealt with in the Act by instituting a "tenure in partnership," the incidents of which are substantially the same as the legal consequences of recognizing the partnership as a legal person as the owner of the partnership property. The Act thus impliedly adopts the legal-person theory. See 28 HARV. L. REV. 771-73. In one instance the Act probably goes beyond the legal-person theory in protecting the partnership from the act of a partner. Suppose the firm of A. and B. owns land standing on the record in the names of A. and B., no partnership relation being disclosed. A. purports to convey to C., a *bonâ fide* purchaser, his half interest as tenant in common. C. would get a good title under existing law, and also under the legal-person theory, as A. and B. would be considered trustees for the partnership. Under § 25 (b) apparently the *bonâ fide* purchaser for value would get nothing, the conveyance not being authorized by the partnership.

¹³ The Act makes no provision for this situation. See 28 HARV. L. REV. 774.

¹⁴ 28 HARV. L. REV. 764.

¹⁵ Some of these cases are cited in a note, 28 HARV. L. REV. 766, n. 37. That they support the proposition for which they are cited follows from Mr. Lewis's admission that "the courts in deciding the cases, in whole or in part, base their conclusion on the legal-person theory." 29 HARV. L. REV. 175. But he denies their value as tending to prove the desirability of adopting the legal-person theory as the basis of codification on the ground that the cases on analysis "fall into two classes: first, those in which the same conclusion as that arrived at by the court can also be reached under the aggregate theory as set forth in the provisions of the Uniform Act; and second, those in which the conclusion, due solely to the conscious adoption of the legal-person theory, is inequitable and unjust." The fact that the Uniform Act contains provisions under which the first group of cases would be decided the same way as they have been decided by courts which have based their decisions on the legal-person theory proves the Act to have adopted, to a certain extent at least, the legal-person theory.

The other cases, which Mr. Lewis characterizes as "unjust and inequitable," apparently consist of two out of the sixteen cited in the note — Clay, Robinson & Co. v. Doug-

6. Many decisions of cases involving questions of partnership law are irreconcilable with any other than the legal-person theory, although that theory is not expressly referred to as the basis of the decisions.¹⁶

las County, 88 Neb. 363, 129 N. W. 548 (1911), and *Curtis v. Hollingshead*, 2 Green (N. J. L.) 402 (1834). In the former case the question was whether the tax law of Nebraska rendered taxable at its place of business the credits of a partnership, the members of which were non-residents. The court held the property taxable under the statutes on the ground that the partnership is an entity distinct and separate from its members recognized by the law as a person which had acquired a domicile in the state, and that its course of business "however much it might protect a natural person, in our judgment presents no obstacle in the instant case to the enforcement of the taxing laws of this state." Mr. Lewis regards this "intimation" in the passage quoted that a non-resident natural person might escape taxation under the circumstances which would render a partnership taxable as an arbitrary and unjust result. It is to be observed (1) the alleged injustice is a distinction between a foreign partnership and a foreign natural person as the subject of taxation under the Nebraska statutes, (2) from the context the distinction seems to be one suggested by counsel rather than by the court, (3) the distinction is at most a *dictum* unnecessary to the decision of the case, (4) the distinction results from the provisions of the statute as construed by the court and not solely from the regarding of a partnership as a legal person.

Curtis v. Hollingshead, *ubi supra*, is also a case of statutory construction. The point decided is that under the New Jersey attachment law a firm creditor cannot sue out an attachment against one of a firm who has absconded, the other members remaining in the state. Mr. Lewis objects to an injustice in the possibility of a distinction between this situation and that of an absconding joint debtor not a partner. It is to be observed (1) that the court does not sanction such a distinction, but on the contrary asserts the same rule applies to both cases (pages 407, 408), and (2) if any such distinction existed it would be due to the statute and not solely to the court's treating the firm as a legal person.

While it is submitted that in neither case is there any inequitable and unjust result due solely to the adoption of the legal-person theory, it is not denied that such results are possible in some situations. But as in the case of corporation law injustice can be avoided by statutory provision and by the court of equity doing what in corporation law has been called "disregarding the fiction."

¹⁶ These cases are referred to in part in 28 HARV. L. REV. 767-68. Mr. Lewis sees in these cases "no more than illustrations of the obvious fact that the activities of the partners as associated in partnership form a group of activities separate from their other activities." 29 HARV. L. REV. 191. He discusses the cases under nine headings, which will be followed in replying to his comments.

First. "A creditor holding a security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm." Mr. Lewis's explanation of this rule is that "each class of the partners' creditors, the partnership and separate creditors, have priority on the joint and separate assets respectively; and therefore the partnership creditor does not take any of the property out of which he or his fellow partnership creditors are claiming dividends when he uses the security which he has received from the separate estate of the partner." 29 HARV. L. REV. 182. The explanation is inadequate for two reasons: (1) The insolvency and bankruptcy acts involved in the cases cited define a secured creditor as

7. There is considerable legislation, aside from attempts to codify the law of partnership, which treats the partnership as a legal person by making it the subject of rights and obligations.¹⁷

¹⁷ 28 HARV. L. REV. 768, 769. These statutes Mr. Lewis disposes of as he does the cases referred to in the preceding note, as "illustrations of the fact that partners as associated in partnership carry on a group of activities which are separated from their other activities." 29 HARV. L. REV. 192. It might be said that the stockholders of a corporation or the citizens of a municipality are merely carrying on through the corporation activities separate from their other activities. It would be far easier to understand Mr. Lewis's discussion if he would define "legal personality" and furnish a test by which one may distinguish between (a) treating the partnership as distinguished from the partners as the subject of rights and obligations, and so treating it as a legal person, and (b) giving legal effect to the separateness of groups of activities for the purpose of enforcing rights and obligations.

one having security out of "property of the debtor" (*In re Levin Bros.' Estate*, 139 Cal. 350, 73 Pac. 159 (1903)) or "property of the bankrupt" (*In re Thomas*, 8 Biss. 139 (1878)); and not as Mr. Lewis takes it to mean "property of the bankrupt as to which no other class of creditors has a priority." (2) In accordance with Mr. Lewis's explanation the creditor would be treated as a secured creditor if the separate estate were sufficient to pay the separate creditors, so that the partnership creditors having a right to the surplus would be injured by the retention of the security. Yet in both the leading cases, *In re Thomas*, *ubi supra*, and *In re Levin*, *ubi supra*, though the separate creditors had been paid, the partnership creditor was allowed to keep the security and was not treated as a secured creditor. It is of interest to note that the dissenting opinion of McFarland, J., in the Levin case proceeds on the ground that the "partnership is really not a legal entity. It is not a person. . . ." It was evidently clear to the mind of this member of the court that the decision was inconsistent with the aggregate theory of partnership.

Second. "Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the joint estate." Mr. Lewis's explanation of this rule is that the courts "follow the partners themselves in keeping their joint assets devoted to each particular business distinct." 29 HARV. L. REV. 183. It is submitted that the origin of the rule of administration of insolvent estates which gives the partnership creditors priority as against the partnership assets is due to a determination, perhaps not clearly formulated, to follow the mercantile practice of treating the partnership as a legal person. It is a right conferred upon the creditors by law. That the debtor or debtors should by their unilateral act or mere intent give to certain creditors a potential priority is a novel idea. A creditor does not get a lien as to part of his debtor's general assets simply because the debtor would like to have it so. An explanation more in accordance with generally accepted legal principles is that expressed in the leading American authority for the rule under discussion, *Forsyth v. Woods*, 11 Wall. (U. S.) 484 (1870), that the partnership is "a distinct thing from the partners themselves." Bearing this phrase in mind, Mr. Lewis's suggestion that the courts "have apparently looked at the facts as they are," 29 HARV. L. REV. 183, seems singularly apt.

Third. "When a firm signs a note as co-makers with an individual the liability of the firm is that of one person for purposes of contribution." Mr. Lewis would prefer to state the result of the cases cited to the effect that "for the purpose of contribution the liability of the firm is no greater than the liability of the individual." 29 HARV.

8. The language and the effect of provisions of the proposed Uniform Act are more nearly consistent with the legal-person theory of partnership than with any other theory.¹⁸

¹⁸ 28 HARV. L. REV. 769-74. Mr. Lewis appears to admit that in substance the provisions of the Act referred to are consistent with the legal-person theory, particularly that § 25 gives the partnership all the rights in partnership property as against the partner which it would have under the legal-person theory. But he argues that the Act should not be regarded as consistent with the legal-person theory because had the draftsman desired to adopt the legal-person theory his form of statement would have been different, though he would have reached the same result as regards the rights of a partner in partnership property. 29 HARV. L. REV. 293. Probably a court inclined to favor a legal-person theory as the basis for solution of a problem not dealt with by the Act would look rather to the substance than to the form of the provisions of the Act in deciding whether the Act is inconsistent with the legal-person theory. Referring to the obligation of a partner to *indemnify the partnership* and to consequences of a *fraud upon the partnership*, 29 HARV. L. REV. 295, Mr. Lewis maintains that one can owe oneself a legal duty and inflict upon oneself a legal injury, conceptions which are hard to reconcile with generally accepted legal principles. See cases cited under note 16, "Fifth," to the effect that one cannot be a party on both sides of a joint obligation.

L. REV. 184. The writer only attempted to paraphrase the language of the opinion in the leading case cited, *viz.*, "the firm of J. & C. T. McCune were to be considered as one person, one party." *Hosmer v. Burke*, 26 Ia. 353, 358 (1868). The court reached the result by treating the firm as one person, as it expressly declares. No doubt in so doing they are carrying out the apparent intention of the parties, which is Mr. Lewis's justification for the result.

Fourth. "A bill bearing the names of two firms engaged in two distinct activities, but composed of the same members, is signed by two persons." The case thus summarized, *Second National Bank v. Burt*, 93 N. Y., 233 (1883), involves the interpretation of a bank's by-law to the effect that "To entitle any paper to be discounted there must be two names of responsible persons liable upon the same . . . the name of a firm being considered as one person." It was held that a cashier was justified in taking paper drawn by one firm upon another composed of the same members. Mr. Lewis says the result follows necessarily from the wording of the by-law. 29 HARV. L. REV. 184. But it is submitted that there is a question as to the meaning of the word "firm." If it mean the aggregate of its members, there is here but one firm and but one person under the by-law unless "name of a firm" is given the forced meaning "each and every name of a single firm." But if the same group of persons in forming a firm have created an entity separate and distinct from themselves in the aggregate, they may form two or more such firms, which will be different firms, and the result of the instant case naturally follows.

Fifth. The cases grouped under this head all involve the validity of a contract between a firm and one of its members or between two firms having a common member. The writer submits that the validity of such contract is inconsistent with treating the firm otherwise than as a legal person. Mr. Lewis asserts that such a contract is not immoral, that the fact that one is interested on both sides does not render it illegal, and sees no objection to its validity though the firm be regarded as an aggregate. 29 HARV. L. REV. 185-88. No one has claimed that a contract between A. on the one side and A. and B. on the other is immoral or that A.'s merely being *interested* on both sides makes it illegal. But the rule of law which seems to have escaped the notice of

The above considerations indicate the desirability of treating the partnership as a legal person and the fact that the tendency of

Mr. Lewis is that one person cannot be both a party obligor and a party obligee to a joint contract. *Ellis v. Kerr*, [1910] 1 Ch. 529; *Boyce v. Edbrooke*, [1903] 1 Ch. 836; *Eastern Tube Co. v. Harrison*, 140 Fed. 519, 524 (1905), *semble*; *Cecil v. Laughlin*, 4 B. Mon. (Ky.) (1843) 30; *Eastman v. Wright*, 6 Pick. (Mass.) 320 (1828). Such a contract between a firm and a partner has, consistently with the aggregate theory, been held invalid. *De Tastet v. Shaw*, 1 B. & Al. 664 (1818), and similarly a contract between two firms having a common member. *Bosanquet v. Wray*, 6 Taunt. 597 (1816). In an early American case, *Wilby v. Phinney*, 15 Mass. 116 (1818), the surviving partner of one firm was allowed to recover in assumpsit against the administrator of the deceased partner on an obligation due from another firm of which the defendant's intestate was a member. The language of the court, at page 123, in referring to proof in insolvency between the estates of two firms having a common member, to the effect that "In such cases they seem to be treated in some respects as constituting corporations, the two co-partnerships being considered as distinct, although one person be a common partner in both," is worthy of note as an early recognition of the legal-person theory. Cases which hold valid a contract between a partnership and a partner or another partnership having a common partner are irreconcilable with the aggregate theory of partnership and are supportable only if the partnership be recognized as having a legal personality separate from that of the partners.

Sixth. "A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt." Mr. Lewis observes that "the question is each case should depend on the intent of the parties to the transaction." In the leading American case, *Bank of Buffalo v. Thompson*, 121 N. Y. 280, 282, 24 N. E. 473 (1890), the court holds that "a fair construction of the language" of the written agreement between the borrower and the bank "shows that it was intended to secure such obligations and such only" (*i. e.*, the individual obligations and not the partnership obligations). In construing a written contract the court adhered to the mercantile usage, of which it took judicial notice, of treating the partnership as a legal person separate from the partners. See *Meehan v. Valentine*, 145 U. S. 611, 622 (1891), in which the United States Supreme Court refers to *Bank of Buffalo v. Thompson* in similar terms. The court is none the less treating the partnership as a separate legal person because in so doing it is carrying out the intention of the parties. On the other hand, it is not a repudiation of the legal-person theory to receive evidence of a contrary intention of the parties and give effect to it, as in *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 28 N. E. 281 (1891).

Seventh and Eighth. In the cases classified under these heads it was submitted that a partnership was treated as a legal person in certain bankruptcy cases. Mr. Lewis maintains that recognition of the fact that activities of partners connected with the partnership are separate from their outside activities does not involve the assumption that the partnership forms a distinct legal person, and "recognition that there are two distinct businesses, one run by A. and B., and the other by A., B. and C. — is a recognition of a patent fact, which . . . does not involve the necessity of saying that each business is conducted by a legal personality." 29 HARV. L. REV. 189. While a business is an entity it is not such an entity as can be treated as a legal person. Only the individual or group which carries on the business can be treated as a legal person. To impose on a group carrying on a business obligations payable primarily only out of the assets of that business is to make of the group entity a distinct subject of rights and

common law jurisdictions is toward the result already achieved in the civil law.

B. ANSWER TO OBJECTIONS TO THE LEGAL PERSON THEORY AS THE BASIS OF CODIFICATION

1. The reasons which induced the change from the legal-person theory first adopted by the commissioners are set forth by Mr. Lewis under three main heads, the first of which is the realization that to base the Act on the legal-person theory "was not to express in statutory form the law of partnership which has grown up in our courts, but in effect to abolish much of our existing partnership law and substitute in its place radically different legal principles."¹⁹ This conservative objection is raised against all efforts toward legal reform. It was raised against the changes introduced by other Uniform Acts, such as the full negotiability of the warehouse receipt and bill of lading.²⁰ The weight of the objection depends upon the extent to which the law would be changed by basing the act on the legal-person theory and the advantages and disadvantages of the necessary changes.

A large part of the body of the law of partnership would be unaffected by the adoption of the legal-person theory. As to those problems the solution of which is affected by treating the partnership as a legal person or otherwise, it is submitted that courts have not invariably applied the aggregate theory, but, as has been shown in many instances, consciously or unconsciously applied the legal-person theory. The principal changes which would follow the uniform and thorough adoption of the legal-person theory pertain to rights of the partner and of his separate creditors in partnership

¹⁹ 29 HARV. L. REV. 172.

²⁰ Uniform Bills of Lading Act, § 31; Uniform Warehouse Receipts Act, § 40; Burdick, "A Revival of Codification," 10 COL. L. REV. 118.

obligations which is treating it as a legal person. The writer disagrees with Mr. Lewis's statement that the priority against partnership assets which is given to partnership creditors does not involve the assumption that the partnership is to that extent treated as a legal person. 29 HARV. L. REV. 190.

Ninth. "A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm." Mr. Lewis contends that cases to this effect do not necessarily involve the legal-person theory because the same result would be reached under the "tenure in partnership" theory of the Act. 29 HARV. L. REV. 191. The writer's inference from this fact is that the Act has here again partially adopted the legal-person theory.

property, rights of an insolvent partnership to apply partnership property to purposes other than payment of partnership debts, and the validity and method of enforcement of contracts and other obligations between a partnership and partner or other partnership having a common member. That the draftsman does not regard as objectionable the changes in respect to these matters which would follow the adoption of the legal-person theory may be inferred from the fact that the Act embodies under the guise of incidents of the newly instituted "tenure in partnership" ²¹ the principal legal consequences as regards rights of a partner and his separate creditors in partnership property which would exist under the legal-person theory; that the restrictions which the legal-person theory would impose on the power of an insolvent partnership to dispose of its assets were embodied in the section on Fraudulent Conveyances which appeared in former drafts prior to the eighth and was rejected because it was thought the matter belonged in another department of law; ²² and that Mr. Lewis sees no objection to the validity of a contract between a partnership and one of its members and none but a technical procedural difficulty in the way of its enforcement by the original parties. ²³ It would appear that the conservative objection to change of existing law is given undue weight, which is rather surprising in view of the introduction by the Act of a radically new legal institution, "tenure in partnership."

2. The second cause or group of causes for the rejection of the legal-person theory is "the perception that the legal-person theory not only rests on the fiction of group personality but also on an assumption that business men in dealing with a partnership do not consider themselves as dealing directly with the partners, an assumption which is directly contrary to the fact; together with the perception that there were unforeseen practical difficulties in working out under that theory the rights of partnership creditors." ²⁴

To say that group personality is a fiction is ambiguous. The legal personality of a group, *i. e.*, its recognition by the law as subject of rights and obligations, can hardly be regarded as fictitious in view of the conspicuous legal position of the state, the municipal, business and other corporations, which are only groups of human beings treated as subject of rights and obligations and so made legal

²¹ Uniform Partnership Act, § 25. See note 12.

²² 29 HARV. L. REV. 297.

²³ 29 HARV. L. REV. 186.

²⁴ 29 HARV. L. REV. 172.

persons. That a group has the same kind of human personality as a man is of course a fiction. But it is submitted that a group of men has a group personality, interests and a power to will and to act, that this is a fact, not a fiction.²⁶

Whether business men consider themselves as dealing with the partnership as an entity or with the partners as an aggregate is a matter as to which one hesitates to generalize without considerable experience and observation. It appears to be the opinion of those who have expressed themselves on this matter, with the exception of Mr. Lewis, that business men regard the firm as an entity.²⁶ This opinion is so widely held that the legal-person theory of partnership is often called the "mercantile theory." It is no doubt true that persons dealing with a partnership expect the partnership obligation to be supported by the personal contributory liability of the partners, but such liability is not inconsistent with the legal-person theory.

One of the two practical difficulties involved in the application of the legal-person theory, according to Mr. Lewis,²⁷ is that of providing the partnership creditor with a satisfactory method of enforcing the obligation of the partner to contribute to the payment of partnership obligations. This is a problem of procedural rather than of substantive law. It was decided not to include in the Act any provisions regarding procedure, but the commissioners are said to have been advised to reject the legal-person theory because its adoption would raise some difficulties in a department of law outside the province of the Act as it has been defined. Under existing law in most jurisdictions a partnership creditor can bring suit against the partnership and attach separate property of a partner where attachment is allowed. Having recovered judgment he can levy execution on the property of those members of the firm who have been served with process or otherwise personally brought within the jurisdiction of the court. But unless the firm is insolvent the creditor seldom needs to take out execution. If the firm is insolvent the property of the partners is likely to be administered by a court of bankruptcy, and under the bankruptcy law an attachment or

²⁶ Laski, "The Personality of Associations," 29 HARV. L. REV. 404.

²⁶ GILMORE ON PARTNERSHIP, 114; 1 LINDLEY ON PARTNERSHIP (Am. ed.), § 206; *Hallowell v. Blackstone Nat. Bank*, 154 Mass. 359, 363, 28 N. E. 281 (1891); *Bank of Buffalo v. Thompson*, 121 N. Y. 280, 282, 24 N. E. 473 (1890).

²⁷ 29 HARV. L. REV. 166.

levy on a judgment obtained within four months prior to bankruptcy is avoided and the separate property applied to the payment of the separate creditors, the balance going into the general partnership estate. The situation is therefore that the personal liability of the partner and the right to levy on his separate property is of value to the partnership creditor only in the exceptional event of a partner's staying out of bankruptcy more than four months after a partnership creditor has obtained judgment which is followed by execution. Apparently Mr. Lewis believes that it is impossible to treat the partnership as a legal person and at the same time give the partnership creditor an equally satisfactory remedy against the partner and his separate property. It is submitted that Dean Ames' proposal to allow joining of the partner as co-defendant under the name of *contributor*, with attachment of his property where attachment is allowed, can be developed into as satisfactory a remedy as exists at present.²⁸ It may seem anomalous as a matter of form to join as co-defendant in an action at law one who is not a party to the obligation, but that is a familiar occurrence in actions of trustee process or garnishment, and practically the same situation exists where suit against the partnership is allowed after service on less than all of the partners,²⁹ and where the partnership may be sued in the partnership name.³⁰ In the light of experience under such procedure it should not be difficult to devise a method whereby under the legal-person theory the remedy of the creditor against the partner and his separate estate would be as valuable to him as is his present remedy.

²⁸ Second Draft, § 12. "Each Partner Answerable for Firm Liabilities. Claims against a partnership shall be satisfied in the first instance, so far as possible, out of the firm assets. If after the exhaustion of the firm assets the judgment against the firm remains unsatisfied in whole or in part, the firm creditor may enforce the joint and several liabilities of the partners as contributories to the firm, to make good any deficiency of the firm assets. If the plaintiff may lawfully attach the property of the firm before judgment against it the plaintiff may also attach before such judgment the property of any one or more of the partners joined as contributories as a security for the payment of his or their contributory liability."

²⁹ *Blythe v. Cordingly*, 20 Colo. App. 508, 80 Pac. 495 (1905); *First Nat. Bank v. Greig*, 43 Fla. 412, 31 So. 239 (1901); *Staiger v. Theiss*, 19 Misc. 170, 43 N. Y. Supp. 292 (1897); *Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797 (1912); *Pope Mfg. Co. v. Welch*, 55 S. Car. 528, 33 S. E. 787 (1899); *State v. Cloudt*, 11 Tex. Ct. Rep. 932, 84 S. W. 415 (1904).

³⁰ *Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677 (1909); *Fritche v. Liddell & Co.*, 6 Oh. Dec. 971 (1880).

The other practical difficulty, at one time referred to by Mr. Lewis as "the most serious practical difficulty"³¹ but later as "another, though minor difficulty,"³² is the matter of registration. At one time Mr. Lewis declares that "as Mr. Ames admitted, it necessitates the creation of a system for the registration of all partnerships, and a provision that no partnership can exist until it is registered,"³³ and later, more mildly, he refers to the "necessity, or rather great desirability, under that theory, of some efficient system for the registration of all partnerships."³⁴ The writer has been informed by Professor Brannan, who has taught partnership in the Harvard Law School for a number of years, that Dean Ames in numerous conversations regarding his drafts of the Partnership Act never said or even intimated that he thought there was any necessity for registration under the legal-person theory — but since a large number of states had requirements of registration of varying terms he concluded that a Uniform Act should contain a provision making uniform the requirements for registration, and so inserted such a provision in his drafts.³⁵ It is to be noted that the only penalty proposed by Dean Ames for failure to register was the one imposed by the majority of existing statutes, — incapacity to sue until the requirements should be satisfied. The only reason advanced by Mr. Lewis for regarding registration as even desirable is that if the partnership be treated as a legal person suit against it must be brought in the partnership name, and if the name is registered it will be easier for the public to learn exactly what it is.³⁶ But on this ground desirability of registration is far greater in the present situation at common law, under which suit must be brought against all the partners. It is more difficult to learn the names of all the partners than it is to learn the name under which a partnership does business. The desirability of registration is no greater under the legal-person theory than under the aggregate theory.

3. The third cause for rejecting the legal-person theory is the belief "that the worst of the existing difficulties and confusions in our partnership law — the rights of partners in specific partnership property — could be overcome by getting rid of the idea that part-

³¹ Lewis, "The Uniform Partnership Act," 24 YALE L. J. 617, 641.

³² 29 HARV. L. REV. 167.

³³ See note 31.

³⁴ 29 HARV. L. REV. 167.

³⁵ First Draft, § 6; Second Draft, § 5.

³⁶ See note 34.

ners hold partnership property as joint tenants with modifications and giving to the co-ownership incidents which fit in with the objects leading men to form partnerships." ³⁷ This supposedly means that "tenure in partnership," with its incidents as set forth in Section 25, embodies all the desirable consequences of the legal-person theory. But there remain the difficulties and confusions caused by attempts of the insolvent partnership to apply its assets otherwise than in the payment of its debts, which would be largely cleared away by the legal-person theory but are left untouched by the proposed Act. The Act is to be commended for its partial adoption of the legal-person theory, but because it does not avowedly and thoroughly adopt that theory it leaves open many questions of partnership law which will continue to receive different answers in different jurisdictions.

Certainty, uniformity and detailed rules which accord with business convenience and popular ideas of justice will never be gained in this important branch of commercial law, in the writer's opinion, without the adoption of the legal-person theory as the basis of codification. It therefore seems regrettable that the commissioners were induced to rescind the instructions to the draftsman that the Act be based on the legal-person theory. Their decision would seem less open to criticism if they had been able to secure and act in the light of expressions of opinion from a larger number of critics than have been consulted. It is respectfully submitted that someone who believed in the legal-person theory should have been asked to submit a draft based on that theory and attempt to meet the objections urged by those favoring the draft now adopted. It is the writer's hope that the advantages of the legal-person theory may in time be so widely understood and appreciated that there will be an effective demand for a Uniform Act based on that theory.

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³⁷ 29 HARV. L. REV. 172.

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A PROBLEM UNDER THE DECLARATION OF PARIS.—The present war has raised for the first time a neat problem under the second paragraph of the Declaration of Paris of 1856, which asserts that "the neutral flag covers enemy goods with the exception of contraband of war."¹ Under this paragraph may an English prize court condemn non-contraband German goods, which were shipped before the war, not on a neutral but on a British vessel? Was the paragraph designed merely to protect neutral trade or to exempt all private enemy property from capture at sea unless found on enemy vessels?

The history of the law as to the capture of enemy property at sea may throw some light on the true purpose of the Declaration of Paris.² It may be said that there are four periods during which four different rules were applied with a certain amount of consistency, always subject to vari-

¹ "Le pavillon neutre couvre la marchandise ennemie à l'exception de la contrebande de guerre." The first paragraph of the Declaration declared privateering abolished; the third provided for the immunity of neutral goods on enemy ships; and the fourth declared that blockades to be binding must be effective. For the full French text of the Declaration, with translation, see 7 MOORE'S DIGEST, 561-62; BOWLES, DECLARATION OF PARIS, 123; HIGGINS, THE HAGUE PEACE CONFERENCES, 2 ed., 1.

² This history will be found summarized with considerable variations as to the space devoted to the different periods by the following text-writers: HALL, INT. LAW, 6 ed., 686-94; 2 OPPENHEIM, INT. LAW, 2 ed., §§ 176-79; 2 WESTLAKE, INT. LAW, 2 ed., 137-46; 3 PHILLIMORE, INT. LAW, 3 ed., 300-69; BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC, 7 ed., §§ 1497-1521.

ation by special treaties or by the proclamations of some individual nation. (1) From the middle of the fourteenth to the middle of the sixteenth century the rule adopted by the *Consolato del Mare*³ was generally enforced, at least by the continental countries — that enemy goods were confiscable and neutral goods exempt wherever found. (2) For the next hundred years or so a far more stringent rule was maintained by the stronger belligerents, notably France and England, to the effect that enemy goods were confiscable wherever found and that neutral goods were also confiscable if found on enemy ships.⁴ (3) During the seventeenth century a strong reaction against such a belligerent policy set in, and several states, under the leadership of the Dutch, commenced to assert the maxim of "free ships, free goods," coupled with a concession which, due to its nicely balanced jingle, was generally considered a necessary corollary — "enemy ships, enemy goods." Between 1650 and 1700 the Dutch induced other countries to sign no less than twelve treaties containing this provision.⁵ England, however, never assented to this principle, but during this period, apart from a few treaties, consistently enforced the law as it had been under the *Consolato del Mare*, holding that the ownership of the goods was alone material. The movement for "free ships, free goods" culminated in the First and Second Armed Neutralities in 1780 and 1800 by which the Northern Continental nations sought to force England to change her rule. Both these leagues had but a short life owing to the inability of the individual members to resist the temptation of departing from their principles when themselves drawn into a war. (4) The fourth and last period commenced with the signing of the Declaration of Paris on April 16, 1856, by which the provisional arrangement entered into between France and England in 1854 for the purpose of conducting the Crimean War was adopted by all the signatories.⁶ The Declaration exempted not only enemy property from capture in neutral ships but also neutral property in enemy ships. The only possible combination that has never been adopted as law is that which the United States has long insisted upon — complete immunity of private enemy property at sea as on land.

It is clear that in the light of this history the result of the Declaration of Paris was caused as much by a desire on the part of neutrals to protect their carrying trade in time of war as by any ideal of complete exemp-

³ 3 TWISS, BLACK BOOK OF THE ADMIRALTY, Chap. 231, p. 539.

⁴ With France this period extended into the eighteenth century. Moreover, her famous "ordonnances" of 1543, 1681, and 1704 extended the rights of belligerents even farther and declared that not only would an enemy ship make neutral property confiscable but that a neutral ship carrying enemy property would also be condemned, — *Robe d'ennemi confisque la robe d'ami*. BONFILS, 7 ed., §§ 1502-04.

⁵ HALL, INT. LAW, 6 ed., 688.

⁶ The Declaration was originally signed by England, France, Russia, Austria, Prussia, Turkey, and Sardinia. All other states were thereafter asked to accede to it. The only states possessing a seacoast that have withheld their formal adherence are the United States, Spain, Mexico, and Venezuela. The only reason that the United States refused to sign was because she was unwilling to give up her privateering rights under the first paragraph unless the signatories would carry their reform further under the second and third paragraphs and accept the so-called Marcy Amendment, exempting all private enemy property at sea, except contraband. The Declaration was adhered to, moreover, by both sides in the Spanish-American war, as it was in the Russo-Japanese war, and is generally regarded as binding international law. See 2 WESTLAKE, 145.

tion of enemy property at sea.⁷ This theory is borne out by the second paragraph of the Declaration's preamble.⁸ Many commentators have also taken this view of the Declaration.⁹ Under these circumstances the Judicial Committee of the Privy Council cannot with justice be criticised for adhering strictly to the wording of the second paragraph and holding in a recent case that private enemy property shipped before the war in a British vessel was not exempt. *The Roumanian*, 114 L. T. R. 3. The court was able, moreover, to refer to an elaborate *dictum* by Sir Samuel Evans in another recent case.¹⁰

On the other hand, considerations which might have led the court to a different conclusion cannot be overlooked. The result of this paragraph of the Declaration has been popularly expressed in the broader formula of "free ships, free goods," as we have seen, and the ship in question could well be argued to be "free." The wording of the paragraph in the terms of a familiar fiction as to the ship's flag might justify a conclusion that these goods, since not on an enemy ship, should be treated as though taken in the country whose flag the ship was flying.¹¹ Moreover, the Declaration of Paris has been regarded by many as laying down a general rule for the immunity of all private enemy property from capture at sea, from which the case of enemy property on enemy ships is alone excepted.¹² It is the more likely that this was the purpose of some of the continental signatories of the Declaration owing to the strength which Rousseau's doctrine had gained during the first half of the nine-

⁷ This is particularly clear from a consideration of the agitation by the Dutch during the third period and of the activities of the Armed Neutralities.

⁸ "... that the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion *between neutrals and belligerents* which may occasion serious difficulties, and even conflicts." 7 MOORE'S DIGEST, 561 (*italics ours*).

⁹ Sir Travers Twiss says that its motive "was a desire to render war, as a state of international relations, as little onerous as possible to neutrals." *BELLIGERENT RIGHT ON THE HIGH SEAS SINCE THE DECLARATION OF PARIS*, 3. Mr. Seward wrote of it to Mr. Adams as "endeavoring to effect some modifications of the law of nations in regard to the rights of neutrals in maritime war." 7 MOORE'S DIGEST, 570.

¹⁰ *The Miramichi*, 112 L. T. R. 349, 352. There is another *dictum* in accord with the present case. *The Mashona*, 10 Cape Times L. R. 163, 178. In that case the goods had been shipped after the war, so the vessel was not innocent as in the present case, owing to the prohibition against trading with the enemy.

¹¹ Private property of the enemy found in the country at the outbreak of war is never confiscated, though the United States has always been careful to assert that the right existed, but that it should never be exercised. *Wolff v. Oxholm*, 6 M. & S. 92; *Brown v. U. S.*, 8 Cranch 110; *SCOTT'S CASES ON INTERNATIONAL LAW*, 481-97.

¹² Thus, President Pierce in his annual message to Congress on December 2, 1856, in explaining why the United States would not accede to the Declaration, said: "Their proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to the citizens of a belligerent state, should be exempted from capture; and had that proposition been so framed as to give full effect to the principle, it would have received my ready assent on behalf of the United States." 7 MOORE'S DIGEST, 564. See also HAUTEFEUILLE, *QUELQUES QUESTIONS DE DROIT INTERNATIONAL MARITIME*, 59 (1861): "Depuis le commencement du dix-septième siècle, toutes les nations ont reconnu que l'on devait agir sur l'océan de la même manière qu'à terre." There is apparently no evidence to be gained as to the motives behind the Declaration from the deliberations of the plenipotentiaries. It was signed eight days after it was proposed by Count Walewski. See BOWLES, *THE DECLARATION OF PARIS*, Chap. XII. Any discussion there may have been was kept secret, together with the other deliberations of the Congress. See GOURDON, *HISTOIRE DU CONGRÈS DE PARIS*, 113, 485-86.

teenth century — that war is a relation between states and not between the private individuals composing the states.¹³ As the result of all these reasons, at least one English authority on international law has stated the effect of the Declaration in its broadest terms.¹⁴

But it is not surprising that, in spite of all these arguments, the English court was unwilling to take any step which would in the least extend the scope of the Declaration of Paris, when the conventional English attitude toward the Declaration is borne in mind.¹⁵ The United States, on the other hand, would naturally be disappointed with anything but the broadest possible interpretation of the Declaration, in view of the fact that this country has for over a hundred years contended unswervingly for the complete immunity of private property at sea, and that England is virtually the only country which is still firmly opposed to this principle.¹⁶

THE NATURE OF THE STOCKHOLDER'S LIABILITY FOR STOCK ISSUED AT A DISCOUNT. — When a corporation issues its stock at a discount, the original holder has been held liable to creditors of the corporation, in the event of insolvency, for the difference between the par value and the amount actually paid in, if that amount is needed to satisfy its creditors.¹ Various theories have been advanced to explain this result. Under the "trust fund" theory, the capital stock, including unpaid balances on

¹³ A good account of the development of this theory on the continent and its reception by England and the United States is given by F. R. Stark, 8 COLUMBIA STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW, [232-57]. Hall, on the other hand, virtually brands the doctrine as a mere fiction invented to attack the legality of private enemy property at sea. HALL, INT. LAW, 6 ed., 63-70. See also Dana's Note 171 to WHEATON.

¹⁴ "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea." 2 WESTLAKE, 145.

¹⁵ This attitude is exemplified by Mr. Bowles' book on the Declaration of Paris referred to above. An idea of his point of view may be gathered from the title of Chap. XII — "The Declaration of Paris — Unauthorized — Contradictory — False — And no Part of the Law of Nations." For an admirable defense of this part of the Declaration, see 144 EDINBURGH REVIEW, 353, 358-69 (1876).

¹⁶ As early as 1785 the United States concluded a treaty with Prussia providing for the immunity of all private property at sea. She made the same proposition in 1823 to England, Russia, and France. She contended for the same doctrine in the Marcy Amendment after the Declaration of Paris. On the continent, Italy in 1865 incorporated the doctrine in her marine code and concluded a treaty on this basis with the United States in 1871. Austria and Prussia asserted the doctrine in their war of 1866. Prussia announced it at the outbreak of the Franco-Prussian war. See HALL, INT. LAW, 6 ed., 438-39, 441, *fn. 1*; 7 MOORE'S DIGEST, 461 *et seq.* Even in England the best opinion is not all in favor of the old belligerent rule. For a good statement of England's arguments against the new doctrine, based on the theory that her naval supremacy would be rendered useless, see Sir Edward Grey's instructions to the English delegates to the Hague Conference in 1907. HIGGINS, THE HAGUE PEACE CONFERENCES, 2 ed., 619-21. For the arguments on the other side, based on the growth of England's commerce, her dependence on it, and the danger of the malevolent neutrality of continental nations if her attitude continues, see 26 CONTEMPORARY REV. 735, 737-51 (1875); LOREBURN, CAPTURE AT SEA, Chaps. II and III.

¹ *Scovill v. Thayer*, 105 U. S. 143. See WARREN, CASES ON CORPORATIONS, 2 ed., 221.

stock issued at a discount, is said to be a fund for the benefit of all the creditors of the corporation.² Under the "holding out" theory, the liability is based upon a reliance by creditors on a representation of the stockholder that the stock has been fully paid up, and only such subsequent creditors can benefit.³ It is to be observed, therefore, that the class of creditors entitled to recover varies according to the theory upon which the court proceeds. Another illustration of the variant results reached according to the theory adopted is presented by the recent case of *Courteney v. Georger*, 228 Fed. 859.⁴ A Minnesota corporation issued stock, with a par value of one hundred dollars, for ten dollars per share, under an agreement that it should be regarded as fully paid up and non-assessable. The corporation became bankrupt and its trustee in bankruptcy, in pursuance of an order of the referee, issued a call upon holders of this stock in order to pay the debts of the corporation. The trustee sued, in the federal court, certain stockholders living in New York. It was held that he was not the proper person to maintain the action. The court based its decision upon the fact that in Minnesota, under the doctrine of *Hospes v. Northwestern Mfg. & Car Co.*,⁵ the stockholder's liability is based upon a fraudulent representation and that only subsequent creditors who relied upon this representation can recover; that the liability is not an asset of the corporation, and therefore the bankruptcy act does not give the trustee the right to sue on behalf of the creditors who are injured.⁶ This result is by no means desirable, for the bankruptcy court is peculiarly fitted to wind up the whole matter, yet under the Minnesota theory of the stockholder's liability, the court could not have reached a different conclusion.⁷ Under the "trust fund" theory, however, the liability of the stockholder to pay the balance would have been implied, the agreement to the contrary held void, and this asset would have passed to the trustee in bankruptcy.⁸ Has the *Hospes* case, then, in rejecting the "trust fund" theory as logically unsound, placed the stockholder's liability upon a more satisfactory basis?

Under both the "trust fund" theory and the "holding out" theory of the stockholder's liability for the unpaid balance, there is a feeling that "watered" stock is a wicked thing.⁹ There are two classes of persons who may be deceived by its existence, — subsequent purchasers of

² *Wood v. Dummer*, 3 Mason 308; *Sawyer v. Hoag*, 17 Wall (U. S.) 610.

³ *Hospes v. Northwestern Mfg. & Car. Co.*, 48 Minn. 174, 50 N. W. 1117.

⁴ See RECENT CASES, p. 877.

⁵ 48 Minn. 174, 50 N. W. 1117.

⁶ *In re Jassoy*, 101 C. C. A. 641, 178 Fed. 515.

⁷ The court treats the liability in the same manner as the double liability of a stockholder imposed by statute, making the stockholder a surety for the corporation. Such a liability is not provable against the corporation in bankruptcy. See *Alsop v. Conway*, 110 C. C. A. 366, 188 Fed. 568; *In re Beachy & Co.*, 170 Fed. 825. But see *Stocker v. Davidson*, 74 Kan. 214, 86 Pac. 136, where the statute expressly made the liability of the stockholder an asset of the corporation in event of insolvency.

⁸ *Sawyer v. Hoag*, 14 Wall. (U. S.) 610; *Scovill v. Thayer*, 105 U. S. 143.

⁹ "Watered" and "bonus" stock is one of the greatest abuses connected with the management of modern corporations." *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 196, 50 N. W. 1117, 1120. "The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention." *Upton v. Tribilcock*, 91 U. S. 45, 48.

the stock and creditors of the corporation who become such after the stock has been issued. Various attempts have been made to protect the unwary purchaser from deception by vendors of stock with no property behind it,¹⁰ but it is safe to say that no business man would think of paying one hundred dollars for a share of stock simply because that amount is embossed upon the certificate. And it is doubtful whether a business man would give a corporation credit simply because of the amount of capital stock it purports to have. If, however, that were all there is to the problem, the theory adopted in the *Hospes* case would be ample protection for such creditors, and there would therefore be no quarrel with that explanation of the liability. And perhaps to-day, by the weight of authority, recovery is restricted to subsequent creditors who are presumed to have relied upon the false representations of the stockholders.¹¹

But behind the feeling that "watered" stock is objectionable is a deeper reason. The courts and legislatures have felt that the stockholder with his limited liability is given a tremendous boon. It is therefore no more than common business decency that he should risk all that he has purported to risk. If the holder of a share of stock is to have his liability limited to one hundred dollars, it must be unlimited up to that amount.¹² It is not considered fair for him to have the benefit of prosperity and throw the risk of adversity upon the creditors of the corporation. In order to clothe this commercial demand in juristic garb, the "trust fund" theory was first advanced; then its too apparent inaccuracies led to the substitution of the "holding out" theory. This, however, gives no remedy to the prior creditor nor to subsequent creditors with notice of the issue at a discount, and to them the risk of failure of the enterprise is shifted. And this discrimination is made only by a forced presumption of reliance, that would be difficult to prove.¹³ The truth is that the liability of the stockholder to pay in full for his stock is an obligation placed upon him because of his relation to the corporation.¹⁴ Incidents of this obligation are that the corporation cannot change it or release the stockholder from its binding effect, and that the stockholder cannot avoid the obligation by the means available in the case of an ordinary debt.¹⁵ On this theory the prin-

¹⁰ See *Alabama, etc. Co. v. Doyle*, 210 Fed. 173, 175; 75 CENT. L. J. 221.

¹¹ *Lea v. Iron Belt Co.*, 147 Ala. 421, 42 So. 415; *State Trust Co. v. Turner*, 111 Ga. 664, 36 S. E. 900; *Hospes v. Northwestern Mfg. & Car. Co.*, 48 Minn. 174, 50 N. W. 1117; *Gogebic Improvement Co. v. Iron Chief Mining Co.*, 78 Wis. 427, 47 N. W. 726. *Contra*, *Easton National Bank v. American Brick Co.*, 70 N. J. Eq. 732, 64 Atl. 917; *Sprague v. Nat'l Bank of Am.*, 172 Ill. 149, 50 N. E. 19; cf. *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736. But see *Bent v. Underdown*, 156, Ind. 516, 60 N. E. 307, where the creditors were held affected with constructive notice of a provision in the articles of association that only fifteen per cent of the par value should be paid.

¹² See Geo. W. Pepper, "Rights of Stockholders and Creditors in the Property of the Corporation," 34 AM. L. REG. (N. S.) 448, 456.

¹³ *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 108, 50 N. W. 1117, 1121; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 139 N. W. 606.

¹⁴ See Geo. W. Pepper, "Rights of Stockholders and Creditors in the Property of the Corporation," 34 AM. L. REG. (N. S.) 448, 459.

¹⁵ Thus he may not avail himself of the right of set-off. *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Babbitt v. Read*, 173 Fed. 712. And after insolvency of the corporation, the right to rescind because of fraud is cut off against subsequent creditors. *Gress*

cial case would have been decided differently and in accord with the practice under the earlier bankruptcy act, when the "trust fund" theory was in vogue.¹⁶

LIABILITY FOR WORDS IMPUTING CRIME. — Are spoken words, which charge a plaintiff with specific acts erroneously alleged to be criminal, actionable *per se*? A recent New York decision suggests this question. The defendant charged the plaintiff with riding on a free pass, and intimated that the act was subject to investigation by the grand jury, although in fact it was not a crime. The court held that the imputation was "libelous *per se*." *Dooley v. Press Publishing Co.*, 170 N. Y. App. Div. 492.¹

Spoken words imputing crime may be allegations of fact,² or they may draw conclusions of law.³ Are they slanderous *per se* if they do both, and the allegations of fact negative the conclusions of law? Surely not if the hearers may be assumed to know the law, for then the words do not impute crime. This seems to be the tacit assumption of all the cases.⁴ But if the hearers do not know the law, and wrongly believe that

v. Knight, 135 Ga. 60, 68 S. E. 834; *Cox v. Dixie*, 48 Wash. 264, 93 Pac. 523. *Contra*, *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481.

¹⁶ See note 8. And to same effect under the present act, see *In re Crystal Springs Bottling Co.*, 96 Fed. 945. The right to collect unpaid subscriptions, where there is no agreement that they shall not be paid in full, passes to the trustee in bankruptcy. See *LOVELAND, BANKRUPTCY*, 4 ed., § 392.

¹ The principal case was one of libel, but the New York courts frequently estimate libel with the aid of the common standards for words slanderous *per se*. The New York rule in libel does not differ essentially from that in other jurisdictions. *Gates v. N. Y. Recorder Co.*, 155 N. Y. 228, 49 N. E. 769. Confusion has been caused, however, by failure to distinguish sharply enough between the definitions of libel and of slander. *Moore v. Francis*, 121 N. Y. 199, 204, 23 N. E. 1127, 1128. The confusion is explained and the New York rule well stated in *Cady v. Brooklyn Union Pub. Co.*, 51 N. Y. Supp. 198: "The rule is of familiar statement, that not only do oral words which amount to slander *per se* constitute libel *per se* if written, but that in addition any written words soever which hold one up to disgrace, hatred, ridicule or contempt, are libelous *per se*, however much they may fall short of charging a criminal offense, or of amounting in any other respect to slander if only spoken."

² As, "thou hast killed thy master's cook," a sufficient charge of murder. *Cooper v. Smith*, Cro. Jac. 423.

³ As, "you are an incendiary and a murderer." *Noeninger v. Vogt*, 88 Mo. 589.

⁴ The most common type of case arises from the application to the plaintiff of a criminal epithet, supplemented by words which show the epithet inapplicable, as "thou art a thievish knave for thou hast stolen my wood," growing wood not being subject to larceny. *Robins v. Hildredon*, Cro. Jac. 1, 65. *Minors v. Leeford*, Cro. Jac. 1, 114 (*semble*); *Christie v. Cowell*, 1 Peake 4; *Thomson v. Bernard*, 1 Camp. 47; *Lemon v. Simmons*, 57 L. J. Q. B. 260; *Jones v. Bush*, 131 Ga. 421, 62 S. E. 279; *Fawcett v. Clark*, 48 Md. 494; *Brown v. Myers*, 40 Oh. St. 99; *Egan v. Semrad*, 113 Wis. 84, 88 N. W. 906; *McCaleb v. Smith*, 22 Ia. 242. Similar decisions are found in cases where it was apparent that the plaintiff could not have committed the crime imputed by the words in their ordinary sense. *Snag v. Gee*, 4 Rep. 16, and *Williams v. Stott*, 1 C. & M. 675, 684, as explained by *Parke, B.*, in *Heming v. Power*, 10 M. & W. 564, 569; *Jackson v. Adams*, 2 Bing. N. C. 402. See *Carter v. Andrews*, 33 Mass. 1; *Williams v. Miner*, 18 Conn. 464, 473; and *cf. Stewart v. Howe*, 17 Ill. 71, where it was held slander *per se* to accuse a child under ten years old of larceny, though a child of that age was legally incapable of the crime. On the basis of this last case *Odgers* states the modern rule to be: "if the words would convey an imputation of felony to the minds of ordinary

the conclusion of law is justified by the allegation of fact, are the words slanderous *per se*? The cases afford no answer. The solution of the problem must depend on whether the gist of the defendant's offense is putting the plaintiff in jeopardy of criminal prosecution or degrading him in the eyes of his fellows.⁵ There is good authority for either contention. Baron Parke took the former position: "The ground of the matter being actionable is that a charge is made, which, if it were true, would endanger the plaintiff in point of law."⁶ Yet it is actionable *per se* to charge the plaintiff with having suffered punishment for crime,⁷ or with having committed a crime for which prosecution is now barred, either by the statute of limitations⁸ or because the criminal statute has been repealed.⁹ And the imputation may be so general as scarcely to endanger the plaintiff.¹⁰ The prevailing modern view, accordingly, seems to take the latter position, and agree with the *dictum* of Lord Holt, that the gravamen of the offense is the effect on the plaintiff's reputation.¹¹ But if this is the right view it is difficult to explain the narrowness of the rule.¹² An imputation of an intent to commit crime seems equally damnatory, yet it is not actionable *per se*.¹³ So also the plaintiff must allege special damage if he is called rogue, rascal, cheat, or swindler.¹⁴

hearers unversed in legal technicalities, an action lies." ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 50. It is submitted that the case does not justify so broad a conclusion, since it did not appear that the hearers were aware of the plaintiff's age. As in *Carter v. Andrews* and *Williams v. Miner* (*supra*), it may well have been a lack of knowledge of the facts, not of the law, on the part of the hearers, which made the defendant's words imputative of actual crime.

⁵ See 6 AM. L. REV. 593, 594.

⁶ *Heming v. Power*, 10 M. & W. 564, 569.

⁷ As, "Thou wast in Launceston gaol for coming . . . you were burnt in the hand for it." *Gainford v. Tuke*, Cro. Jac. 1, 536; *Boston v. Tatam*, Cro. Jac. 1, 623; *Fowler v. Dowdney*, 2 M. & Rob. 119; *Krebs v. Oliver*, 78 Mass. 239; *Smith v. Stewart*, 5 Pa. St. 372. See ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 45.

⁸ *Webb v. Fitch*, 1 Root (Conn.) 544. See *Van Ankin v. Westfall*, 14 Johns. (N. Y.) 233.

⁹ *French v. Creath*, 1 Ill. 31.

¹⁰ As, "if you had your desserts you had been hanged before now." *Donne's Case*, Cro. Eliz. 62. *Jenkinson v. Mayne*, Cro. Eliz. 384; *Curtis v. Curtis*, 10 Bing. 477; *Francis v. Roose*, 3 M. & W. 191; *Tempest v. Chambers*, 1 Stark 67; *Webb v. Beavan*, 11 Q. B. 609. See ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 40.

¹¹ "And Holt, Chief Justice, said, it was not worth while to be learned on that subject; but said, that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, because so doing would contribute much to the preservation of the peace." *Baker v. Pierce*, 6 Modern 23. "Where the words spoken do tend to the infamy, discredit or disgrace of the party, there the words shall be actionable." *Smale v. Hammon*, Bulstrode 40. So in ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 2: "In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation." *Shipp v. M'Craw*, 3 Murphy (N. C.) 463; *Krebs v. Oliver*, 78 Mass. 239; *Smith v. Stewart*, 5 Pa. St. 372; cf. *Klumph v. Dunn*, 66 Pa. St. 141, 144. See STARKIE, LAW OF SLANDER AND LIBEL, 3 ed., 99.

¹² As an example of the reasoning to which recourse is had, see *Shipp v. M'Craw*, 3 Murphy (N. C.) 463, 466: "The gravamen in an action for slander is social degradation. The risk of punishment, and the rule to test the question whether the words be or be not actionable, to wit: does the charge impute an infamous crime, is resorted to, to ascertain the fact whether it be a social degradation, and not whether the risk of punishment be incurred. . . . No other degradation will give an action, for no other degradation is a social loss."

¹³ *Fanning v. Chace*, 17 R. I. 588; 22 Atl. 275; *Dickey v. Andros* 32 Vt. 55; *Bays v. Hunt*, 60 Ia. 251, 14 N. W. 785; *Mitchell v. Sharon*, 59 Fed. 980.

¹⁴ See 6 AM. L. REV. 593, 595; ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 49.

The rigid and artificial classification by which no words are slanderous *per se* unless they impute crime, certain contagious diseases, or disrepute in one's business, office, or profession must have an historical rather than a logical basis. Shame was keenly felt among the early English, and in the manorial courts, where defamation was first dealt with, almost everything militating against personal honor was cognizable.¹⁵ With the decay of the local courts defamation was taken over by the ecclesiastical courts. In 1295 the king's court declared solemnly that it would not entertain pleas of defamation.¹⁶ The jurisdiction thus disclaimed was not easily acquired, and the resulting struggle was probably responsible for the artificiality of the rules of the modern action for slander.¹⁷ The suggestion has been made¹⁸ that the king's courts acquired jurisdiction of words imputing crime on the ground that the offense charged drew after it as an incident the right to investigate the charge and to compensate the person injured if it were false. Similar reasons, it is said, can be found for the assumption of jurisdiction over the other two classes of words which became defamatory *per se*. The leper, for instance, was subject to the writ *de leproso amovendo* which determined his legal existence, and the plague-stricken were legally removable to the pest-house.¹⁹ Similarly the earlier cases of words touching a man in his office or business all relate directly to the administration of justice, as the defamation of a judge, a justice of the peace, or an attorney in his office; and so also to call a merchant a bankrupt was to subject him to the statute of bankruptcy. For some such reasons these narrow classes of words, along with words causing special damage, came to be regarded as "imputations strictly temporal," while all other opprobrious terms were merely "spiritual" and remained legitimately within the jurisdiction of the courts Christian.²⁰

If it is true that the common law courts took jurisdiction over words imputing crime on the basis of their jurisdiction over the crime charged, it would seem that the words must impute acts which are in fact criminal, irrespective of the allegations of the defendant or the opinions of the hearers as to the law. If a modern court were squarely faced with the

¹⁵ So it was slander to call one "a false man, full of frauds, and a picker of quarrels." See F. Carr, in 18 L. Q. REV. 255, 266; F. W. Maitland, in 2 GREEN BAG 4.

¹⁶ Rot. Parl. I, 133. See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 535.

¹⁷ See V. V. Veeder in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 446, 458.

¹⁸ See 6 AM. L. REV. 593, 605.

¹⁹ The inclusion of syphilis in this assumption of jurisdiction over contagious disorders is not so easily explained. It did not appear in England until late in the 15th century, however, and is known to have resembled a form of leprosy then common.

²⁰ See *Palmer v. Thorpe*, 2 Coke's Rep. 315. "Touching defamations determinable in the ecclesiastical court, it was resolved, that such defamation ought to have three incidents: 1. That it concerns matter merely spiritual and determinable in the ecclesiastical court, as for calling him 'heretic, schismatic, adulterer, fornicator, etc.' 2. It ought to concern matter spiritual only; for if such matter touches or concerns anything determinable at the common law, the ecclesiastical judge shall not have cognizance of it. 3. Although such defamation is merely spiritual . . . yet he who is defamed cannot sue there for amends or damages, but the suit ought to be only for the punishment of the sin, *pro salute animae*." Even after the jurisdiction of the ecclesiastical courts was crippled, a jurisdiction remained over words imputing an offense punishable in the ecclesiastical courts. *Harris v. Butler*, cited in the note to *Crompton v. Buller*, 1 Haggard Cons. 463.

question, however, it is not impossible that the decision would be made on the basis of the obloquy rather than the jeopardy brought upon the plaintiff.²¹ Although such a decision would represent a natural tendency to approximate the law of slander to the more liberal rules in libel,²² it would amount to no more than a patch on an artificial, illogical structure in the law for which the only real remedy is legislation.

ÆSTHETICS AND THE FOURTEENTH AMENDMENT.—The increasing complexity of modern conditions of life has induced a growing tendency, in the interest of public welfare, to restrict the use of private property. It is but natural that this has resulted in attempts to regulate the unsightly use of property—legislation inspired solely by æsthetic motives. The more usual forms are limitations on the erection of buildings, or, even more common, a prohibition of that most typical feature of American scenery, the billboard. There can be little doubt that such regulation, if reasonably exercised, is highly expedient. But such legislation has met with great difficulty from the Fourteenth Amendment. One might suppose that it would clearly fall within the scope of the police power as it is so frequently broadly laid down.¹ Nevertheless, the decisions are practically unanimous in holding a regulation of the use of private property for æsthetic reasons alone beyond the police power.² It is, there-

²¹ See *Klumph v. Dunn*, 66 Pa. St. 141.

²² The desirability of a broader rule in slander was expressed by Mr. Justice Holmes in *Rutherford v. Paddock*, 180 Mass. 289, 292, 62 N. E. 381, 382. The opposite tendency is well illustrated by *Jones v. Jones*, [1916] 1 K. B. 350, 358: "The law of slander is an artificial law, resting on very artificial distinctions and refinements, and all the court can do is to apply the law to those cases in which hereto it has been held applicable."

¹ "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Justice Holmes in *Noble v. Haskell*, 219 U. S. 104, 111. "It may be said to be the right of the State to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community." *Champer v. City of Greencastle*, 138 Ind. 339, 351, 35 N. E. 14, 18. "It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about 'the greatest good of the greatest number.' Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction." *People v. Brazee*, 149 N. W. 1053, 1054 (Mich.). Coupled with such judicial utterances the admission of Justice Brown in *Holden v. Hardy*, 169 U. S. 366, 385, that "This court has not failed to recognize that the law is, to a certain extent, a progressive science," offers hope for a more liberal treatment of this question in the future.

² In the following cases billboard ordinances were declared unconstitutional: *Varney & Green v. Williams*, 155 Cal. 318, 100 Pac. 867; *Curran Bill Posting Co. v. Denver*, 47 Colo. 221, 107 Pac. 261; *Haller Sign Works v. The Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920; *Haskell v. Howard*, 109 N. E. 992 (Ill.); *Crawford v. City of Topeka*, 61 Kan. 756; *Kansas City Gunning Advertising Co. v. Kansas City*, 240 Mo. 679, 144 S. W. 1099; *Passaic v. Paterson Bill Posting Co.*, 72 N. J. L. 285, 62 Atl. 267; *People v. Green*, 85 App. Div. (N. Y.) 400; *People v. Murphy*, 195 N. Y. 126, 88 N. E. 17; *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123; *State v. Staples*, 157 N. C. 637, 73 S. E. 112; *Bryan v. City of Chester*, 212 Pa. 259, 61 Atl. 894.

In the following cases æsthetic building regulations were held invalid: *People v.*

fore, of great interest to note a decision in the Philippines, *Churchill v. Rafferty*, 14 Phil. Gaz. 383 (Phil. Sup. Ct.),³ which holds that an ordinance allowing the removal of billboards "offensive to the sight" was not a taking of property without due process.⁴

It is clear that to some extent at least the law recognizes æsthetics as a matter of public interest. A state unquestionably has power, which it may delegate to a municipal corporation, to expend public moneys for purely æsthetic purposes, such as the erection of statues, or in preserving natural scenery.⁵ Further, although there is no unanimity among the authorities, some cases have allowed property to be condemned under the right of eminent domain to be used solely for æsthetic purposes.⁶ Thus, it has been held constitutional to condemn land for a road to give access to natural scenery.⁷ A noteworthy case has allowed property adjoining a park to be condemned for the purpose of adding to the beauty of the park.⁸ It is to be noticed that the user of streets is also subject to any reasonable regulation as state property, presumably even for æsthetic reasons.⁹ The ordinary type of ordinance imposing æsthetic regulation has usually certain similarities to these cases. It is

City of Chicago, 261 Ill. 16, 103 N. E. 609; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 1 So. 625; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828. See also 27 HARV. L. REV. 571.

But observe the *dicta* in the following cases which, though possibly unconsciously, seem to point to a more liberal view. *In re Wilshire*, 103 Fed. 620, 623; *Ex parte Quong Wo*, 161 Cal. 220, 232, 118 Pac. 714, 719; *People v. Ericsson*, 263 Ill. 368, 374, 105 N. E. 315, 318; *Cochran v. Preston*, 108 Md. 220, 229, 70 Atl. 113, 114.

³ Compare with this case another recent case in which an ordinance forbidding the erection of unsightly building extensions was held unconstitutional. *Lavery v. Board of Commissioners of Jersey City*, 96 Atl. 203 (N. J.)

For a statement of the facts of these cases, see RECENT CASES, p. 884.

⁴ Strictly speaking, this case does not involve the constitutional question presented in similar state legislation. The exact words of the Fourteenth Amendment are, however, reproduced in the Philippines organic act. 32 U. S. STAT. AT L. 693.

⁵ *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998; *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157; *cf. U. S. v. Gettysburg Electric Ry. Co.*, 160 U. S. 668; *Higginson v. Nahant*, 11 Allen (Mass.) 530.

⁶ *U. S. v. Gettysburg Electric Ry. Co.*, *supra*; *Petition of the Mount Washington Road Co.*, 35 N. H. 134; *Parker v. Commonwealth*, 178 Mass. 199, 59 N. E. 634, *aff'd as Williams v. Parker*, 188 U. S. 491. *Contra*, *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 57 Atl. 398. See *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. 561.

The power to condemn for a park is unquestioned; but it is usually equally supportable as a measure for public health. *Shoemaker v. U. S.*, 147 U. S. 282; *Wilson v. Lambert*, 168 U. S. 611.

The suggestion has been made that the police power and the power of eminent domain are essentially the same. See "The Police Power and the Right to Compensation," E. V. Abbott, 3 HARV. L. REV. 189.

⁷ *Higginson v. Nahant*, *supra*, 11 Allen (Mass.) 530.

⁸ *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77. In another case the limitation of the height of buildings in Boston was held constitutional; although justified as a public safety measure, its main objects were admittedly æsthetic. *Welch v. Swasey* 193 Mass. 364, 79 N. E. 745, *aff'd* 214 U. S. 91.

⁹ The cases are justifiable on grounds of safety or morality, but it is submitted that the reasoning would apply equally to a purely æsthetic regulation. For general instances of such regulation, see *Fifth Ave. Coach Co. v. City of New York*, 194 N. Y. 19, 86 N. E. 824, *aff'd* 221 U. S. 467; *Davis v. Massachusetts*, 167 U. S. 43; *State v. Wightman*, 78 Conn. 86, 61 Atl. 56; *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451.

not a great step for the courts to regard the streets as partaking of some of the characteristics of a park, as in fact they do, and not as mere passageways, [and the possibility of a regulation without compensation of land adjoining parks has been suggested.¹⁰ In the case of a billboard statute there is in a sense a regulation of the use of a public way, since the value of the private use arises entirely from the adjoining public way. It would not involve a great advance to allow regulation of private property adjoining public places for æsthetic reasons.¹¹

But another group of cases offers a line of approach toward supporting æsthetic regulation, a group with which such legislation is perhaps most naturally affiliated. Some senses are unquestionably protected by our law, that is, injuries to them are regarded as nuisances and so subject to legislative regulation or prohibition. It is clear that noisome smells are treated as nuisances, whether or not they are injurious to health.¹² Excessive noise is treated in the same way.¹³ Smoke, fumes, and gases are likewise subject to regulation.¹⁴ A user which causes vibration on a neighbor's property is a nuisance, which the law will prevent.¹⁵ It is somewhat difficult to see why there should be this invidious distinction against the sense of sight. Possibly injuries to the other senses are so often bound up with matters of health that the courts have more easily drifted into protecting them. It is true that noise and stench are more objectionable to the average person and harder to avoid than unsightliness. On the other hand they are usually the accompaniments of a useful industry; the unsightliness but too frequently involves an uneconomic expenditure and derives its value from its offensive intrusion.

It is submitted that it is not necessary to regard all legislation which might have an æsthetic motive as valid. It is not necessary to treat public æsthetics in the same sweeping way in which public health, morals, and safety are treated. As soon as any particular form of unsightliness becomes by "strong and preponderant opinion," to quote Justice Holmes, a fit subject for regulation, the courts should recognize it as a fit subject for the exercise of the police power. As to certain forms of æsthetic regulation, that seems to be already the case; but unquestionably it is not yet so as to all. At the present time it is apparent that many courts are striving to support æsthetic legislation, wherever any possible benefit, however slight, to the public health may be pressed into service.¹⁶ It is well settled that æsthetic motives may be auxiliary in

¹⁰ See Attorney General v. Williams (*supra*), 174 Mass. 476, 478, 55 N. E. 77.

¹¹ It is submitted, however, that such regulation within reasonable limits may well become valid with developing public opinion.

¹² Fischer v. St. Louis, 194 U. S. 361; U. S. v. Luce, 141 Fed. 385; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246; State v. Woodbury, 67 Vt. 602, 32 Atl. 495.

¹³ Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317; Tuebner v. California-Street R. Co., 66 Cal. 171, 4 Pac. 1162; Bishop v. Banks, 33 Conn. 118.

¹⁴ People v. N. Y. Edison Co., 159 App. Div. (N. Y.) 786, 144 N. Y. Supp. 707; State v. Tower, 185 Mo. 79, 84 S. W. 10; Ross v. Butler, 19 N. J. Eq. 294.

¹⁵ Seligman v. Victor Talking Machine Co., 71 N. J. Eq. 697, 63 Atl. 1093; Rogers v. Philadelphia Traction Co., 182 Pa. 473, 38 Atl. 399.

¹⁶ See Reinman v. Little Rock, 237 U. S. 171; Hadacheck v. Sebastian, 36 Sup. Ct. Rep. 143; *Ex parte Quong Wo*, *supra*; People v. Ericsson, *supra*; Thomas Cusack Co. v. City of Chicago, 267 Ill. 344, 108 N. E. 340; Cochran v. Preston, *supra*; Welch v.

inducing legislation without invalidating it.¹⁷ The resort to indirection may well foreshadow the future path of the law; it would seem but a matter of time before other courts will recognize the wisdom and soundness of the decision in the principal case.

SUPPLEMENTING MEMORY WITH BUSINESS RECORDS. — To prove the contents of the ledger of a large mercantile or industrial establishment, is the testimony of the bookkeeper sufficient, or is it necessary to produce as witnesses the host of clerks, salesmen, or other employees who alone have first-hand knowledge of the facts therein recorded? A recent Kentucky decision, following Wigmore,¹ held that the testimony of the bookkeeper was sufficient, where the slips from which the books were compiled had been destroyed by fire and the identity of those who had actually made the sales thereby lost. *Givens v. Pierson*, 167 Ky. 574, 181 S. W. 324. An analogous situation arises in the case of a large establishment which has lost track of former employees, or where the expense involved in the production of all who contributed to the record is too great to be practicable. A business man regards the entries in a day-book or ledger as trustworthy. What is to be the attitude of the courts?

Where a record is made by one having personal knowledge of the transaction, as is the case in a small business, and the recorder is put on the stand, legal proof of the transaction is easily secured. If the witness can testify to a present recollection of the events, with or without the aid of the record to refresh his memory, there is no need of the record as evidence.² But if, as frequently happens, he cannot testify from memory, the record may be admitted in evidence upon proper authentication by him.³ The witness identifies the record. He may recall the circumstances under which he made that particular entry, or he may only be able to testify to the conditions under which he made all his entries. The record is in his handwriting; he made an entry only immediately after effecting a transaction, at which time he would carefully record it; therefore if the books record a sale, a delivery, or what not, he must have transacted it. Thus the witness testifies that he does not remember the transaction, but that he recorded it in the book at a time when he did remember. The book evidences what he recorded. Neither his statement nor the entry is of itself evidence of the transaction to be proved; taken together they testify to the event. The hearsay rule is not violated,

Swasey, *supra*; *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673; *Buffalo Branch Mutual Film Corporation, v. Breitunger*, 95 Atl. 433; *Fifth Ave. Coach Co. v. City of N. Y.*, *supra*; *In re Wilshire*, *supra*.

¹⁷ *Welch v. Swasey*, 193 Mass. 364, 375, 79 N. E. 745, 746.

¹ WIGMORE, EVIDENCE, § 1530.

² *Commonwealth v. Ford*, 130 Mass. 64; *Friendly v. Lee*, 20 Ore. 202, 25 Pac. 396.

³ *Owens v. Maryland*, 67 Md. 307; *Haven v. Wendell*, 11 N. H. 112; *Merrill v. Ithaca & Owego R. Co.*, 16 Wend. (N. Y.) 586; *Cole v. Jessup*, 10 N. Y. 96; *State v. Rawls*, 2 N. & McC (S. C.) 331; *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375; *Bourda v. Jones*, 110 Wis. 52; and see WIGMORE, EVIDENCE, § 754. Some courts, however, do not allow the records in evidence. *People v. Elyea*, 14 Cal. 144; *Hoffman v. Chicago, M. & St. P. Ry. Co.*, 40 Minn. 60, 41 N. W. 301; and see *Bates v. Preble*, 151 U. S. 149, 154.

for the record is evidence, not of the transaction, but of what was recorded. Of that, of course, it is direct evidence.

The situation becomes more complicated as the size of the establishment is increased and a division of labor introduced. The entries in the book are no longer made by the individual employee who performed the act recorded, but are entered by a bookkeeper in accordance with reports made to him by this employee. Accordingly a similar division of labor is introduced into the proof.⁴ The bookkeeper identifies the entries in the books and explains how he entered the facts as reported to him. The employee narrates the manner in which he reported the facts. Thus the employee says he reported the transaction accurately to the bookkeeper, the bookkeeper says he recorded what the employee told him, and the record shows what the bookkeeper recorded. The chain of evidence is now composed of a third link, but its essential character remains unaltered. The difficulty arises where the production of the employee becomes impossible or impracticable. If this link is omitted the proof involves hearsay. The testimony of the bookkeeper, supplemented by his books, is competent evidence of the report of the employee engaged in the transaction. But if the employee does not testify, evidence of his report is evidence of mere hearsay, and therefore inadmissible unless the report itself comes within the principle of some exception to the hearsay rule.

A recognized exception to the hearsay rule is that of regular entries made in the course of business. The exception is thus rationalized: The entries, although merely the written declarations of the recorder, and thus hearsay, are sufficiently trustworthy, by reason of the conditions under which made, to be admitted in evidence when the death of the maker excludes direct testimony.⁵ Although under this exception it is the written declarations (the entries) of the declarant himself that are put in evidence, yet the principle of the rule applies to the case under discussion. Here the necessity of a record made by the declarant himself is dispensed with by proof of his declaration through the records of the bookkeeper, as outlined above. There remains the problem of dispensing with the witness, a situation similar to that involved in the regular entry exception to the hearsay rule — the circumstance now being that of regular reports in the course of business instead of regular entries. The question is, what unavailability other than death of the entrant, or reporter, is sufficient to admit his entries, or evidence of his reports, in spite of the hearsay rule? Recognizing that unavailability of the witness was the real basis of the exception, courts have held, in the case of regular entries, that insanity or absence from the jurisdiction was sufficient.⁶ Should not unavailability on the ground of impracticability suffice? Where the employees are numerous, the cost of producing all who have contributed to the record may be prohibitive, and the

⁴ *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468; *Mayor, etc. of New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905.

⁵ See WIGMORE, EVIDENCE, § 1522.

⁶ *Insanity: Town of Bridgewater v. Town of Roxbury*, 54 Conn. 213, 217, 6 Atl. 415, 418; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 109. *Absence from jurisdiction: North Bank v. Abbot*, 13 Pick. (Mass.) 465, 471; *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346; *Alter v. Berghaus*, 8 Watts (Pa.) 77.

delay to the court not inconsiderable. In one reported case the testimony of 4500 workmen would have been required to identify their time-slips from which the entries in the books were compiled.⁷ Against the cost involved in compelling the production of such evidence, including the delay to the courts and the loss to justice in the exclusion of probative matter, there can be balanced but the slight evidentiary value of the testimony of a host of clerks, salesmen, teamsters, or weighers, to the effect that they were in the habit of making accurate reports. From the nature of the situation, the volume of business transacted, they cannot testify to more.

On this analysis the evidence may be admitted without violence to the traditional hearsay rules. The result squares with a pragmatic, business-like view of such documentary evidence as account books, ledgers, etc., a view which looks upon the credibility of such records as arising out of the nature and character of the business, and not from the personality of the recorder. According to this view the records are evidence as business records, not as declarations of the recorder,⁸ and so, whatever the conditions of their admission, the hearsay rule has no application to their composition. If the books of the X. Co. are admitted in evidence because the books of the X. Co. are trustworthy, it makes no difference whether the records were kept by clerk A. or clerk B., or whether A., the deceased clerk, made the entries upon information known to him personally or upon information known to his fellow clerk B., or *vice versa*. Thus regular entries made in the course of business would be admissible though founded on hearsay, and, *a fortiori*, such entries would be admissible to supplement recollection. After all, the admissibility of evidence is merely a question of a balance of convenience, and it may well be that the law of evidence, in its development as a rationalization of the intuitions of earlier trial judges, has suffered from an overdose of logic. At any rate, authority for the liberal rule is not wanting.⁹ Where

⁷ Wis. Steel Co. v. Md. Steel Co., 203 Fed. 403.

⁸ Note this attitude toward such evidence in Hare & Wallace's notes to 1 SMITH'S LEADING CASES, 8th Am. ed., 574. Perhaps it was some such attitude toward this class of evidence which lead the earlier publicists to speak of it as *res gestae*. See, for example, Hare & Wallace's notes, *supra*, p. 571. At any rate, courts will frequently be found speaking of regular entries as a special species of circumstantial evidence instead of as the declarations of an absent witness.

⁹ Northern Pacific Ry. Co. v. Keyes, 91 Fed. 47; Wis. Steel Co. v. Md. Steel Co., 203 Fed. 403; Fielder Bros. & Co. v. Collier, 13 Ga. 496; Indianapolis Outfitting Co. v. Cheyne Electric Co., 52 Ind. App. 153, 100 N. E. 468; Meyer v. Brown, 130 Mich. 449, 90 N. W. 285; Remer v. Goul, 185 Mich. 371, 152 N. W. 91; Corkran & Meloney v. Rutter, 76 N. J. L. 375, 69 Atl. 954; Imhoff v. Fleurer, 2 Phila. 35; Jones v. Long, 3 Watts (Pa.) 325; International & G. N. R. Co. v. Startz, 42 Tex. Civ. App. 85, 94 S. W. 207; Scruggs v. Woodley Lumber Co., 179 S. W. 897 (Tex.).

But *contra*, San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999; Chicago Lumbering Co. v. Hewit, 64 Fed. 314; Schnellbacher v. Plumbing Co., 108 Ill. App. 486; Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston, 155 Ky. 481, 159 S. W. 987 (unless distinguished on the ground that only one witness was absent, overruled by the principal case); White v. Wilkinson, 12 La. Ann. 359; Kent v. Garvin, 1 Gray (Mass.) 148; Atlas Shoe Co. v. Bloom, 209 Mass. 563, 95 N. E. 952. (But note Massachusetts exception in case of train dispatcher's records, Donovan v. Boston & Maine R., 158 Mass. 450, 33 N. E. 583.) Swan v. Thurman, 112 Mich. 416, 70 N. W. 1023 (overruled by later decisions, *supra*, though not referred to); Paine v. Sherwood, 21 Minn. 225, 239; Chaffee & Co. v. United States, 18 Wall. (U. S.) 516, 539.

courts are unable, or unwilling, to meet the demands of the situation, this would seem a fit field for legislative action. Such legislation would have the advantage of being able to work out detailed rules having regard to the size and nature of a business with reference to the trustworthiness of its records. In any event a large amount of discretion should be left to the trial court.

THE LIABILITY OF THE MANUFACTURER OF A DEFECTIVE AUTOMOBILE TO A SUB-VENDEE. — The much discussed question of the liability of a manufacturer of an article which, because of his negligence, is defective, to a remote vendee who is injured as a result of the defect, has been passed on by the New York Court of Appeals in a way which will undoubtedly settle the question in that state. In a recent case, the manufacturer of an automobile was held liable to a sub-vendee for an injury resulting from a defective wheel which negligent inspection had allowed to become a part of the machine. *McPherson v. Buick-Motor Co.*, 54 N. Y. L. J. 2339.

It is well settled that the manufacturer of an article impliedly warrants its merchantability and general fitness for use.¹ This is a comparatively modern rule, but is merely an extension of the stringent liability early imposed on the seller of food.² The rule is now extended to all articles, and an automobile is clearly not an exception.³ But since a warranty does not run with the goods,⁴ it can only be taken advantage of by the immediate vendee.⁵

¹ *Jones v. Bright*, 5 Bing. 533; *Randall v. Newson*, 2 Q. B. D. 102; *The Nimrod*, 141 Fed. 215. In England, the same warranty is implied on a sale by a dealer. *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608; *Preist v. Last*, [1903] 2 K. B. 148. The weight of American authority, however, holds that a dealer who is not a manufacturer makes no such warranty in the sale of specific goods. *White v. Oakes*, 88 Me. 367, 34 Atl. 175; *Gage v. Carpenter*, 107 Fed. 886.

² The rule that a dealer in food warrants its wholesomeness was probably originally statutory. See *Burnby v. Bollett*, 16 M. & W. 644. It is now generally accepted at common law. *Wallis v. Russell*, [1902] 2 I. R. 585; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210. A few courts, however, have recently denied the rule in cases where the dealer has no part in the preparation of the goods and no chance to find out defects, basing their decision on its alleged unsuitability to modern conditions. *Bigelow v. Maine Cent. R. Co.*, 110 Me. 105, 85 Atl. 396. *Valeri v. Pullman Co.*, 218 Fed. 519. This is certainly strong ground for holding the liability of the person first in fault to extend to sub-vendees. It is notable that the New York Appellate Division, while feeling bound by authority to hold a dealer in food to a liability as warrantor, has, in a recent case, declared its reluctance to do so. *Rinaldi v. Mohican Co.*, 54 N. Y. L. J. 2188.

³ See *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

⁴ *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394; *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288. See WILLISTON, SALES, § 224. There are, however, *dicta* to the contrary in *Childs v. O'Donnell*, 84 Mich. 533, 538, 47 N. W. 1108, 1109, in *Mazzetti v. Armour & Co.*, 75 Wash. 622, 624, 135 Pac. 633, 634, and in *Catani v. Swift & Co.*, 95 Atl. 931, 932 (Pa.).

⁵ It is of course true that a middleman who has been obliged to pay damages to his vendee may recover them back from his vendor. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065. It has even been held that a middleman who is liable for breach of warranty, but who has not yet paid, may recover his prospective damages from his vendor. *Buckbee v. Hohenadel Co.*, 224 Fed. 14. See 29 HARV. L. REV. 221. It must follow that the sub-vendee can proceed against the

On the other hand, it would seem clear on principle that when the manufacturer is negligent (but only then), he should be liable to anyone within the zone of danger from his negligence and injured as a proximate result of it. However, the courts have generally denied the existence of such liability to anyone with whom the manufacturer did not directly contract.⁶ This is put on the ground that there is no duty to anyone but the immediate vendee. But apart from any contract relations, a manufacturer certainly ought to owe a duty to anyone who is likely to be injured by his negligence in making the article; and who can be more likely to suffer injury than the sub-vendee who is to use it? The denial of his right, therefore, can probably be best explained by reference to theories of legal causation that are now considered antiquated.⁷ Of course the manufacturer cannot be held liable unless his act is wrongful; he is justified in selling a defective article if he gives proper warning to his immediate vendee, and he could not then be held liable for an injury to a sub-vendee. But when no warning has been given, as must always be the case when the negligence has been unwitting, there has been a wrongful act to found the liability. The liability should then extend to any injured person whose contact with the goods could have been foreseen at the time the defendant made the sale.⁸ The other rule, combined with the American doctrine that in a sale of specific goods a dealer makes no implied warranty against latent defects, brings about the result that often the injured sub-vendee can get no redress at all. He cannot sue the manufacturer, and he cannot sue the dealer because the latter is not negligent. Such a result is most unfortunate.

The realization of courts that this was so, resulted in two far-reaching exceptions to the rule. One is where the manufacturer fraudulently conceals known defects.⁹ The other is where the article is "intrinsicly middleman and attach this claim which the latter has against the first vendor. He can very likely reach it ahead of other creditors of his vendor, for it is a claim to exoneration from liability to him, and if he collects only a dividend on this liability while the estate is paid as if he had been paid in full, the other creditors are enriched at his expense. Cf. *In re Richardson*, [1911] 2 K. B. 705. But none of these results can be attained unless the middleman is liable. This is a possible argument for holding dealers strictly to an implied warranty.

⁶ The traditional leading case for this proposition is *Winterbottom v. Wright*, 10 M. & W. 109. The case does not really stand for the proposition, as it went off on a question of pleading, and was, as such, correctly decided. However, the proposition of the text is squarely supported by numerous cases, most of them professing to follow *Winterbottom v. Wright*, *supra*. *Collis v. Selden*, L. R. 3 C. P. 495; *Loop v. Litchfield*, 42 N. Y. 351; *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651; *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 19 S. W. 630. The matter has not been squarely decided in the United States Supreme Court, but a *dictum* in *Savings Bank v. Ward*, 100 U. S. 195, 202, appears to support this proposition.

⁷ "That the act of the purchaser who uses the article, though known to be defective, for the very purpose for which it was sold, for which the vendor knows it is to be used, should be regarded as legally unnatural and unexpected, is a relic of the distinction between legal and actual probability once common to all subjects." F. H. Bohlen, "Affirmative Obligations in the Law of Torts," 44 AM. L. REG. (N. S.) 209, 341.

⁸ The limitation of liability to persons who are foreseeably likely to have dealings with the goods is evidently the ordinary limitation of tort liability for negligence. It takes care quite adequately of the case that is the chief terror of the courts that cling to the old rule, the case, that is, where the defendant's product has been taken and made up into a complicated article which has finally done damage to the plaintiff.

⁹ *Huset v. Case Threshing Machine Co.*, 120 Fed. 865; *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847; *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098.

dangerous."¹⁰ In either of these exceptions it is hard to find any duty to the injured sub-vendee if it does not exist in the ordinary case. The latter exception is very elastic. Its development has been especially interesting in New York. The first case recognizing the exception¹¹ applied it to a poisonous drug improperly labeled. But a little later the principle was held not to apply to a flywheel¹² nor to a boiler.¹³ In later years, however, the New York courts have carried this exception to its extreme and the following articles have been held intrinsically dangerous: a scaffold,¹⁴ a derrick rope,¹⁵ an elevator,¹⁶ a siphon bottle,¹⁷ and a steam coffee urn.¹⁸ Indeed, two other courts have informed us that a cake of soap is such an intrinsically dangerous article.¹⁹ When we see a so-called exception carried to such extremes, it clearly shows that the rule itself is recognized as wrong and is as good as abrogated.²⁰

Fortunately, however, the court in the principal case does not attempt to justify its result (as indeed it might without serious inconsistency have done) on a further application of the exception of intrinsically dangerous articles. The decision is avowedly based on ordinary principles of tort liability.²¹ The result reached must be deemed alike sound in principle and desirable in policy.

RELIEF FOR WRONGFUL EXPULSION FROM ENGLISH TRADE UNIONS. — The rights of members of a trade union *inter se* have been rather unsettled in England since the trade union acts of 1871.¹ That act legalized such associations, but provided that it should not enable any legal proceedings to be maintained for "directly enforcing or recovering damages for the

¹⁰ *George v. Skivington*, L. R. 5 Exch. 1; *Thomas v. Winchester*, 6 N. Y. 397; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118; *Roberts v. Anheuser-Busch Brewing Co.*, 211 Mass. 449, 98 N. E. 95. The rule, as might be expected, is applied frequently in cases relating to defective food. *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314; *Ketterer v. Armour & Co.*, 200 Fed. 322; *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633; *Catani v. Swift & Co.*, 95 Atl. 931 (Pa.).

¹¹ *Thomas v. Winchester*, 6 N. Y. 397.

¹² *Loop v. Litchfield*, 42 N. Y. 351.

¹³ *Losee v. Clute*, 51 N. Y. 494.

¹⁴ *Delvin v. Smith*, 89 N. Y. 470. Cf. *Coughtry v. Globe Manufacturing Co.*, 56 N. Y. 124.

¹⁵ See *Davies v. Pelham Hod Elevator Co.*, 65 Hun 573, 20 N. Y. Supp. 523.

¹⁶ *Kahner v. Otis Elevator Co.*, 96 N. Y. App. Div. 169, 89 N. Y. Supp. 185.

¹⁷ *Torgeson v. Schultz*, 192 N. Y. 156, 84 N. E. 956.

¹⁸ See *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 481, 88 N. E. 1063, 1064.

¹⁹ *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157; *Armstrong Packing Co. v. Clem*, 151 S. W. 576 (Texas).

²⁰ See 17 HARV. L. REV. 274. Cases that show this even more clearly than those cited are *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, and *Quackenbush v. Ford Motor Co.*, 167 N. Y. App. Div. 433, 153 N. Y. Supp. 131, in both of which recovery was granted for an injury other than a hurt to the plaintiff's body. Such cases cannot by any stretch be brought within the reasons given for the "intrinsically dangerous" exception.

²¹ "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

¹ 34 & 35 VICT. c. 31.

breach of" certain specified agreements.² It was naturally a matter of some uncertainty just what fell within the term "directly enforcing." The House of Lords authoritatively settled in 1905 that a payment of benefit funds to persons not entitled could be enjoined³ although agreements regarding such funds were not directly enforceable under the act,⁴ and Lord Davey in his dissent pointed out that under the principle of *Lumley v. Wagner*⁵ this is enforcing the agreement through its implied negative.⁶ From this a decision readily followed that the wrongful expulsion of a member could be declared void and an injunction issued against enforcing it,⁷ although the plaintiff would thereby be put in a position where he might receive benefits. The Court of Appeal, following that decision, have now sustained an injunction against a union restraining it from enforcing the expulsion of a member, but have at the same time refused to award the member damages suffered on account of his *de facto* expulsion. *Kelly v. Nat. Soc. of Operative Printers*, 113 L. T. R. (N. S.) 1055.

The whole bill might perhaps have been dismissed on the ground that it lay in tort and thus ran afoul of the Trade Disputes Act of 1906.⁸ The result of the court might possibly have been reached by introducing another subtlety into the construction of the Act of 1871, to wit: that since the plaintiff is asking damages on account of his loss of employment inevitably caused by his expulsion, such damages, if recovered, would be for the breach of an agreement concerning the conditions on which any member should be employed, which is not actionable under the act,⁹ notwithstanding the fact that his reinstatement is held not to "directly enforce" such an agreement. Although this suggestion is probably untenable, the grounds advanced by the court seem rather less plausible. The union is treated as an association of individuals and not as an entity, contrary to apparently the great weight of judicial opinion in England;¹⁰

² 34 & 35 VICT. C. 31, § 4.

³ *Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256. *Accord*, *Wolfe v. Mathews*, 21 Ch. D. 194; *McLaren v. Miller*, 7 Sess. Cas. (4th Ser.) 867; *cf. Cope v. Crossingham*, 52 SOL. J. 683. See 52 SOL. J. 697. *Contra*, *Rigby v. Connol*, 14 Ch. D. 482; *Chamberlains Wharf Ltd. v. Smith*, [1900] 2 Ch. 605; *Duke v. Tittleboy*, 49 L. J. Ch. 802. This presupposes the decision that a labor union can be sued. *Taff Vale Ry. Co. v. Amlg. Soc. of Ry. Servants*, [1901] A. C. 426; *Trollope & Sons v. London Bldg. Tr. Fed.*, 72 L. T. R. (N. S.) 342; *cf. Ruck v. Williams*, 3 H. & N. 308. *Contra*, *Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255, 259.

⁴ 34 & 35 VICT. C. 31, § 4 (3) a.

⁵ 1 DE G. M. & G. 604.

⁶ See *Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256, 269. There is also force in the suggestion of MacNaughten, L. J., that the word "directly" in the statute seems to be used only to mark a contrast with the words "recovering damages," which follow. See *id.*, p. 264.

⁷ *Osborne v. Amlg. Soc. of Ry. Servants*, [1911] 1 Ch. 540.

⁸ 6 EDW. VII, c. 47, § 4.

⁹ 34 & 35 VICT. C. 31, § 4 (1).

¹⁰ The opinion of Farwell, J., in the *Taff Vale* case clearly holds it an entity. See [1901] A. C. 426, 429. Each of the five opinions in the House of Lords, except that of Lindley, L. J., expressly approves the opinion of Farwell, J. See *id.*, pp. 436, 440, 441. Furthermore, Halsbury, L. C., speaks of the "thing" created by the Legislature. See p. 436. And Brompton, L. J., expressly says the union is an entity. See p. 442. See also *Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256, 275, *per James, L. J.*; *Osborne v. Amlg. Soc. of Ry. Servants*, [1909] 1 Ch. 163, 191, *per Farwell, J.*; *id.*, [1910] A. C. 87, 102, *per Atkinson, L. J.*; *cf. id.*, [1910] A. C. 87, 93, 107, *per Halsbury, L. C.*,

but even assuming that point in favor of the court, the difficulties are not removed. Bankes, L. J., says that the plaintiff, in proving that the expulsion was unauthorized by the rules, necessarily shows that the officers were not the authorized agents of the members to do the acts complained of, and hence that the members could not be held for the damage thereby caused. The doctrine of scope of the employment in agency is too elementary to require more than mention, but it seems to have been ignored. The same line of reasoning would lead to the ingenuous suggestion that no recovery could be had on an *intra vires* contract of a corporation, for its breach would be beyond the capacity of the corporation.¹¹ Bankes and Phillimore, L. JJ., also make the point that the officers of the association were as much agents of the plaintiff as of the other members and that he would be suing himself if he sued the principals. A court with equitable powers, however, is scarcely worried by an objection of such prenebulous tenuity. A partner can bring a bill for relief against his co-partners¹² and if, as is perhaps seldom the case, no accounting is necessary, he has been allowed to maintain a bill on a single claim.¹³ Cases may be put such as that of a grocer's boy negligently running over one of his masters, and it seems clear that the injured party should have damages, diminished in proportion to his interest in the business.¹⁴ The justice of the situation is not changed whether the right be regarded as against all the principals with a right on their part to contribution from him, or simply as a right on his part to get them to contribute to the loss suffered by him on account of the common agency. If there is a partnership, the plaintiff was not acting in the capacity of a partner in being injured, but as an outsider, and the fact that he is also one of the persons responsible for the act of the agent should prevent him from recovering some but not all of the damages suffered. This reasoning applies *a fortiori* to the principal case where there is no partnership, where there is no difficulty as to an accounting and where the interest of the plaintiff as a principal is insignificant. If, however, the association is treated as an

and Shaw, L. J.; *id.*, [1900] 1 Ch. 163, 174, *per* Cozens-Hardy, M. R.; Taff Vale Ry. Co. v. Amlg. Soc. of Ry. Servants, [1901] 1 K. B. 170, 175, *per* Cozens-Hardy, M. R., quoting Farwell, J. The judges in the principal case have seized upon two *dicta* by MacNaughten, L. J., which point the other way. See Russell v. Amlg. Soc. of Carpenters, etc., [1912] A. C. 421, 429; Taff Vale Ry. Co. v. Amlg. Soc. of Ry. Servants, [1901] A. C. 426, 439. A couple of observations by Lindley, L. J., seem the only other authority for the non-entity view. See Yorkshire Miners' Ass'n v. Howden, [1905] A. C. 256, 280; Taff Vale Ry. Co. v. Amlg. Soc. of Ry. Servants, [1901] A. C. 426, 443.

¹¹ This is not much more extravagant than the notion once held that a corporation could not commit a tort. See Edward H. Warren, "Executed *Ultra Vires* Transactions," 23 HARV. L. REV. 495, 498.

¹² Cole v. Reynolds, 18 N. Y. 74; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526. See LINDLEY, PARTNERSHIP, 6 ed., 276; PARSONS, PARTNERSHIP, 4 ed., 269, 276, 281.

¹³ Stettheimer v. Stettheimer, 114 N. Y. 501, 505, 21 N. E. 1018, 1019. The old rule at law was of course otherwise. Bosanquet v. Wray, 6 Taunt. 597. See PARSONS, PARTNERSHIP, 4 ed., 246-47.

¹⁴ Where a statute makes partnership debts joint and several, a partner has been allowed to recover a part of a debt from the firm on this principle at law. Willis v. Banon, 143 Mo. 450, 45 S. W. 289. Damages might be severed where one partner fraudulently conveys firm property. See PARSONS, PARTNERSHIP, 4 ed., 275. Contribution between those vicariously liable for a tort should not be denied where both are innocent of any personal wrongdoing. See POLLOCK, TORTS, 195; SALMOND, TORTS, 2 ed., § 25.

entity, which seems more in accord with both reason and authority, no deduction should be made in the amount recovered, for the plaintiff is not then a defendant. An additional difficulty in the decision rendered lies in the fact that if the union has done nothing, and if there is no legal right against it, an injunction such as appears to have issued is not easily supported.

RECENT CASES

ADMIRALTY — JURISDICTION — VESSEL REQUISITIONED BY FOREIGN GOVERNMENT RELEASED ON OWNER'S BOND. — A vessel was libeled, and released on the owner's bond. Thereafter the United States Attorney suggested to the court that the ship had previously been requisitioned by the Italian government, and was engaged in government business. *Held*, that the attachment would not be quashed nor the bond canceled. *Barnes-Ames Co. v. S. S. Luigi*, 73 Leg. Int. 141 (U. S. Dist. Ct.)

It is well established that the vessels of a foreign government devoted to a public use are not liable to arrest. *The Parlement Belge*, 5 P. D. 197. See 17 HARV. L. REV. 270. Here the Italian government by the requisition seems to have acquired a prior lien on the vessel. Accordingly the court should have refused the order for attachment if it had known the facts, not because of any defense of the owner, but out of respect to the interests of the government, an objection to the proceeding which from the owner's standpoint was purely accidental. But by the release of a ship on bond, the latter is substituted for the former, and the authority of the court over the vessel entirely ceases. *The Old Concord*, 18 Fed. Cas., No. 10,482. See *The Frank Vanderkerchen*, 87 Fed. 763, 765. See BENEDICT, ADMIRALTY, 4 ed., § 421. Thus after the release, the interests of the government in the ship are no longer under the authority of the court, but only the owner's bond, in which the government has no interest. Therefore no objection remains to letting the action proceed, since the court will not be exercising jurisdiction over any property of the government. In a similar case, where the bond was given by the agent of the owning government, the action was dismissed. *The Jassy*, [1906] P. 270. But there the government was interested in the bond as well as in the ship, and would have been impleaded had the action proceeded. And it is a settled principle of international law that no sovereign can be impleaded in any court. See *The Parlement Belge*, *supra*, 219.

BANKRUPTCY — JURISDICTION — IS A DEPOSIT IN A LOCAL BANK PROPERTY WITHIN THE JURISDICTION? — Section 2 (1) of the Bankruptcy Act provides that the federal courts shall have jurisdiction to adjudge persons bankrupt who have property within the jurisdiction. The defendant committed an act of bankruptcy in England, where he was resident. He had money deposited in a bank in New York, but no other property there. A petition is brought in New York within four months. *Held*, that the New York court has jurisdiction to adjudicate him a bankrupt. *In re Berthoud*, 54 N. Y. L. J. 2321 (U. S. Dist. Ct., S. Dist. N. Y.).

A bank deposit of a bankrupt is clearly property within the act in the sense that it passes to his trustee. *Cf. New York County Nat. Bank v. Massey*, 192 U. S. 138. It is evident, therefore, that it is sufficient to support bankruptcy proceedings if its *situs* is in the jurisdiction. Since an intangible *chose* can of course have no location in fact, its *situs* must be that place having such power to control it as the relief sought demands. See *Matter of Houdayer*,

150 N. Y. 37, 41, 44 N. E. 718, 719. Since the requisite control in bankruptcy is power to pass the benefit of the claim from the defendant to a third person, it would seem that jurisdiction over both defendant and debtor is necessary; or at least over the debtor and the place of payment. See BEALE, CASES ON CONFLICTS OF LAWS, SUMMARY, § 38. In the analogous case of garnishment, a few cases have recognized this. *Louisville & Nashville R. Co. v. Nash*, 118 Ala. 477, 23 So. 825; *Sawyer v. Thompson*, 24 N. H. 510. See BROWN, JURISDICTION, 2 ed., § 150; cf. *Comm. Nat. Bank v. Chicago, etc. Ry. Co.*, 45 Wis. 172. The great weight of authority, however, disregards this principle. Cf. *Chicago, etc. Ry. Co. v. Sturm*, 174 U. S. 710; *Swedish-American Nat. Bank v. Bleeker*, 72 Minn. 383, 75 N. W. 740; *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663. The case of a bank deposit seems relatively clear, since the *situs* of the debtor and the place of payment necessarily concur. Accordingly, the debt has been held to exist at the *situs* of the bank. *McBee v. Purcell Nat. Bank*, 1 Indian Terr. 288, 37 S. W. 55. Moreover, it seems that the courts are tending to adopt the mercantile conception of a bank deposit as the equivalent to cash. See *Blackstone v. Miller*, 188 U. S. 189, 205. *Matter of Houdayer*, 150 N. Y. 37, 40, 44 N. E. 718, 719. See 24 HARV. L. REV. 586. Upon sound principle, therefore, as well as upon the spirit of the Bankruptcy Act, which calls for distribution of the property of an insolvent wherever it is practically available, the result reached by the court in the present case is a desirable one.

BANKRUPTCY — PREFERENCES — EFFECT OF ENFORCEMENT OF TRANSFER.

— Within four months before the filing of a petition in bankruptcy, an insolvent debtor paid in full a personal creditor who had actual knowledge of the debtor's circumstances. Though liable for certain partnership debts, the insolvent then had no other individual debts outstanding. However, by the time the petition was filed there were other individual creditors, who could not be paid in full. The trustee seeks to avoid the transfer as a preference. *Held*, that the transfer may be set aside. *Rubenstein v. Lottow*, 111 N. E. 973 (Mass.).

Since a preference includes only transfers giving one creditor an advantage over other "creditors of the same class," no preference was effected at the time of the transfer, for partnership creditors and individual creditors are not "creditors of the same class." See BANKRUPTCY ACT OF 1898, §§ 60 *a*, 5 *f*; *Mills v. J. H. Fisher & Co.*, 159 Fed. 897, 900; *In re Denning*, 114 Fed. 219, 221; cf. *Swarts v. Fourth National Bank*, 117 Fed. 1, 6. The principal case therefore decides squarely that if the enforcement of the transfer effects a preference as of the date of the petition, it may be set aside. This seems to be the natural inference from the requirement in section 60 *a*, that a transfer made by an insolvent debtor within four months of bankruptcy shall be deemed to be a preference if "the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." But this is difficult to reconcile with the provision in section 60 *b*, that a transfer shall be voidable if (*inter alia*) "at the time of the transfer . . . the . . . transfer then operate as a preference." However, by treating the word "preference" as strictly relative to the definition in section 60 *a*, it is possible to construe section 60 *b* as making voidable only transfers which when given operate to produce a situation that at the time of bankruptcy will give one creditor an advantage over others. This construction is in harmony with the general policy of the bankruptcy act to determine all questions in so far as possible with reference to the conditions existing when the petition is filed. Cf. *Bailey v. Baker Ice Machine Co.*, 36 Sup. Ct. 50, 54; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307. Any other construction would involve the great practical difficulty of computing of percentages at the date of every transfer within the four months' period. It would also lead

to inequality of distribution, thus violating one of the fundamental objects of the bankruptcy law. See *Swarts v. Fourth National Bank*, *supra*, 3; *In re Leslie*, 119 Fed. 406, 410. See J. M. Olmstead, "Bankruptcy a Commercial Regulation," 15 HARV. L. REV. 829, 834, 843.

BANKRUPTCY — PROVABLE CLAIMS — CLAIMS UNDER EXECUTORY CONTRACTS. — A hotel entered into a five-year contract granting to a transfer company, in consideration of a certain monthly sum, its exclusive baggage and livery privilege. Soon after, the transfer company was put into involuntary bankruptcy, and the hotel now claims to prove for damages against the estate. *Held*, that proof of the claim be allowed. *Central Trust Co. v. Chicago Auditorium Association*, Sup. Ct. Off. Nos. 162, 174.

For comment upon this case when it was before the Circuit Court of Appeals, see 27 HARV. L. REV. 469. It was there contended that if claims under executory bilateral contracts are to be held provable on a satisfactory basis, it must be on the ground that contingent claims, if capable of liquidation, should be allowed proof under the present act. The Supreme Court, in affirming the decision of the Circuit Court of Appeals upon this point, goes solely upon the ground that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, and that the claim for damages by reason of such a breach is founded upon a contract, within the meaning of § 63 a (4) of the Bankruptcy Act of 1898.

BILLS AND NOTES — DAMAGES — DEPRECIATION OF GERMAN MARKS FOR WHICH BILL OF EXCHANGE IS DRAWN. — The defendant accepted bills of exchange payable in marks at Leipzig, Germany. The payee brings an action in New York on the bills. *Held*, that the recovery should be of a sum sufficient to have purchased the named sum of marks as depreciated at the time of default. *Gross v. Mendel*, 157 N. Y. Supp. 357 (App. Div.).

Intrinsic differences of money value, whether due to differences in standard or to excessive paper issues, should of course be taken account of in fixing the amount to be recovered on a debt due in foreign currency. *Bissell v. Heyward*, 96 U. S. 580; *Comstock v. Smith*, 20 Mich. 338. And it is now tolerably clear that when the debt is due abroad, the loss or gain of exchange should also be taken into account, at least when a bill of exchange is the foundation of the action. *Scott v. Bevan*, 2 B. & Ad. 78. See *Grant v. Healey*, 3 Sumner (U. S. Circ. Ct.) 523, 524; *Weed v. Miller*, 1 McLean (U. S. Circ. Ct.) 423. *Contra*, *Chumasero v. Gilbert*, 24 Ill. 651. *Cf. Adams v. Cordis*, 25 Mass. 260. Accordingly, the current rate of exchange, which expresses the resultant of these factors, is properly applied to determine the sum due. It remains to choose between the rate at the time of default and at the time of trial. That choice depends in theory on the decision of a question that has divided the masters of the law of contracts. If, on default, a right to damages is substituted for the debt, the principal case is correct, since it gives the creditor a sum which would exactly purchase the named sum of marks when they were due. *Bissell v. Heyward*, *supra*. However, if the debt continues and it is that which is recovered, the rate of exchange at the time of trial would seem to be determinative. *Taan v. Le Gaux*, 1 Yeates (Pa.) 204; *Lee v. Wilcocks*, 5 Serg. & Rawle (Pa.) 48. See *Hawes v. Woodcock*, 26 Wis. 629, 635. It might not be unreasonable to allow the plaintiff to recover on the rate most favorable to him within a reasonable time after the default, on an analogy to what is done on the conversion of pledged stocks, for he might have had to borrow or draw reëchange to cover his necessities at any time within that period. *Cf. Dimock v. United States National Bank*, 55 N. J. L. 296, 25 Atl. 926.

BILLS AND NOTES — DEFENSES — NEGLIGENCE OF THE DRAWER OF A CHECK AS A DEFENSE TO THE DRAWEE BANK. — The president of a corporation left checks, blank except for his signature, with the manager to be used during his absence as the necessities of business demanded. Two of the checks, which were carelessly left exposed, were taken by a business caller and cashed by the drawee bank. The first check exhausted the corporation's deposit, but the bank cashed the second, notwithstanding, and reimbursed itself from a subsequent deposit. The corporation now sues to recover its deposits. *Held*, that it may not recover either. *S. S. Allen Grocery Co. v. Bank of Buchanan County*, 182 S. W. 777 (Kansas City Court of Appeals).

In general, no liability exists on an incomplete instrument which was not delivered. Nor does the passing of an instrument from one officer of a corporate maker to another constitute delivery, since the instrument then never leaves the possession of the corporation. But because a bank is bound to pay the checks of its depositors, it is generally held that a depositor is under a duty of care not to impose liability on the bank through incomplete instruments. See *Scholfield v. Earl of Londelborough*, [1896] A. C. 514, 538; *Linick v. Nutting & Co.*, 140 App. Div. 265, 267, 125 N. Y. Supp. 93, 96. *Contra*, *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, 201; *Marshall v. Colonial Bank*, [1906] A. C. 559. See Beven, "Young v. Grote," 23 LAW QUART. REV. 390. The same duty exists in the civil law. See 4 POTHIER, CONTRAT DE CHANGE, ed. Beignet, 516. A violation of this duty is stated by some courts to support a liability in tort. See *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010. In others, it is treated as estopping the depositor from denying the validity of the instrument. *Trust Co. America v. Conklin*, 65 Misc. 1, 119 N. Y. Supp. 367; *cf.* 23 HARV. L. REV. 306. And the leaving of incomplete checks in an exposed place, as in the principal case, has been held sufficient negligence to bar a recovery from the bank. *Snodgrass v. Sweetser*, 15 Ind. App. 682. See 2 BOLLES, LAW OF BANKING, 589. As to the overdraft, however, it seems that the plaintiff should recover, for the duty of care is ended since the bank is no longer under an obligation to pay. *Troiike v. Cook, etc. Bank*, 127 Ill. App. 413; *Henderson v. U. S. National Bank*, 59 Neb. 280, 80 N. W. 898. However, if it was customary for the bank to cash the overdrafts of a depositor, it is arguable that the existence of this custom should impose on the depositor the same obligations as when the bank pays his checks under a legal duty.

CHAMPERTY AND MAINTENANCE — CONTRACT FOR PROPORTIONATE CONTINGENT FEE — RECOVERY ON QUANTUM MERUIT. — The plaintiff, an attorney, contracted to bring a suit for the defendant for which his compensation was to be a percentage of the amount recovered. The suit was compromised while pending. The plaintiff now sues for compensation. *Held*, that he may recover on a *quantum meruit* for the services rendered. *City of Rochester v. Campbell*, 111 N. E. 420 (Ind.).

In most American jurisdictions, although not in Indiana, a provision for a contingent fee does not make a contract void for champerty. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 451, note; *Scobey v. Ross*, 13 Ind. 117. And even in jurisdictions where such a contract is held void, recovery in quasi-contract for the services rendered has often been allowed. *Holloway v. Lowe*, 1 Ala. 246; *Husbands v. Cook*, 24 Ky. L. Rep. 1320, 71 S. W. 508; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *cf.* *Rust v. Larue*, 4 Litt. (Ky.) 411. Whether champerty should avoid a contract is a disputable question of public policy. But clearly a jurisdiction which has gone on record against champerty can find no justification in allowing a *quantum meruit*. This anomalous recovery has sometimes been based upon a distinction drawn between services illegal in themselves and services, otherwise lawful, that are to be compensated for in an illegal way. *cf.* *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563, with *Gam-*

mons v. Johnson, 76 Minn. 76, 78 N. W. 1035. However, with champertous contracts it is not the mere payment of money, but rather the performance of services with such contingent compensation in view which is of doubtful policy. Further, to allow such recovery in quasi-contract would tend to encourage the formation of champertous contracts, as the attorney then has nothing to lose and everything to gain. See *Roller v. Murray*, 112 Va. 780, 787, 72 S. E. 665, 687. Wherefore the jurisdictions which strongly disapprove of champerty have refused recovery in *quantum meruit* as well as on the contract. *Buller v. Legro*, 62 N. H. 350; *Mazureau v. Morgan*, 25 La. Ann. 281; *Ackert v. Barker*, 131 Mass. 436. See KEENER, QUASI-CONTRACTS, 262; Brooks, "Champerty and Maintenance in the United States," 3 VA. L. REV. 421, 422.

CONFLICT OF LAWS — JURISDICTION OVER TORTS TO FOREIGN REALTY — WHETHER STATUTE CONFERRING JURISDICTION IS RETROACTIVE. — The plaintiff brought suit in New York for the burning of his mill in Kansas in 1882. At the time of the alleged injury, no action could be brought in New York for an injury to foreign realty; but a statute passed in 1913 permitted such a suit. (NEW YORK CODE OF CIVIL PROCEDURE, § 982 a.) The defendant demurred to the complaint, on the ground that the statute should not be construed as retroactive, since it created a new substantive right. *Held*, that the demurrer be sustained. *Jacobus v. Colgate*, 54 N. Y. L. J. 2033 (Ct. of App. N. Y.)

It is a generally accepted rule of the conflict of laws that a right created by the appropriate law exists as a fact and will be recognized everywhere. See *King v. Sarria*, 69 N. Y. 24, 31. See DICEY, CONFLICT OF LAWS, 2 ed., 23. But any state may refuse to give a right of access to its courts, and so refuse to enforce the recognized right. See DICEY, CONFLICT OF LAWS, 2 ed., 31. Before the statute, New York followed the anomalous common law rule and refused to enforce such rights when growing out of injuries to foreign realty. *Brisbane v. Pennsylvania R. Co.*, 205 N. Y. 431, 98 N. E. 752; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703. But, nevertheless, the courts of that state have recognized the existence of the plaintiff's right. *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650. And there is no doubt that a right may exist without a remedy. For example, when a plaintiff under certain disabilities is not permitted to come into court, he may sue if the disability is removed by consent, or by legislative action, although his substantive rights remain unchanged. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Sims v. Sims*, 79 N. J. L. 577, 76 Atl. 1063; *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949; *cf. Gardner v. Thomas*, 14 Johns. (N. Y.) 134. Accordingly, the statute in the principal case did not create a new right of redress, but gave a remedy for a right already existing, though previously unenforceable. The general rule is that statutes operate prospectively only, unless a contrary intention clearly appears. *Sherrill v. Christ Church*, 121 N. Y. 701, 25 N. E. 50. See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., 642. But a statute which deals only with procedure, even though it supplies a remedy for a hitherto unenforceable right, or substitutes or adds a new remedy, applies *primâ facie* to actions on accrued as well as on future rights. *Fisher v. Hervey*, 6 Colo. 16; *Robinson v. Ferguson*, 119 Iowa 325, 93 N. W. 350; *Richardson v. Fletcher*, 74 Vt. 417, 424, 52 Atl. 1064, 1067. See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 674. Thus the reasoning of the court in the principal case seems opposed to the theory of the conflict of laws and to the general rules of statutory construction. But it is possible that the particular circumstances surrounding this statute justified the court's interpretation of the legislative intent.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — VALIDITY OF STATUTE RESERVING POWER TO ALTER CONTRACTUAL RIGHTS THROUGH REPEAL OF LEGISLATION. A creditor filed a bill to enforce the statutory liability of

directors arising out of the contraction of excessive debts for the corporation. Before judgment a repeal of the statute terminated this liability. Section 327 of the California Political Code provides that any statute may be repealed at any time and that persons acting under a statute are deemed to have contemplated this power of repeal. *Held*, that the rights of the plaintiff under the statute were destroyed even though the statute was remedial. *Moss v. Smith*, 155 Pac. 90 (Cal.).

The remedial statutory liability of a director enters into a contract made with the corporation. *Hargroves v. Chambers*, 30 Ga. 580, 602. See *Farr v. Briggs' Estate*, 72 Vt. 225, 232, 47 Atl. 793, 796; see 14 HARV. L. REV. 620; *cf. Horner v. Henning*, 93 U. S. 228, 232. And if the liability is unconditional, to alter it is to impair the obligation of the contract. *Hawthorne v. Cales*, 2 Wall. (U. S.) 10; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 535. But the liability is the product of the law creating the contract and subject to its limitations. See *Pritchard v. Norton*, 106 U. S. 124, 129. Here the legislature has made it subject to a condition subsequent. No doubt a legislature may impose some conditions upon contractual obligations. Thus in granting a charter it clearly may make its own contract subject to alterations at its pleasure. *Greenwood v. Freight Co.*, 105 U. S. 13. Again it may make all future obligations dischargeable upon a defined contingency, such as the bankruptcy of the obligor. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213. Whether it could go further and declare all contractual obligations to be conditional upon any future legislative action is another question. For a suggestion of this possibility, see Marshall's dissent in *Ogden v. Saunders*, *supra*, 339; *cf.* 29 HARV. L. REV. 521. Perhaps such a complete reservation of control would be held a fraud upon the contract clause. And, as it would seem unreasonable to deprive persons of the right of contracting freely, it would probably be held contrary to the Fourteenth Amendment. But the statute in the principal case is open to no such objections. It can be no fraud on the contract clause for a state to reserve control merely over what it reads into the contract of the parties, and the making conditional of a prospective statutory right is not a deprivation of a right but a mere qualification of a gratuity.

CONSTITUTIONAL LAW — WITNESSES — PRIVILEGE AGAINST SELF-CRIMINATION. — The defendant was indicted under a federal statute, which requires anyone keeping an alien woman for the purpose of prostitution to file an informing statement with the Commissioner of Immigration, and provides that no person shall be prosecuted "under any law of the United States" on account of anything truthfully reported in such statement (1913, COMP. ST., § 8817). He demurred on the ground that the statute forces self-crimination under state laws and therefore violates the Fifth Amendment to the federal constitution. *Held*, that the statute is unconstitutional. *United States v. Lombardo*, 228 Fed. 980.

A privilege against self-crimination may be overridden only if a coextensive immunity against punishment is afforded. *Counselman v. Hitchcock*, 142 U. S. 547, 564, 585. The correctness of the principal case, then, depends upon the extent of the constitutional privilege. Clearly no privilege against self-crimination exists when the danger of punishment is remotely contingent. *The Queen v. Boyes*, 1 B. & S. 311, 330. Professedly upon this principle, several cases have refused to extend the privilege to crimination under the laws of a foreign jurisdiction. *Jack v. Kansas*, 199 U. S. 372, 382; *Brown v. Walker*, 161 U. S. 591, 608; *State v. March*, 1 Jones (N. C.) 526; *King of the Two Sicilies v. Willcox*, 7 State Trials (N. S.) 1049, 1068. *Contra*, *United States v. McRae*, L. R. 3 Ch. App. 79, 87. However, it is submitted that the true principle underlying these decisions is that the privilege embraces only the criminal laws of the forum. See *Hale v. Henkel*, 201 U. S. 43, 68; 4 WIGMORE, EVIDENCE, § 2258. For the foundation of the privilege is the danger of oppression by the

sovereign, and his sinister interest in the criminating effect of testimony ceases when he does not punish for the act on which the testimony bears. Also there are grave practical objections to the existence of a privilege interfering with the rendition of justice, whose scope is determined by heterogeneous foreign laws. See 4 WIGMORE, EVIDENCE, § 2258. Now as the criminal laws of the federal and state governments are entirely independent, this reasoning would restrict the federal privilege from extending to state, just as to foreign laws. Furthermore, the history of the Fifth Amendment shows clearly that its purpose is to protect the individual against the federal government only. See *Barron v. Baltimore*, 7 Peters (U. S.) 243. This purpose is fully effectuated when immunity from federal prosecution is granted. *Hale v. Henkel*, *supra*, 68. See 10 HARV. L. REV. 120, 121. Obviously, though, when federal courts are applying state law, crimination under state law should be the criterion of the privilege. *United States v. Saline Bank*, 1 Peters (U. S.) 100.

CORPORATIONS — INSOLVENCY OF CORPORATION — RIGHT OF TRUSTEE IN BANKRUPTCY TO RECOVER UNPAID BALANCE OF STOCK ISSUED AT A DISCOUNT. — A Minnesota corporation issued stock at ten per cent of its par value as fully paid up and non-assessable. Upon bankruptcy, its trustee seeks to recover from original holders of this stock the unpaid balance. *Held*, that he may not recover. *Courtney v. Georger*, 228 Fed. 859 (C. C. A., 2d Circ.)

For discussion of this case, see NOTES, p. 854.

CORPORATIONS — STOCKHOLDER'S LIABILITY — GIFT OF STOCK TO CORPORATION. Many of the shareholders in a state bank donated a third of their shares to the bank, to sell and build up a surplus. The bank failed while much of this stock was unsold. The creditors seek to enforce the statutory double liability on the unsold stock against the donors. *Held*, that the donors are liable. *Barth v. Pock*, 155 Pac. 282 (Mont.)

In many American jurisdictions the purchase by a corporation of its own stock is *ultra vires*. See 4 THOMPSON, CORPORATIONS, 2 ed., §§ 4075, 4076. Such is the uniform rule in England. *Trevor v. Whitworth*, 12 A. C. 409. In such jurisdictions, collateral attack, even if denied for some purposes, will be permitted, in order to avoid prejudice to the innocent creditors. See E. H. Warren, "Executed *Ultra Vires* Transactions," 23 HARV. L. REV. 495, 509. However, if the stock has been resold by the corporation such protection of the creditor is unnecessary, as the depleted assets are then restored and the purchaser substituted to liability on the stock. *Lantry v. Wallace*, 182 U. S. 536; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551. Even if the purchase is not *ultra vires*, the courts should not permit such a purchase to injure the rights of creditors, and clearly would not as to existing creditors. *Clapp v. Peterson*, 104 Ill. 26. Some courts would refuse relief to subsequent creditors. *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226. For such a purchase is really a reduction of the capital stock, on the apparent amount of which existing and subsequent creditors are alike entitled to rely. See 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 112. A gift of stock to a corporation, however, is different. If the stock is fully paid up, then no assets are destroyed, and there is no objection to acceptance by the corporation. *Rivanna Navigation Co. v. Dawson*, 3 Gratt. (Va.) 19; *cf. Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87, 93. But when the stockholders are subject to a statutory double liability or the shares are only partly paid up, a gift or release destroys the creditors' security, and is a fraud on creditors as much as if assets were directly paid out. *Bellerby v. Rowland, etc. Co.*, [1902] 2 Ch. 14. Especially is this so as the creditor, though the other shareholders are still liable on their own stock, cannot hold them on the statutory liability for the stock, held by the corporation. See *Crawford v. Roney*, 126 Ga. 763, 766, 55 S. E. 499, 501; *cf. In re Republic Ins. Co.*, 3 Biss. (U. S. C. C.) 452. Accordingly the

attempt by a corporation to release unpaid stock assessments is subject to attack by creditors. *Vick v. La Rochelle*, 57 Miss. 602; *Rider v. Morrison*, 54 Md. 429; cf. 23 HARV. L. REV. 566. Hence the principal case seems correct in not releasing the shareholders, even though the transaction was intended for the benefit of the bank. Cf. *Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452; *In re Reciprocity Bank*, 22 N. Y. 9, 18.

DEEDS — CONDITIONS SUBSEQUENT — IMPOSSIBILITY OF PERFORMANCE. — A widow conveyed land to her son and his wife on their promise and on condition that they maintain and care for her during her life, the deed to be null and void if this condition was not complied with. On the death of one grantee and the incurable insanity of the other, the grantor sues for cancellation of the deed. *Held*, that the deed will be canceled. *Huffman v. Rickets*, 111 N. E. 322 (Ind. App.).

It was early laid down that an estate subject to a condition subsequent becomes absolute if the contingency for divesting becomes impossible without fault of the grantee. See CO. LIT. 206 a; *Cromwel's Case*, 2 Coke's Rep. 69, 79 b. However, the hostility of the courts to conditions subsequent has led them to expand this principle even to cases where the condition is not one for divesting, but a contingency on which the grantee may keep the estate. *In re Bird*, 8 Reports 326; *In re Greenwood*, [1903] 1 Ch. 749. See 6 KENT, COM. 130; KALES, CONDITIONAL AND FUTURE INTERESTS IN ILLINOIS, § 277. But in thus relieving an innocent grantee from a forfeiture which he was helpless to prevent, a court should not go beyond cases where the purpose of the condition has been substantially accomplished, as when a merely collateral desire of the grantor becomes impossible. Cf. *Lynch v. Melton*, 150 N. C. 595, 64 S. E. 497. With conditions of support there is no difficulty if the beneficiary dies, though in the lifetime of the testator, as the contingency of divesting cannot happen. *Parker v. Parker*, 123 Mass. 584; *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443. But when the person to furnish support dies, the performance of the contingency on which the grantee may keep the estate becomes impossible, for the personal attention of the grantee is generally contemplated and therefore his successor cannot perform in his place. See *Glocke v. Glocke*, 113 Wis. 303, 312, 89 N. W. 118, 121; cf. *Richards v. Merrill*, 13 Pick. (Mass.) 405, 408. On the ground of this impossibility, the weight of authority would probably hold the condition excused. *Merrill v. Emery*, 10 Pick. (Mass.) 507; cf. *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726; *Collett v. Collett*, 35 Beav. 312. And it is doubtful whether the maintenance would constitute a charge on the land. *Richards v. Merrill*, *supra*. See 3 POMEROY, EQUITY JURISPR. 1246 n. Other courts, looking at the hardship on the widow who would thus be deprived of both the support and the land, have rightfully refused to relieve against the forfeiture provided in the deed, and have restored the land to her. *Cromwel's Case*, *supra*. See *Cross v. Carson*, 8 Blackf. (Ind.) 138, 139. However, it is possible that where, as in the principal case, there is both a covenant and a condition, the deed will be construed as if containing a covenant only. See *Hoyt v. Kimball*, 49 N. H. 322, 326. *Contra*, *Glocke v. Glocke*, *supra*; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787. But even if so construed, it is disputed whether equity will grant rescission and restore the land. *Bruer v. Bruer*, 109 Minn. 260, 123 N. W. 813; *Bishop v. Aldrich*, 48 Wis. 619, 4 N. W. 775. *Contra*, *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673; *Anderson v. Gaines*, *supra*.

ESTATES TAIL — UNUSUAL FORM OF ESTATE TAIL SPECIAL. — Land was devised to a man "and the heirs of his body (other than A., his eldest son)." with remainders over. *Held*, that the devisee took a valid estate tail special, from which A. was excluded. *Elliot v. Elliot*, [1916] 1 I. R. 30 (Ch. Div.).

The several kinds of estates tail enumerated in the Statute *De Donis* are not exhaustive, but only examples. See CO. LIT. 24 a; CRUISE'S DIGEST, v. 1, Tit.

2, Ch. 1, § 22; CHALLIS, REAL PROPERTY, 3 ed., 288. However, besides the estate tail general, only two classes of tails have become established in property law: an estate limited to the issue of the donee by a particular spouse, and one limited according to the sex of the issue. See CHALLIS, REAL PROPERTY, 3 ed., 290, 295. But other forms have been suggested. The court relied on a case of a gift to the heirs of the body of a man *in posterum procreandis*, where the eldest son was excluded. *Anonymous*, 3 Leon, 87. But there the youngest son took as purchaser. See 2 PRESTON, ESTATES, 450, 451. Coke mentions without comment a gift to a man and his heirs begotten by his son, as a tail special, which passes over a degree. See Co. Lit. 20 b; 2 PRESTON, ESTATES, 392, 421. And it is said there may be a tail to a man and the heirs of his body being Protestants. See 2 PRESTON, ESTATES, 362, 445. If those suggestions are sound, there is no stopping place. The donor of any estate confined to the issue of the donee may classify and discriminate between the issue as his fancy dictates; and the descent must follow the lines marked out, until the entail is barred. But there is a policy against the creation of novel estates. See *Johnson v. Whiton*, 159 Mass. 424, 426, 34 N. E. 542; Co. Lit. 27 b; 1 PRESTON, ESTATES, 472. And it seems more in accord with the present tendency of property law to allow only the established classes of estates tail.

ESTOPPEL IN PAIS — WHAT ACTS WILL ESTOP — FAILURE OF ASSIGNEE OF WRITTEN CONTRACT TO TAKE THE WRITING FROM ASSIGNOR. — The obligee of a written contract assigned his rights under the contract but retained the written instrument. The assignee notified the obligor of the assignment. Later an agent of the obligee presented the writing to the obligor and represented that there had been a reassignment. The obligor paid the agent. The assignee now sues on the contract. *Held*, that he is estopped to deny the validity of the payment. *Phelps v. Linnan*, 156 N. W. 294 (Ia.)

A person may be estopped not only to deny his own misrepresentation, but also in some cases to deny those he has enabled others to make. See EWART, ESTOPPEL, 19. Thus if a specialty, even though non-negotiable, is delivered to a third person who represents that he has authority to deal with it, the owner will be estopped to deny this authority against a person who has acted in reliance thereon. *Combes v. Chandler*, 33 Ohio St. 178; *Moore v. Metropolitan National Bank*, 55 N. Y. 41. But some courts do not raise an estoppel unless the instrument is such as by business custom passes freely. *Scollans v. Rollins*, 173 Mass. 275, 53 N. E. 863. And certainly the bailment of a chattel will never in itself create an estoppel. *McMahon v. Sloan*, 12 Pa. 229; *Ciannone v. Fleetwood*, 93 Ga. 491, 21 S. E. 76; *Baker v. Taylor*, 54 Minn. 71, 55 N. W. 823. The reason for these distinctions rests in the fundamental nature of the estoppel, the creation of which is dependent upon the deceptiveness of the situation and the fault of its creator, as opposed to the general policy of protecting property rights. Thus while the nature of chattels is such that possession is hardly more indicative of ownership than of bailment, the possession of a specialty, since the instrument is ordinarily of value only as proof of property rights, is a very strong indication of authority to pass title. A written contract presents a situation lying between those two extremes. For while possession is not a prerequisite to its enforcement, yet it is of no value except as evidence of rights therein. In the principal case, however, the assignee did not create the appearances by delivering the contract, but failed to prevent such appearances by neglecting to obtain the instrument. This however should not effect the creation of an estoppel, for given a sufficiently deceptive appearance, a duty should arise of affirmative, as well as negative action. See 18 HARV. L. REV. 140.

EVIDENCE — DOCUMENTS — SECONDARY EVIDENCE: NOTICE TO ACCUSED TO PRODUCE PRIVILEGED DOCUMENTS. — In a trial upon a charge of embezzle-

ment the prosecuting attorney stated in open court that a notice to produce an incriminating document had been served on the defendant, and asked the defendant if he had the paper in his possession. The court directed the jury to disregard the question and the statements. *Held*, that the admission of the evidence was error but was cured by the direction of the trial court. *People v. Gibson*, 55 N. Y. L. J. 573 (N. Y. Ct. of Appeals).

This *dictum* follows that of *McKnight v. United States*, 115 Fed. 972, 976. The court noticed the severe condemnation of that case by Professor Wigmore, but refused to be influenced. See 3 WIGMORE, EVIDENCE, § 2273, n. 3. For a criticism of the doctrine that a notice to produce documents in a criminal trial is in violation of the defendant's privilege against incrimination, see 29 HARV. L. REV. 211.

EVIDENCE — SUPPLEMENTING MEMORY — TESTIMONY OF BOOKKEEPER OF LARGE ESTABLISHMENT WHO HAS NO PERSONAL KNOWLEDGE OF FACTS RECORDED. — To prove an account against the defendant, plaintiff introduced in evidence the testimony of his bookkeeper, employed in a large mercantile establishment. The bookkeeper testified from his books, compiled from memoranda furnished by clerks, in the regular course of business, who alone had first-hand knowledge of the facts recorded. The memoranda had been destroyed by fire and the identity of the clerks lost. Over objection, the bookkeeper was permitted to supplement his memory from the records in his books, although he had no personal knowledge of the facts there recorded. *Held*, that there was no error. *Givens v. Pierson*, 167 Ky. 574, 181 S. W. 324.

For a discussion of the principles involved, see NOTES, p. 863.

FOREIGN CORPORATIONS — SERVICE OF PROCESS — JURISDICTION OVER CAUSE OF ACTION ARISING OUTSIDE THE STATE. — A foreign corporation doing business in the state appointed an agent to receive service of process, in accordance with state law. Service was made on this agent on a cause of action arising outside the state. *Held*, that a personal judgment may be founded on such service. *Bagdon v. Phila. & Reading Coal Co.*, 217 N. Y. 432.

Last year the Supreme Court held that where there had been no express appointment of an agent to receive process, it would be a denial of due process to extend the "implied" consent to a cause of action arising beyond the state. *Simon v. Southern Ry.*, 236 U. S. 115. See 28 HARV. L. REV. 804. Jurisdiction in the absence of express appointment has generally been justified on the ground that doing business in the state indicates a real consent to all valid conditions, as to service, etc., contained in state statutes. *St. Clair v. Cox*, 106 U. S. 350, 356. See BEALE, FOREIGN CORPORATIONS, § 266. It was urged upon the court in the principal case that in accordance with this doctrine, actual and implied consent must be coextensive, and that hence the *Simon* case compelled the court to hold the service invalid even where there was an agent expressly appointed. The court met the dilemma by declaring that "implied consent" is not real, but is the creature of law, and subject to such limitations as the law imposes, whereas consent in the principal case was actual, and voluntary. A recent case in the federal district court has taken the same distinction. *Smolik v. Phila. & Reading Coal Co.*, 222 Fed. 148. But see *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893. A person may consent, it seems, to any kind of service, for any purpose. *Tharsis Sulphur Co. v. Société des Métaux*, 58 L. J. Q. B. 435; *Montgomery, Jones & Co. v. Liebenthal*, [1898] 1 Q. B. 487 (C. A.). If, therefore, consent in the principal case was voluntary, the reasoning of the court is irresistible. The power of the state to impose such a condition to the right of a foreign corporation to do business in the state is, however, doubtful, under the recent doctrine of "unconstitutional conditions." *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56. See *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 83.

HUSBAND AND WIFE — ANTENUPTIAL AGREEMENT — CONSTRUCTION — FAILURE OF CONSIDERATION. — Under an antenuptial agreement made in New York, where the parties were domiciled, the intended wife, in case she kept her promise to marry, was to be left certain securities by the husband's will. Several years after the marriage she left him, obtained a divorce in Missouri on a ground not recognized in New York, and remarried. When her former husband died, he bequeathed the securities to a third party. The wife claims them under the antenuptial agreement. *Held*, that she is not entitled to them. *New Jersey Title Guaranty & Trust Co. v. Parker*, 96 Atl. 574 (N. J.).

Marriage or a promise to marry is a valuable consideration. *Smith v. Allen*, 5 Allen (Mass.) 454; *Magniac v. Thompson*, 7 Peters (U. S.) 348, 393. And a promise for valuable consideration to make a specific testamentary disposition will be enforced by imposing a trust upon persons claiming under the deceased promisor. *Rivers v. Executors of Thomas Rivers*, 3 Desauss. (S. C.) 190; *Emery v. Darling*, 50 Oh. St. 160, 33 N. E. 715. See *Synge v. Synge*, [1894] 1 Q. B. 466, 470, 471. But where the essential equivalent demanded in return for the promise is not received, there is a failure of consideration, and the promise becomes unenforceable. *Cf. Rice v. Goddard*, 14 Pick. (Mass.) 293; *Jones v. Buffum*, 50 Ill. 277. Now, it is arguable that the equivalent demanded in the principal case was the continuance of the marriage relation, at least until dissolved on some ground authorized by the law of New York. See *York v. Ferner*, 59 Ia. 487, 489; *Barclay v. Waring*, 58 Ga. 86, 93. But even so, as entering the marital relationship is so substantial a part of the contemplated consideration in these contracts, it is doubtful whether a subsequent separation, especially after several years, is a sufficiently essential failure to render the agreement unenforceable. Thus it is generally held that neither misconduct after the marriage nor subsequent divorce will prevent the guilty party from enforcing an antenuptial agreement or enable the injured party to set aside a marriage settlement. *Moore v. Moore*, 1 Atk. 272; *Fitzgerald v. Chapman*, 1 Ch. Div. 563; *Evans v. Carrington*, 2 De G. F. & J. 481; *cf. Smith v. Allen*, *supra*. *Contra, York v. Ferner*, *supra*. This is the more clearly correct if entering into the marriage relation is the only consideration contemplated. See *Moayon v. Moayon*, 114 Ky. 855, 871, 872, 72 S. W. 33, 37. Such would seem to be the reasonable construction of the agreement in the principal case. Again if both parties know that the marriage may be invalid, even invalidity does not cause a failure of consideration. *Ogden v. McHugh*, 167 Mass. 276, 45 N. E. 731.

ILLEGAL CONTRACTS — PUBLIC POLICY — AGREEMENT TO SUE IN CERTAIN COURTS ONLY. — A contract between a domestic and a foreign corporation contained a stipulation that no action should be maintainable against the latter except in certain courts of the foreign state. The domestic corporation now sues in the courts of its own state. *Held*, that the stipulation is invalid. *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N. E. 678 (Mass.).

The invalidity of agreements seeking wholly to deprive any sovereign of jurisdiction is settled by an almost unbroken line of authority. *Ins. Co. v. Morse*, 20 Wall. (U. S.) 445. See 1 PAGE, CONTRACTS, § 347. *Cf. United States, etc. Co. v. Trinidad, etc. Co.*, 222 Fed. 1006, 1007. Since the underlying policy is the insistence of the sovereign upon its right ultimately to determine disputes in its courts, a partial limitation upon that right, if reasonable, has not been held objectionable. So, a contract shortening the period of limitations is valid. *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.) 61; *Northwestern Ins. Co. v. Phoenix Oil, etc. Co.*, 31 Pa. 448. *Contra, French v. Lafayette Ins. Co.*, 5 McLean (U. S.) 461. Similarly a contract limiting the right of appeal is sustained. *Hostetter's Appeal*, 92 Pa. 132. See *Stedeker v. Bernard*, 93 N. Y. 589, 591. But a limitation of action to certain counties of a state has been held un-

reasonable. *Savage v. Savings Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174. But *cf. Greve v. Aetna Live Stock Ins. Co.*, 81 Hun 28, 30 N. Y. Supp. 668. Clearly this principle renders general arbitration agreements ineffectual to oust the courts of jurisdiction, however unfortunate it may be to discourage the settlement of disputes out of court. See 1 PAGE, CONTRACTS, § 348. But where the contract calls for performance of a duty to be fixed by arbitration, the clause is valid, as arbitration is then a condition precedent to any cause of action at all. *Hamilton v. Ins. Co.*, 136 U. S. 242. See A. C. Burnham, "Arbitration as a Condition Precedent," 11 HARV. L. REV. 234. Mere words, however, will not make it a condition precedent when the arbitration serves not to define the duty but to determine its infringement. See *Meacham v. Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 352, 105 N. E. 653, 655. In Massachusetts, the doctrine of *Nute v. Hamilton Mut. Ins. Co.*, *supra*, invalidating territorial limitations on suit, had been seriously undermined. *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425; *Daley v. People's Bldg., etc. Ass'n*, 178 Mass. 13, 59 N. E. 452. The present case, however, brings Massachusetts once more into harmony with the generally accepted doctrine.

INSURANCE — EMPLOYER'S LIABILITY INSURANCE — LIABILITY OF INSURER BEFORE PAYMENT BY EMPLOYER. — An employer took out insurance against losses resulting from injuries to employees. In a suit defended by the insurance company the plaintiff recovered a judgment against the employer for death of her husband. As the employer was totally insolvent, the plaintiff took an assignment of the policy and now sues the company, admitting that the policy is for reimbursement only. *Held*, that she may recover. *Davies v. Maryland Casualty Co.*, 154 Pac. 1116 (Wash.).

When, as in the principal case, the policy is indisputably an agreement merely to reimburse the employer for losses actually suffered and not to exonerate him from liability, a payment by the employer is a condition precedent to a right of action on the policy which his insolvency makes impossible of performance. *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395; *Cushman v. Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509. See *Puget Sound Imp. Co. v. Frankfort Marine, etc. Co.*, 52 Wash. 124, 131, 100 Pac. 190, 193. A feeling of sympathy for the employee, however, has led to a tendency to construe the policy as one for exoneration, whenever possible. Thus, when the policy provides that the insurer shall defend suits against the employer, express provisions that the policy is for reimbursement of actual loss have been held to apply only to liability incurred without suit, on the theory that such action is inconsistent with a mere agreement to reimburse. *Sanders v. Frankfort, etc. Co.*, 72 N. H. 485, 57 Atl. 655; *cf. Campbell v. Maryland Casualty Co.*, 52 Ind. App. 228, 97 N. E. 1026. But if, as in the principal case, the policy is construed as one for reimbursement only, it is difficult to see how the mere fact that the insurer attempts to protect his contingent liability by defending the suit can estop him from asserting the existence of this condition precedent. *Carter v. Aetna Life, etc. Co.*, 96 Kan. 275, 91 Pac. 178. A more difficult question arises when the employer is not totally insolvent, but is bankrupt and paying a dividend. Logically, the employee should be given his dividend along with the other creditors, the amount paid to him should be collected from the insurance company, a dividend in this should be given to the employee, and this process of payment and collection continued indefinitely. *Cf. Royal Bank of Scotland v. Commercial Bank of Scotland*, 7 A. C. 366. But to perform this infinite series of transactions would be impossibly cumbersome, while to compute the result and assess compensation from the insurance company for all these sums at a single transaction would involve the logical inconsistency of forcing indemnity at a time when the employer could not have paid the whole amount assessed. An Amer-

ican court, recognizing these difficulties, has applied a rule of thumb by which the employee may recover from the insurer as great a percentage of his judgment as is given to the other creditors out of the remaining assets of the employer. *Moses v. Traveller's Ins. Co.*, 63 N. J. Eq. 260, 49 Atl. 720. See 18 HARV. L. REV. 154; 59 CENT. L. JOUR. 5. Since this involves no greater inconsistency, and reaches practically the same result, it seems preferable.

INTERSTATE COMMERCE — DISCRIMINATION AGAINST SHIP BROKERS — EXCLUSIVE STORAGE FACILITIES ON A CARRIER'S WHARF. — A railroad, which, by owning a wharf connecting with ocean freight carriers was able to issue through bills of lading, granted the exclusive storage facilities on the wharf for "parcel" freight, to a ship broker, but gave equal facilities to all for "full-cargo" shipments. The plaintiff, another ship broker, sues to recover damages for this discrimination. *Held*, that he may not recover. *Gulf, etc. R. Co. v. Buddendorff*, 70 So. 704 (Miss.).

Despite the general statutory and common-law prohibitions against discrimination, public carriers have been allowed discretionary power in the assignments of certain of their facilities. *Audenried v. Philadelphia & Reading R. Co.*, 68 Pa. St. 370. Thus the grant of exclusive carriage privileges at a station has been upheld by the courts. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 296; *Ex parte Painter*, 2 C. B. (N. S.) 702. And there is considerable authority sustaining a railroad in its assignment of exclusive privileges to an express company. *Express Cases*, 117 U. S. 1, 29; *Atlantic Express Co. v. Wilmington, etc. R. Co.*, 111 N. C. 463, 16 S. E. 393. These cases, however, rest in part on the ground that a railroad is a common carrier of freight and not of parcels sent under special supervision. See *Sargent v. Boston & Lowell R. Co.*, 115 Mass. 416, 422. The discrimination made in the principal case as to storage facilities for "parcel shipment" only, would seem to be within this reasoning. But the general current of authority is contrary to the argument of the *Express Cases*. *Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 430. It would seem as if the true basis of the *Express Cases* must be the public welfare balanced against individual discrimination. See *Sandford v. Catawissa, etc. R. Co.*, 24 Pa. St. 378, 382. The extremes between which variation in the right of discrimination is possible seem to have one limit in the cases holding that competing carriers have no right to each other's wharves. *Weems v. People's Steamboat Co.*, 214 U. S. 345. The other limit is determined by the cases denying a carrier's right to discriminate between patrons, even though one's business is very large. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — CONSCIOUS VIOLATION OF A STATUTE AS "WILFUL MISCONDUCT." — An employee was killed by an accident in the course of and arising out of his business while driving an automobile at an illegal rate of speed. The statute refuses compensation if the "wilful misconduct" of the employee was a proximate cause of the accident (1911-1913 CALIFORNIA LAWS, CONSOLIDATED SUPP., p. 1420). Compensation was awarded his widow. *Held*, that the award be set aside. *Fidelity and Deposit Co. v. Industrial Accident Commission*, 154 Pac. 834 (Cal.).

In several of the United States recovery under the workmen's compensation acts is refused if the accident is attributable to the "wilful misconduct" of the workman. See 1 BRADBURY'S WORKMAN'S COMPENSATION, 2 ed., 518. If the misconduct contemplated by these statutes is solely a wrong to the employer and his business, it is clear that the mere violation of a statute is not necessarily misconduct, as the employer might have acquiesced in the violation. See

George v. Glasgow Coal Co., [1909] A. C. 123, 129. But if it means negligence from the point of view of the state, the breach of a statute would, by the best authority, be conclusive. See E. R. Thayer, "Private Wrong and Public Action," 27 HARV. L. REV. 317, 321-26. However, in either event, the subjective element of conscious wrong required by the word "wilful" is not necessarily present in every violation of a statute. See TERRY, ANGLO-AMERICAN LAW, §§ 216-17. See *contra*, *Dobson v. The United Collieries*, 43 Scot. L. R. 260, 264. For the fiction that everyone always knows the law is of no aid in a search for a subjective reality. But if the workman was aware of the statute and deliberately broke it without sufficient excuse from his employer, his act would necessarily be both "wilful" and "misconduct." Cf. *Great Western Power Co. v. Pillsbury*, 149 Pac. 35 (Cal.) In the principal case, as such appear to have been the facts, the decision, under the California law, would seem to be correct. But the problem is further complicated by a question of degree in the various jurisdictions which limit the exception to "serious" as well as "wilful misconduct." *Nickerson's Case*, 218 Mass. 158, 105 N. E. 604; *Casey v. Humphries*, 6 B. W. C. C. 520; *Mitchell v. Whitton*, 44 Scot. L. R. 955; *Johnson v. Marshall, etc. Co.*, [1906] A. C. 409.

POLICE POWER — INTERESTS OF PUBLIC TASTE — BILLBOARD AND BUILDING REGULATIONS. — A statute empowered the Collector of Internal Revenue to remove "any sign, sign board or billboard, displayed or exposed to public view which is offensive to the sight or otherwise a nuisance." PHIL. ACT No. 2339, § 100, subsection 5. A bill was brought to enjoin the enforcement of this statute. *Held*, that it is constitutional. *Churchill v. Rafferty*, 14 Phil. Gaz. 383 (Phil. Sup. Ct.).

An ordinance was passed forbidding the erection of unsightly extensions on residence streets without a permit. The plaintiff was refused a permit, and sues to have the decision reviewed. *Held*, that the ordinance is unconstitutional. *Lavery v. Board of Commissioners*, 96 Atl. 292 (N. J. Sup. Ct.).

For a discussion of these cases, see NOTES, p. 860.

PROCESS — VALIDITY AND AMENDMENT — MISDIRECTION. — The defendant was properly served by the sheriff of his own county with process directed to the sheriff of another county. *Held*, that the process is voided by the misdirection and cannot be amended so as to validate the judgment obtained on it. *Caldwell v. Alexander Seed Co.*, 87 S. E. 843 (Ga. App.).

Some jurisdictions which hold that a defective direction invalidates process, have refused to allow any later amendment of the process return on the theory that since the original process is wholly void there is nothing to amend. *Anthony v. Beebe*, 7 Ark. 447; cf. *Strauss Brothers v. Owens*, 6 Ga. App. 415, 65 S. E. 161. This reasoning, however, would apply with equal force to defective pleadings which, it is generally conceded, may be amended, unless the amendments would change the cause of action or the defense to the substantial injury of the party opposing it. See PHILLIPS, CODE PLEADING, §§ 312, 313. Now the substantial requirements of process are formal notice of the action to the defendant, by the proper authorities and in due time. Any other elements to a process must be purely matters of form. As such, therefore, they should clearly be open to amendment, and the majority of courts have so held. *Parker v. Barker*, 43 N. H. 35; *Chadwick & Co. v. Divol*, 12 Vt. 499. See *Mitchell v. Long*, 74 Ga. 94, 97; cf. 5 PARKS, GA. CODE (1914), § 5709. One court has even decided that there need be no amendment; a process though improperly directed to a sheriff was held valid and binding when served by a constable, or any officer to whom it might properly have been directed. *Hagan v. Stuart*, 4 Ky. L. Rep. 834.

TRIAL — VERDICTS — AFFIDAVITS OF JURORS TO SHOW "CHANCE" VERDICTS. — An affidavit of nine jurors stated the following: The nine jurors were for the plaintiff and the others for the defendant. Differing on a proposition of law, they all agreed to ask for an additional instruction and to give their verdict according to the instruction. The instruction was favorable to the defendant, and a verdict was given for him. The nine would not have consented to this verdict but for the agreement. *Held*, that the affidavit may be received and that the verdict is invalid. *Garden v. Moore*, 156 N. W. 410 (Ia.).

Where it is shown that the jurors made and acted on an agreement to determine by chance the verdict or its amount, the verdict will be set aside. *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897; *Merseve v. Shine*, 37 Ia. 253; *City of Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252. The objections to "chance" verdicts are that the agreement made bears no relation to the merits, and that the jurors feel precluded by the agreement from further consideration of the case. Where the jurors are divided because they differ as to a point of law, if they agree to follow, and do follow, the judge's instruction on this point, only the second objection would apply. This objection in itself, it is submitted, is not a sufficient reason for the court to assume the danger incident to disturbing the verdict. But if, as the court assumed in the principal case, the agreement of the jurors is to follow an instruction irrelevant to their disagreement, the verdict is a true "chance" verdict. In most states, in the absence of a statute, affidavits of jurors are not admissible to show their own misconduct in rendering a verdict. *McDonald, etc. v. Pless*, 238 U. S. 264; *Birmingham, etc. Co. v. Moore*, 148 Ala. 115, 130, 42 So. 1024, 1029; *Hull v. Larson*, 14 Ariz. 492, 131 Pac. 668. Such statutes, however, are not infrequent in the case of quotient verdicts, while some states, including Iowa, have obtained the same result by decision. *Wright v. The Illinois, etc. Tel. Co.*, 20 Ia. 195; *Elledge v. Todd*, 1 Humph. (Tenn.) 43. See DEERING, CODE CIV. PROC. CAL., § 657; REM. & BAL. CODE (Wash.), § 399.

TRUSTS — RIGHTS AND LIABILITIES OF THIRD PARTIES — RECOVERY AGAINST TRUST ESTATES FOR SERVICES RENDERED THE TRUSTEE. — The beneficiaries of a trust estate brought a bill in equity for the removal of the trustee. The trustee, as such, engaged an attorney who successfully defended him. The attorney now seeks to recover for his services in an action against the trustee in his representative capacity. *Held*, that he cannot recover. *Jessup v. Smith*, 170 N. Y. App. Div. 605.

Except as expressly authorized by the instrument creating the trust, a trustee cannot give third persons with notice direct rights against the trust estate. See 2 PERRY ON TRUSTS, § 815 (b). However, in an accounting between the trustee and the *cestui que trust*, exoneration may be given the trustee for liabilities incurred under contracts which were proper, though not authorized. This right to exoneration, being an equitable asset of the trustee, may be reached by a bill against the trustee and *cestui que trust*. *Fairland v. Percy*, L. R. 3 P. & D. 217; *Laible v. Ferry*, 32 N. J. Eq. 791. See *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115. But such remedy is secondary, and contingent upon the failure of the creditor's primary right against the trustee as an individual; for the adjudication of rights between the trustee and *cestui que trust* should come in their regular accounting, and not at the behest of any creditor. See L. D. Brandeis, "Liability of Trust Estates on Contracts made for their Benefit," 15 AM. L. REV. 449, 457. A few cases hold that there is a direct right against the trust estate founded on unjust enrichment, when the trustee is insolvent and the derivative right through him is valueless because of claims of the estate against him. *Manderson's Appeal*, 113 Pa. St. 631, 6 Atl. 893; *Courier-Journal Job Printing Co. v. Columbia Fire Ins. Co.*, 54 S. W. 966 (Ky.) See A. W. Scott, "Liabilities in the Administration of Trusts," 28 HARV. L. REV. 725, 740. In

the principal case it did not appear that the estate had been enriched or that the creditor's primary right against the trustee as an individual would fail in any respect. The denial of a right against the trust estate on either ground was therefore proper.

TORTS — LIABILITY OF A MAKER OR VENDOR OF A CHATTEL TO A THIRD PERSON INJURED BY ITS USE — LIABILITY FOR INJURY RESULTING FROM A DEFECTIVE AUTOMOBILE WHEEL. — The defendant, an automobile manufacturer, sold a car with a defective wheel to a dealer. The defendant did not make the wheel, but was negligent in inspecting it. The dealer resold to the plaintiff, who was injured as a result of the defect. For this injury, the plaintiff sues. *Held*, that he may recover. *McPherson v. Buick Motor Co.*, 54 N. Y. L. J. 2339 (N. Y. Ct. of Appeals).

For a discussion of the principles involved, see NOTES, p. 866.

TORTS — WILFUL INTERFERENCE WITH PLAINTIFF'S BUSINESS — JUSTIFICATION — CHURCH INTERDICT AGAINST NEWSPAPER. — The defendants, bishops of the Roman Catholic Church, published in a pastoral letter an interdict against the plaintiff's newspaper. The paper was condemned as "greatly injurious to the Catholic Faith and discipline," and all Catholics were forbidden to read, keep, or subscribe thereto, upon pain of committing sacrilege. The plaintiff now sues for damage to his business. *Held*, that he cannot recover. *Kuryer Pub. Co. v. Messmer*, 156 N. W. 948 (Wis.).

In dealing with the modern questions involved in the interference with trade relations, there is a growing tendency to approach the problem from the premise that all harm intentionally caused by active conduct is actionable unless justified. *Walker v. Cronin*, 107 Mass. 555, 562; *Tuttle v. Buck*, 107 Minn. 145, 149, 119 N. W. 946, 947. See POLLOCK, TORTS, 8 ed., 21. But there seems to be no well-settled legal principle as to what constitutes a justification. See *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077. In an effort to find a general rule, the courts have attempted to apply various formulæ. See *Allen v. Flood*, [1898] A. C. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119. Perhaps the most rational of these justifies the intentional injury only if incidental to a legitimate business endeavor. *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369; *Keeble v. Hickeringill*, 11 Mod. 74; *Quinn v. Leathen*, [1901] A. C. 495. But what is "legitimate" and "incidental"? It seems preferable to determine whether or not the interference is actionable primarily by the relative social utility of the success of the defendant's purpose on the one hand and the injury to the plaintiff's lawful business on the other, and not upon an attempt to justify, to interpret, or to apply such uncertain terms as "unmixed malice," "unlawful motive," or "conspiracy." *Tuttle v. Buck*, *supra*. See O. W. Holmes, "Privilege, Malice and Intent," 8 HARV. L. REV. 1, 8. The principal case presents essentially the same problem, and should be decided upon the same considerations; the public policy against judicial interference with essentially church matters should weigh in the balance. There is perhaps an analogy in the privilege accorded to church communication in the law of libel. See 29 HARV. L. REV. 561.

BOOK REVIEWS

THE LAW OF ARCHITECTURE AND BUILDING: A CONSIDERATION OF THE MUTUAL RIGHTS, DUTIES AND LIABILITIES OF ARCHITECT, OWNER AND CONTRACTOR, WITH APPENDICES AND FORMS. By Clinton H. Blake, Jr. New York: The William T. Comstock Co. pp. xxxviii, 314.

The subtitle of this work better defines its purpose, since it treats of a relatively narrow field, as the respective rights, one against another, of the architect, contractor, and owner.

The reviewer's function is conceived, first, to enumerate informally the principal features, and then to comment fairly upon its avowed purpose, the methods of accomplishment or its failure to do so.

The book is divided into three principal parts:

- I. The status of the architect toward the owner.
- II. Relations of owner with contractor.
- III. Liens.

In Part I, the principal chapters are: the "Architect as an Agent," which is well handled; the "Compensation of the Architect," — certainly a matter of vital interest to him and carefully covered; and the "Duties and Liabilities of the Architect." These are the most prominent chapters of the book, and receive from twenty to twenty-five pages each.

As between the owner and contractor, the general relation receives sixteen pages, with chief attention given to builder's compensation, architect's certificate, and damages. These seem reasonably well covered, but the requisites of a construction contract, seemingly a natural foundation to the whole book, receives but four pages. Another chapter, however, of seven articles, gives eleven pages to the terms and operation of the building contract. Here, the principle of arbitration, extras, suspension, liquidated damages, and right of owner to complete are the topics treated, apparently well in the main. The part devoted to liens comprises forty pages, and has greater thoroughness than any other single topic, covering in turn liens of architect, of contractor, and sub-contractor. The text proper closes with five pages of meaty advice to the architect upon legal difficulties, summarizing to a certain extent the foregoing topics of the book.

Nearly a hundred pages are then given to various appendices. The full opinions in certain cases are cited, and occupy thirty pages. The merit of this is not obvious, since the lawyer could readily read the original reports — while the layman would be about equally at sea after reading them as before. Being only four in number, the variety of points covered is very limited.

Thirty-four pages are given to Standard Documents, referring to the uniform or standard form of agreement and setting out in full the general conditions of an architectural contract as adopted by the American Institute of Architects. The reviewer feels that this is an especially valuable piece of material, but is not so sure that it properly belongs in a text purporting to declare the law covering the architect and builder. The same remarks apply to the Schedule of Minimum Charges, the next appendix. Twenty pages then set out various Legal Forms commonly useful in building operations. There is also a well-arranged index.

The success of writing is to be measured by its purpose. Here the purpose is said to be (1) to help architects keep out of legal troubles, and (2) to make a compilation of architectural law useful to attorneys. From the special introduction by an architect, the aim first stated seems to be the leading one. The author must then state technical matters in a non-technical way for the layman. Failing to write intelligently for him, then the layman must still go

to the attorney — the book has failed to serve him. He should have gone to the attorney in the first place.

From the viewpoint of several years' experience in trying to teach certain elementary legal principles to engineering students both correctly and promptly — an incident of which was the production of a textbook for that purpose — the reviewer doubts whether the author has as fully accomplished his first purpose as he doubtless has the second.

His book seems written by one trained in the "case system" of learning law. This method studies at first hand frequently elaborate and complex cases, often bringing in many extraneous facts and legal factors. After a strong diet of close cases, which have in fact taxed the minds of eminent jurists (and are chosen for that reason), the student is supposed to formulate the principles illustrated. In this strenuous task most students are hopeless failures — hunters afield not knowing what game they are in quest of.

Those not intellectual giants need first a clear-cut statement of legal principles or rules in the abstract, with some argument for the reason and necessity for such principles. These later are clothed by the narration of actual events, such as befell in a real case. This is the "textbook system" — an easier path to the heights of legal knowledge.

These facts probably explain why much material in this book is not in a form more readily comprehensible to the lay reader, such as an engineer or architect. The author rather commonly states his principle last, if at all, and then frequently not comprehensively. He gives numerous details of decided cases, but does not string them together upon a cord of reasons, narrative, or connected criticism, which, however, the layman must chiefly rely upon if he is to grasp them clearly and in proper perspective. Nor does he commonly explain technical legal phrases when used.

True, his legal friends will not need any of this, but the architects are probably not so fortunate. They will see something, but "as through a glass, darkly."

Similarly the style evidences another fact worthy of at least passing comment.

Lawyers perforce spend countless hours poring over the language of perhaps poorly educated and frequently centuries-dead jurists. If time *was* money, great judges gave no evidence of it in their ponderous and obscurely written opinions. Unfortunately for us, many modern lawyers succumb to this pernicious influence, tending toward involved and obscure expression. The lawyer becomes immune to this style, yet indeed *his* readers must suffer later. So here, sentences close to two hundred words in length are not uncommon, but they do *not* assist the layman to follow the thought — in fact they frequently obscure it, and the ideas are easily lost sight of before the end is reached.

In conclusion: The author has made a praiseworthy effort. It might have been more fruitful if in harmony with the criticisms made. On the whole, attorneys will probably find it of greater usefulness than practicing architects.

JAMES IRWIN TUCKER.

THE PRINCIPLES OF EQUITY. By Edmund H. T. Snell. London: Stevens and Haynes Law Publishers. 1915. pp. xli, 579.

It is unfortunate that this admirable treatise on equity jurisprudence, now in its seventeenth edition, is not better known to American students and practitioners of law. Although strictly an English textbook in that only English cases are cited, the cases are well selected and carefully confined to those decisions in which the great principles of equity jurisprudence have been developed and enlarged. The expression is clear and direct, showing the accuracy of

thought of a true scholar, very different from the haphazard style which characterizes so many of our American text-writers. Confined to less than 600 pages, its breadth of scope is made possible only by its conciseness of expression. There is included, as well as the more strictly equitable field of trusts, specific performance, injunction and accident and mistake, such subjects as the administration of assets, conversion and reconversion, election, the rights of married women, infants and lunatics, mortgages, suretyship and partnership. Much of the discussion turns upon interests in real property, as, for instance, the theory of trusts is based largely upon the law underlying marriage settlements. In fact, the book contains much of interest to the student of property law. The principles of equitable conversion and reconversion are well stated. Conversion may occur only in four instances: (1) where realty becomes partnership property, (2) under an order of court, (3) under a trust with a direction to sell or purchase, and (4) under a contract to sell or purchase. In the last instance, only if specific performance is possible will there be a conversion. "A contract does not operate to convert the property unless it is one of which specific performance would be ordered." The author accepts the doctrine of *Townley v. Bedwell*, 14 Ves. 590, however, as law, but rightly considers it anomalous, for it is said: "If, however, the option is not exercised until after the lessor's death, on principle the lessor's interest ought to be treated as realty, for there was, at the moment of his death, no contract of which specific performance would be ordered." An interesting distinction is taken in the case where realty is given by will to trustees upon trust to sell and divide the proceeds between A. and B. equally, and A. dies in the testator's lifetime and there is a lapse of the gift to him, but B. outlives the testator; and where the gift is by deed instead of by will. Now if there is a total failure of the objects for which conversion was directed, no conversion takes place, since there is "no one who can insist on its character being altered." But the rule apparently does not work the other way, certainly as regards gifts by will, for in the above case, although B. could insist upon the conversion, yet it was decided in *Ackroyd v. Smithson*, 1 Bro. C. C. 503, that the property goes to the testator's heir at law and not to his next of kin. This principle is based upon the apparent intent of the testator, for if A. could not take there was no intention that the proceeds go to the testator's next of kin. Yet if "the testator's heir dies before receiving his share of the proceeds of sale, his share will be treated as part of his personalty, whether the trustees of the will have sold the realty in his lifetime or not, for the failure of the objects of conversion being partial only, the trustees are under an enforceable duty to sell, and the property is therefore converted into personalty, and the persons claiming the heir's realty have no equity to reconvert it, being merely volunteers." Where the gift is by deed, however, with a direction to sell and convey, and there is a partial failure, the property will revert to the settlor in its converted form. The test would seem to be, therefore, whether there is anyone who can demand that the character of the property be altered.

It is interesting to note that the author considers the twelve maxims of equity are based substantially on two: "Equity will not suffer a wrong to be without a remedy" and "Equity acts *in personam*." He hints at a common confusion of thought, by warning us that this last maxim should not be construed as determinative of the *nature* of an equitable right, for "this highly important maxim is descriptive of the *procedure* of equity" only. It is an important distinction to keep in mind when considering such problems as whether the right of a *cestui qui trust* against the trustee is a right *in rem* or *in personam*. Unquestionably the *cestui* must proceed against the person of the trustee, but the more recent and sounder view would seem to be that the *cestui's* interest is an equitable interest in the trust *res* itself. In the discussion of the maxim "Where the equities are equal, the first in time shall prevail," the English doc-

trine of prior equities is followed to its logical conclusion. Hence, on the sale of an equitable interest subject to a mortgage, the equitable mortgagee is said to prevail over the transferee of the *res* for value without notice. The reason given is that in equity the doctrine of tortious conveyances does not apply, hence the mortgagor can convey no more than he has. Unfortunately the right of a beneficiary under an equitable trust as against the transferee for value without notice is not discussed. It would seem that on the same reasoning as in the case of an equitable mortgagee, the beneficiary should prevail if his interest be considered a property right in the trust *res* itself, although it might well be argued that equity should follow the law in protecting a purchaser for value without notice.

On the whole, the book is worth a careful study. Well indexed, well written, with a good selection of cases and statutes, it gives the reader a comprehensive idea of those principles of law underlying our equity jurisprudence.

M. B. ANGELL.

FEDERAL TRADE COMMISSION MANUAL. By Richard S. Harvey and Ernest W. Bradford. Washington: John Byrne & Co. 1916. pp. xxii, 457.

FEDERAL TRADE COMMISSION, ITS NATURE AND POWERS. By John M. Harlan and Lewis W. McCandless. Chicago, Callaghan & Co. 1916. pp. vi, 183.

The constitutional status of the Federal Trade Commission, the scope and limits of its powers and duties, and the meaning of the new anti-trust legislation which it is called upon to administer, have as yet received almost no judicial definition. A few cases in which the Clayton Act was involved have been reported. But the juristic development of the administrative and substantive provisions of the legislation of 1914, a development corresponding to that which followed the establishment of the Interstate Commerce Commission, lies in the future. For the present, lawyers must look to the text of the Federal Trade Commission Act and Clayton Act, and to the large background of decisions under the Sherman Law, the Interstate Commerce Act, and at common law for an understanding of the scope of the new legislation.

For this purpose the book of Messrs. Harvey and Bradford is a valuable aid. To a thorough analysis of the structure and details of the statutes is added a comprehensive review of the common law of unfair trade and monopoly, a historical sketch of the Sherman Law and its judicial interpretation, and an examination of the specific prohibitions contained in the Clayton Act, in the light of existing decisions. The relation of the statutes to patent and copyright law, to the law of trade marks and unfair competition, and to the struggle of labor and capital is adequately treated. Since industrial legislation is no longer framed abstractly in a legal vacuum, the authors have wisely extended their discussion beyond the strictly legal phases to the economic and social background on which the statutes are projected. A series of appendices contains in convenient form texts of the Trade Commission and Anti-trust acts, the Commission's Rules of Practice, the report of the Senate Committee on Interstate Commerce, on anti-trust legislation, and extracts from the ensuing debates in Congress.

Messrs. Harlan and McCandless have covered a narrower field, but in a no less useful manner. The book is designed as a guide to the general structure and theory of the statutes, rather than as a detailed reference manual. The underlying thesis of the authors is twofold: (1) The substantive provisions of the Clayton and Trade Commission Act do no more than re-enact the Sherman Law, as interpreted by the courts. The "rule of reason" is embodied in the Clayton Act by provisos extending the specific prohibitions only to transactions which "substantially lessen competition" or "tend to create a mo-

nopoly." It may be implied in the general purpose of the Trade Commission Law, prohibiting "unfair methods of competition," for the law was designed to strike at practices which were injurious to the public, and not to merely private wrongs. This is indicated by the provision that the Commission shall institute proceedings only where it is "in the interests of the public." (2) The administrative provisions of the laws are not designed to make the Commission a judicial tribunal, but to give it merely administrative functions; and the provision authorizing review of its proceedings by the Circuit Court of Appeals does not devolve on that body appellate jurisdiction, but gives it original jurisdiction over the controversy, the Commission being the complainant. These two theses are clearly developed and forcibly maintained.

G. C. HENDERSON.

CASES ON THE LAW OF PUBLIC SERVICE. By C. K. Burdick. Boston: Little, Brown & Company. 1916. pp. xiii, 544.

The present-day law school case book marks a reversion to type. Its original prototype was compiled solely as a shop tool for the law school. Then followed a generation of case books approximating treatises in their scope and elaborateness of detail. Such works as Gray's Cases on Property, Ames's Cases on Bills and Notes, and Thayer's Cases on Evidence are much more than mere skeletons upon which to hang law courses. In the present generation, however, the case book has again become the mere superstructure for the course. As a consequence, it has become the fashion for every law instructor who has reached the age of pedagogical puberty to compile his own case book adapted to the purposes of his own course. The result is regrettable although perhaps inevitable. For the practitioner, who in these busy days must have his law predigested, the case book is useless. To the student the substantial, thorough-going volumes of Gray and Ames represent too great a capital outlay too soon "scrapped." Moreover, the idea that case books must be kept abreast of the rising tide of judicial decisions and the shifting sands of the curriculum has also tended to destroy the incentive to more permanent works. Yet, strangely enough, Ames's Cases on Bills and Notes, Ames's Cases on Partnership, and Thayer's Cases on Evidence have seen service in the Harvard Law School for thirty-five, twenty-nine, and sixteen years respectively without substantial revision, and their age has not seriously impaired their usefulness. While the old saw about leading horses to water still holds good, it is also true that many a man will eat what is put before him when he would never think of asking for it. May it not be a false economy to cut the cloth to fit the course too closely? Might it not be worth while, by furnishing him with a case book which will serve as a full historical guide to its particular field of law rather than as mere analytical outline, to tempt the student to stray from the narrow alleys of the classroom into the more secluded and less traveled lanes of the law? There are those who still believe it is worth while: witness Wigmore's Cases on Torts.

Doubtless the law of public utilities, or public service, as Professor Burdick calls it, is in need of less historical elaboration than some other branches of the law, but one cannot conceive of its development being adequately traced in a selection of cases compressed within less than five hundred pages. An inspection of the index of Professor Burdick's new case book, which, by the way, like most case-book indexes, is entirely inadequate, reveals the secret. The liability of the public utility for injuries to the person or property of its patron in the course of the undertaking is entirely omitted, probably because the subject is regarded as adequately treated in the course on Torts. This stamps the book as of the present generation of case books (better, perhaps, "course

books"), and it is only fair to test it by the standard of such books. So regarded, it seems to be a carefully and conveniently arranged selection of cases, adequately annotated and up-to-date. The arrangement is not greatly different from that usually pursued in courses on the subject. The first 86 pages are devoted to the bases of public-service duties, the next 130 pages to the obligations to render service and the right to make rules for such service. Then follow nearly 200 pages of cases on rates and discrimination. Finally there are nearly 100 pages of cases on the duty to furnish adequate facilities and the right to withdraw from the service. The book also contains the texts of the Act to Regulate Commerce and the Elkins Act. As the working basis for a course on public utilities the book fulfills its purpose well enough.

C. A. McLAIN.

VICARIOUS LIABILITY. By T. Baty. Oxford: Clarendon Press. 1916. pp. 244.

The subtitle describes this book as "a short history of the liability of employers, principals, partners, associations, and trade union members, with a chapter on the laws of Scotland and foreign states." Obviously the bringing together of these diverse but allied topics is well worth while. The book is indeed an interesting one. Its interest is not diminished by its being not written, it would seem, from the merely historical point of view, but rather with a disputatious purpose. The preface frankly indicates the character of the book by saying: "The present-day discussion of the question of the liability of Trade Unions is hampered by the constant and unwarranted implication that liability on the part of principals for the wrongful acts of those who are employed by them is a sort of natural law. . . . The society member's asserted liability is only an illogical inference from that of shareholders; the shareholder's liability is only a variety of the liability of the partner; the partner's liability is only *qua* principal, and began in 1833; the principal's liability is only *qua* master; and the master's liability is based on a tissue of misapprehensions and began in 1692." This polemical flavor persists throughout the book and with honesty puts the reader on his guard for unconscious excesses of emphasis. The author's enthusiasm for making out his case brings results which, though perhaps misleading for beginners, in no way injure a reader of experience. Thus he complains that in *Jones v. Hart*, 2 Salk. 441, 1 Ld. Raym. 738, Holt 642, Holt, C. J., by way of *dictum* "clearly lays down the modern principle, which thus rests on the precarious foundation of an *obiter dictum* in a *nisi prius* case"; and this may sound serious enough to the beginner, who may think that the proper metaphor for law is a building upon a foundation, whereas in truth a more useful metaphor is a stream — a river — not to be spoken of disrespectfully because it began in a small spring. Again, Y. B. Trin. 44 Edw. III 20, pl. 16, is cited by the author as proving that "the taking of unlawful toll at a mill by a servant could not prejudice the master"; whereas the action was brought not against the master but against the servant, and the servant defended himself under the master's right to take toll, and the statement by Thorpe, C. J., that an action would not lie against the master was undoubtedly a *dictum*, whether right or wrong. Still again, *Bush v. Steinman*, 1 B. & P. 404, certainly a grotesque distortion of *respondeat superior*, is discussed without any indication that it was distinctly discredited by *Reedie v. London & Northwestern Railway Co.*, 4 Exch. 244. Finally, it is certainly a misfortune that such an interesting work should have as its basic conception the doctrine that law either should never have grown at all, or at least should have ceased to grow in or before 1692. Yet all these comments, and more, should not tend to conceal the fact that here is a book of great interest

to any one who wishes to find the old familiar cases, and new ones also, discussed in a lively way. Thus no one would wish to miss the searching discussion of a servant's "authority" to commit wrongs (Chapter V), or of the ambiguous expression "scope of employment" (Chapter VII), or of the ethical justifications for *respondeat superior* (Chapter VIII).

EUGENE WAMBAUGH.

YEAR BOOKS OF EDWARD II. Volume XI, 5 Edward II (1311-12). Edited by William Craddock Bolland, being the volume for the year 1915 of the publications of the Selden Society. London: Bernard Quaritch. 1915. pp. xlix, 257.

In this volume Mr. Bolland has a less picturesque subject matter than in his "Eyre of Kent"; the cases are mostly real actions, the learning is obsolete, the facts undramatic. What does it interest us, whether by essoining himself the lord estopped himself from claiming a villain, or whether the King or the Archbishop of Dublin could present to a Deanery, or whether the Abbot of Holland could have his writ of mesne? We cannot get as excited as Beresford, C. J., about a point of pleading on a writ of replevin of cattle. Mr. Bolland himself appears to regard this as a rather uninteresting volume; his introduction is not in his best vein. There is nothing about it to make us forget that our own time will be past before the Selden Society gets through with Edward II; and of Richard II but one year has been printed. (And the reviewer for one is grateful for this publication, maugre its faults; life is evidently too short to wait for perfection, and get so little.) Should not the Selden Society take note of the fact that the noble historic impulse which led to the formation of the society is in danger of death from inanition? Give us more such noble volumes, such fruitful discussions, cases so full of life as those the society gave us in its earlier years, and we may hope for a new birth of historical scholarship in the younger men. Starve us on vapidty, or on dribbles, and we shall all join the social justiciaries.

But there is no need of despair over this volume. Read aright, it is the Epic of Beresford. That lusty conservative fills each page with some expression of his vigorous mind. "At what time," he asks, "was the view granted in a writ of intrusion? In the time of the Antichrist? . . . This is a new writ, and a truly wonderful writ," he observes. "Never will I uphold this writ." An agreement drawn by a soldier is brought before him. "Men-at-arms are clever hands," he allows, "at making a mess of work of this sort." He is alive to his duty as professor of law, teaching the apprentices in the Crib. "One thing I tell you for the learning of the young men that be about us," — and he bettered his promise by telling two things. He could make a pun or a jest barely verging on the delicate; he could illustrate a point by an anecdote of Roger de Heugham and the unjust judges; he could make over a statute to correspond with the unexpressed intention of the legislator.

If all the unpublished Year Books were published we might not be vastly enlightened legally; but we should be wondrous wise as to the life of the English people, and we should know pretty well a number of strong, racy personalities who sat on the bench and molded our law for us. They would be worth knowing.

J. H. BEALE.

RIGHTS AND DUTIES OF NEUTRALS. By Daniel Chauncey Brewer. New York: G. P. Putnam's Sons. 1916. pp. ix, 1-248.

This small volume consists largely of papers prepared for the Army and Navy Journal since the outbreak of the present war. It is not, therefore, to

be expected that the book should be in substance or form a legal treatise. References to decided cases and other authorities are few in number.

In so far, however, as the avowed purpose of the book is to draw attention to issues which might involve the nation in war, it well serves that purpose, for it discusses many subjects of great importance, involving the relations of belligerents and neutrals, such as the sinking of merchant ships, blockade in the sense which it bore before the present war and in the sense in which it is now being often employed, belligerent use of neutral flag, and the plotting of belligerent agents in neutral territory. All these are discussed in an interesting manner.

While the author insists that for the good of the world it is desirable and necessary that neutral rights should be defined and enforced, he is persuaded that that result can never be accomplished unless neutral nations are prepared to assert their rights and to enforce the assertion to the extent of joining in battle in vindication of the principles to which they are committed (p. 248). But though a champion of neutral rights, he is not a mere partisan, for he says the neutral must acquire the habit of putting itself in the place of the nation at war and seek to understand the difficulties it is trying to overcome — its motives — and the arguments by which it has convinced itself of the propriety of its action (p. 69).

The statement (p. 222) that Sir *Walter* Scott decided *The Boedes Lust*, 5 C. Rob. 245, is probably to be ascribed to the compositor.

JENS I. WESTENGARD.

THE SETTLEMENT OF ESTATES IN MASSACHUSETTS. By Guy Newhall. Boston: G. A. Jackson. 1915. pp. xxxi, 339.

The main part of this admirable little book deals with the powers and duties of executors and administrators in Massachusetts. We know of no clearer short account of these matters than is here given. A lawyer or layman who wishes to put an estate through the Massachusetts probate court will be helped at every step by this simple yet thorough guide. No attempt is made to cite more than the principal cases, but all the statutory references are given. Yet the book is not like many other manuals dealing with a particular jurisdiction, — a mere stringing together of paraphrased statutory sections. The problem that the deceased's representative must meet is stated, the way out explained, illustrations put to give life to the abstract principle, and finally the statutory reference cited. The latter part of the book deals very briefly with the making and revocation of wills, the duties of trustees, guardians, and conservators, and the settlement of estates of absentees. Every probate practitioner in the state will have use for Mr. Newhall's book. And the student of testamentary law in any part of the country will be helped by this short practical statement of the modern law of decedents' estates in one of the leading jurisdictions.

THE GROTIUS SOCIETY. PROBLEMS OF THE WAR. Volume I, pp. 104. London: Sweet & Maxwell. 1916.

This volume contains a series of papers read before the Grotius Society, a society formed since the war to discuss questions of international law. The papers, intended as they are merely to promote discussion, are not exhaustive. They are interesting in suggesting some of the difficult problems developed in the present war. Considerable impartiality is shown. For instance, Sir Graham Bower condemns the treatment of the imprisoned submarine officers and

men by the English government. The so-called English blockade of Germany also comes in for some criticism; in fact Sir John Macdonell implies its only justification is that doctrine of necessity which is subject to such general condemnation. Such comments are of particular interest in view of recent diplomatic developments.

A. I. HENDERSON.

THE GIST OF REAL PROPERTY LAW. By Harold G. Aron. New York: Writers Publishing Company. pp. xiii, 268.

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AN ANALYSIS OF THE SEVENTEENTH EDITION OF SNELL'S PRINCIPLES OF EQUITY. By E. E. Blyth. Eleventh Edition. London: Stevens & Haynes. 1916. pp. xx, 250.

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AMERICAN PUBLIC HEALTH PROTECTION. By Henry Bixby Hemenway. Indianapolis: The Bobbs-Merrill Company. pp. 283.

ESSENTIALS OF VETERINARY LAW. By Henry Bixby Hemenway. Chicago: T. H. Flood and Company. 1916. pp. xiv, 319.

THE BRIEF, WITH SELECTIONS FOR BRIEFING. By Carroll Lewis Maxcy. Boston: Houghton Mifflin Company. pp. 332.

THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE. By Howard Lee McBain. New York: Columbia University Press. 1916. pp. xviii, 724.

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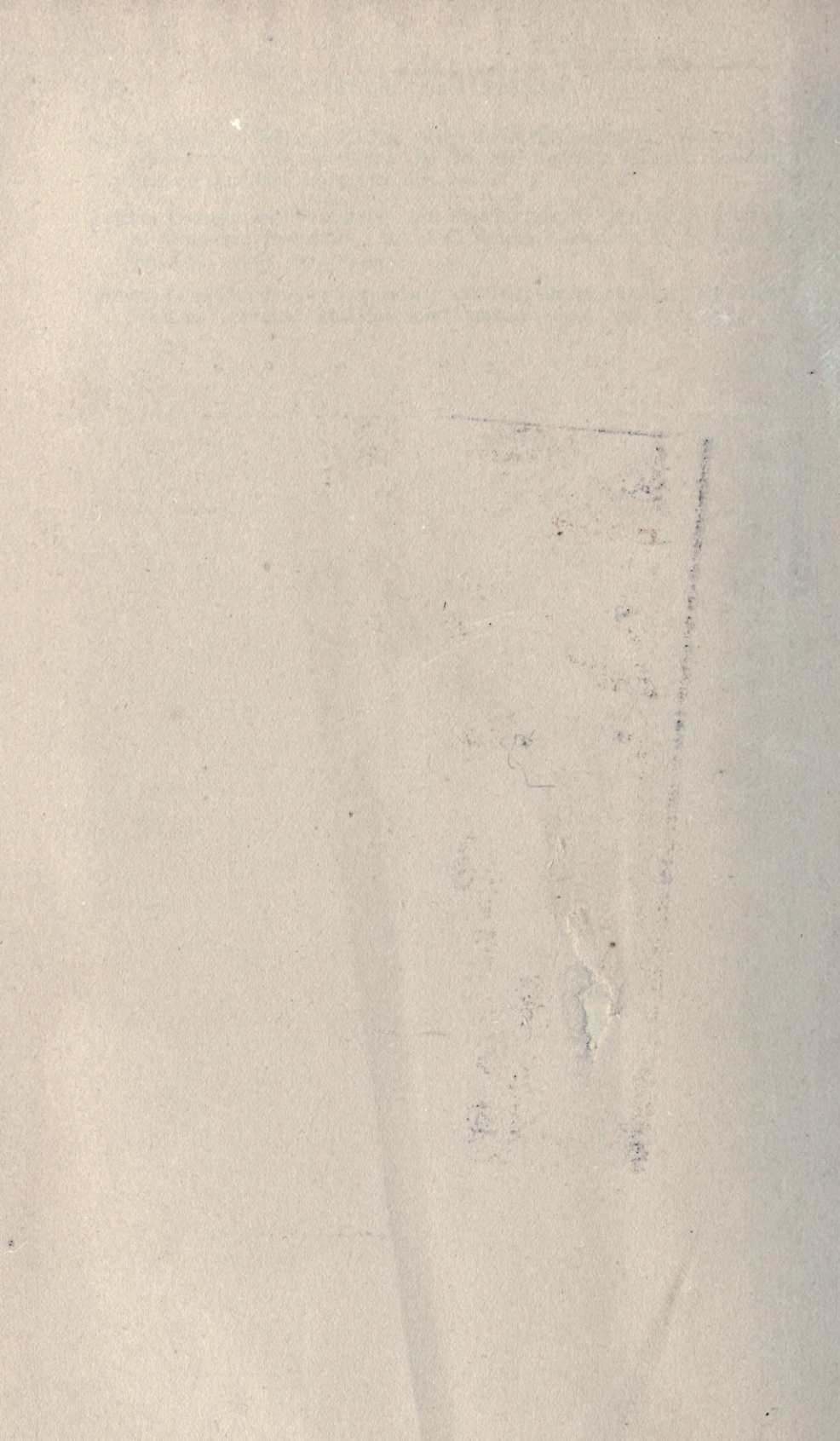
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5 Edward II, A.D. 1311-1312. By William Craddock Bolland. London:
Bernard Quaritch. 1915. pp. xlix, 281.

BRITISH INCOMES AND PROPERTY: THE APPLICATION OF OFFICIAL STATISTICS
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Son, Ltd. 1916. pp. xv, 537.

SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT. By Edgar
Watkins. Atlanta: The Harrison Company. 1916. pp. cxvi, 1057.



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